

Insights

A REFRESHER ON COPYRIGHT – LENNOX ESTATES V S&W VENTURES

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Imagine... you own a site. You give an option to a developer to buy that site subject to obtaining planning permission. It gets the planning permission, using planning drawings prepared by a firm of architects that it engages, but the *option to buy* the site lapses. You sell the site (which now comes with planning permission) to another developer. So far so straightforward, but then the new developer instructs its architects to prepare further plans and construction drawings that rely heavily on the drawings devised for the purposes of the planning application. The original developer (who owns the *copyright* in the plans) objects.

Surely, they don't have a case? After all, you own the land and it has the benefit of planning permission based on drawings prepared specifically for the site, so you must own the copyright in any drawings to do with the land.

Oh no you don't, said the court in the recent case of *Lennox Estates Ltd v S&W Ventures Ltd*, which provides a reminder of the care that should be taken when purchasing land with planning permission and when re-using plans and drawings obtained by a previous owner or developer when seeking planning permission.

This blog takes a closer look at this case.

WHAT HAPPENED?

The facts were very much as set out above.

The defendant site owner and the claimant property developer entered into an agreement under which the claimant had the right to purchase the site if it obtained planning permission.

The claimant engaged architects to draw up some drawings (let's call these the original drawings) and was duly successful in obtaining planning permission. *Copyright in the original drawings* was assigned by the architects to the claimant (and even if the claimant had failed to obtain this assignment, the architects themselves would have had title in the works and would have been able to challenge further usages of these drawings).

The option to purchase the site then lapsed (the claimant said this was because of the market downturn) and the site owner sold the site (with the planning permission) to another developer (the defendant developer for our purposes). The defendant developer then instructed its architects to adapt the plans and applied to vary the planning permission.

The claimant issued *summary judgment* proceedings against both the defendant site owner and the defendant developer alleging infringement of the copyright in the original drawings. It argued that the original drawings themselves were being copied or that an interim set of drawings based on the original drawings were being copied by the defendant developer's architect, thereby indirectly infringing the copyright in the original drawings.

The defendant developer denied copying the original drawings and said that the defendant site owner was entitled to use the original drawings to the extent necessary for the exploitation of the site on the basis that if the option was not exercised, the benefit of any planning consent would pass to the site owner and so the site owner would acquire a *licence* under the copyright in the original drawings.

JUDGMENT

The court ruled in favour of the claimant. Key points from the judgment included:

- The original drawings did attract copyright protection and reached the threshold for copyright to subsist, on the basis of the architects expending the necessary "intellectual creativity" when creating them. Interestingly, they may not have done had they been "copied slavishly" from the design of the buildings already on the site but the court felt the defendant would not be able to prove this was the case here.
- The defendant developer's architects had substantially copied the original drawings and so there was no real prospect of establishing at trial that the use of the original drawings for construction of the buildings would not infringe copyright.
- There was no prospect at trial of the defendant site owner establishing that the agreement between it and the claimant developer should be interpreted to mean that:
 - if the claimant failed to exploit the planning permission then the site owner could do so; or
 - that there was an *implied term* in that agreement that the claimant's failure to exploit the planning permission gave rise to an implied term that the site owner should receive a copyright licence in the original drawings; or
 - the site owner had the right to grant a sub-licence to any other developer it chose allowing them to exploit the original drawings.

THOUGHTS

This decision is notable for the protection it afforded the original developer – that developer’s involvement in devising the original drawings (characterised by the judge as involving expenditure as well as its “expert input”) was felt to be incompatible with the option agreement including an implied term that a licence to use the drawings would be made available to another developer. This would seem to make commercial sense – why should the later developer free-ride on the investment made by an earlier participant?

So where does this leave a developer who has just acquired a site with planning permission?

Ideally, before the developer purchases the site it should be thinking about who owns the copyright in the drawings that were used to obtain the planning permission and asking appropriate questions at the due diligence stage about the scope of any right to use the drawings. To the extent it wants to use those drawings that may have been produced for a previous owner or at a previous stage of the development process, it will need to seek permission from the copyright owner.

Even where there is a grant of a licence, it may not extend to all the purposes for which a subsequent owner may wish to use the drawings, so will need to be carefully reviewed. It would be an unwise developer who assumed that even fairly generic development plans produced by or for a third party are free to use, whether because the drawings appear to be too basic to attract copyright protection in the first place or because it is believed that the right to use them runs together with the sale of the land.

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