

Developing a case for additional damages for copyright infringement

- Claim of copyright infringement of architects' drawings
- Claimant seeks additional damages for the "flagrancy" of the breach
- To what extent is the Defendant's knowledge relevant?

What's it about?

Signature identified a site for development and instructed architects, who produced plans for the proposed development. Signature obtained planning permission but failed to secure funds for the project. Fortis subsequently acquired the site and proceeded with a development.

Signature discovered that the Fortis development was proceeding and on investigation considered that the plans being used by Fortis (produced by a different firm of architects) were altered copies of Signature's original plans. Fortis confirmed that it had downloaded the original architect's drawings from the planning portal but disputed that any copyright had been infringed.

The Judge held that some of Fortis' architects' drawings did reproduce a substantial part of the original drawings and infringed Signature's copyright.

Signature also sought an order that it was entitled to additional "flagrancy" damages. On the facts this was rejected by the Court, with particular reference to Fortis' witnesses being "*clear and frank*", "*honest witnesses*" and "*reliable*".

The Judge refused to grant an injunction as Signature failed to show that an injunction was necessary. There was no future threat of infringement given that the project had been completed and sold and Signature accepted that an injunction should not interfere with the future use of the building.

Why does it matter?

Architects' drawings are copyright works and disputes about infringements of architects' drawings are common.

The Court confirmed that there are no statutory or intellectual property rights in a planning permission but reiterated that a party inspecting or downloading the plans supporting an application will only have a limited implied licence to use the plans.

In considering additional damages the Court noted that "flagrancy" implies "*scandalous conduct, deceit and such like; it includes deliberate and calculated infringement*" or a "*couldn't care less*" attitude. The Judge said that in approaching this assessment the knowledge of a Defendant was a very relevant matter. Even the continuation of an infringement after receipt of a cease and desist letter or the commencement of proceedings may not amount to flagrancy in the right circumstances.

Now what?

An increasing number of reported cases have addressed the award of additional damages for copyright infringement. The Courts are prepared to allow awards but it is plain that the circumstances of each case will be critical. There is no blanket entitlement. As seen here, the performance of the witnesses at trial and the Court's assessment of them will be highly relevant.

The refusal to grant an injunction also continues the practical approach of the Courts to the exercise of discretion when granting remedies. The Courts have declined to make injunctions where the injunction would serve no useful purpose. A Claimant will need to persuade the Court that it is suffering continuing damage or there is a real threat of the infringement recurring.

[*Signature Realty Ltd v Fortis Developments Ltd and another \[2016\] EWHC 3583 \(Ch\)*](#)

For further information on this or any other IP related matter please contact [Rachel Cook](#) on 020 7160 3028.

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