

CH 1993 C NO. 5508

Neutral Citation Number: [1995] EWHC 7 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 July 1995

Before: THE HON. MR. JUSTICE LADDIE

B E T W E E N

(1) CALA HOMES (SOUTH) LTD
(2) CALA HOMES (SOUTHERN) LTD
(3) CALA PLC
(4) CALA MANAGEMENT LTD
(5) ROGER DATE

Plaintiffs

- and -

ALFRED McALPINE HOMES EAST LTD

Defendant

Mr. Howe instructed by Frere Cholmeley Bischoff for the Plaintiffs
Mr. G. Hobbs QC and Miss D. McFarland instructed by Edward Lewis for the Defendant

Hearing dates: 13 - 26 June, 1995

JUDGMENT

Mr. JUSTICE LADDIE:

Introduction

This is an action for copyright infringement and inducement of breach of contract. There are five plaintiffs. The first four are companies engaged in the business of designing and building houses. The third plaintiff, Cala Plc, is the parent company. Nothing turns on the separate identities of these companies for the purpose of this judgment. They will be referred to as Cala. The corporate plaintiffs are part of a group of associated companies which are referred to in this judgment as the Cala group. The fifth plaintiff, Roger Gareth Date, has been employed by Cala for about 12 years. He is currently Cala's Design Director. The plaintiffs claim to own the copyright in a number of drawings for houses which Cala has erected on various sites round the United Kingdom. Once again, for the purpose of this judgment, if relevant copyright is owned by one or more of the five plaintiffs, no issue arises at this stage as to which one that is. The defendant, Alfred McAlpine Homes East Limited, is a company engaged in the same line of business as the corporate plaintiffs. Its managing director is Mr. Stephen James Rosier.

Background to the dispute

In the late 1970's and early 1980's the Cala Group consisted of a number of independent companies, each operating in a particular area of the United Kingdom. Each of them put up houses on estates to designs which they thought were satisfactory. The result was that throughout the Group many different styles of house were being built. The designs which the management team running the Cala company in Scotland thought suitable for its area might well be very different to those considered suitable in, say, the West of England. A number of the designs in use in the mid-1980's were produced by Mr. Date who, in the early days of his employment by Cala, spent some 85% of his time designing and drawing houses. Those drawings were not just of the elevations of the houses but also of the floor plans. In about 1987 it was decided that Cala needed to rationalise the activities of the regional companies by developing a standard range of house designs suitable for use in all regions. This would have the effect not only of pooling the design expertise of all the companies but also, eventually, reducing the duplication inherent in a system where each member of the group designed its own houses. The new range of houses was known within Cala as the New Standard House Range. Mr. Date played a large part in conceiving and developing the designs in the range together with Mr. John Curtis, the Design Director of another company in the Cala group in Scotland. One of the directors of Cala also intimately involved in the creation of the New Standard House Range was Mr. Rosier, who at that time was a senior director in the group. As he states in his witness statement, he initiated this programme of design rationalisation. He says that prior to the rationalisation, something in excess of 90 house types were being used throughout the Cala group.

Although Mr. Date, who is not a qualified architect, had done the hands-on draughting of many of the designs used by Cala in England in the early and mid 1980's, he says that he had become so over-worked by 1986 that it was necessary to turn to an outside firm for

draughtsmanship skills. The result was that Cala employed a firm of technical draughtsmen, Crawley Hodgson, at about that time. Crawley Hodgson were not then qualified architects although subsequent to the events relevant to this dispute they did merge with a firm of architects. Crawley Hodgson produced most of the drawings of the elevations and floor plans for the New Standard House Range. By late 1988 Cala had 25 designs in its new range. One of the issues in this action is the precise terms upon which Cala employed Crawley Hodgson and, in particular, who owned the copyright in the drawings for the New Standard House Range drawn for Cala by Crawley Hodgson in and after 1988.

The New Standard House Range was a success. Many houses to those designs have been built on a number of estates around the United Kingdom.

In August or September, 1991 Mr. Rosier left Cala. It is common ground that the parting was not amicable. There was litigation between Cala and Mr. Rosier in which each side made serious allegations of impropriety against the other. That litigation was settled. In the meantime Mr. Rosier joined McAlpine. There he set about doing for his new employers what he had done in Cala, namely introducing a range of national house designs. It is not disputed that he was entitled to do so.

One of the early projects with which Mr. Rosier became involved in McAlpine was the design of houses to be erected on a site which was being bought from Higgs & Hill Ltd and for which the latter company had already obtained outline planning permission. For the purpose of the McAlpine national house range and, in particular, the houses to be erected on the Higgs & Hill site, Mr. Rosier decided to instruct Crawley Hodgson to produce some design drawings. The first meeting between Crawley Hodgson and McAlpine took place on 10 July 1992. Mr. Hodgson represented Crawley Hodgson at that meeting and Mr. Rosier was present for part of the time. A follow-up meeting was held on 21 July 1992. Once again Mr. Hodgson was present as, for part of the time, was Mr. Rosier. The precise terms of the instructions given to Crawley Hodgson and the terms of engagement by McAlpine are matters of dispute. What is not in dispute is that at the 21 July meeting Mr. Hodgson produced some Cala drawings from the Cala New Standard House Range with manuscript amendments on them to show what he suggested as possible variants of them to meet the design brief of McAlpine. These marked up Cala drawings were analysed in detail by McAlpine and, after some further adjustment, full working drawings were produced. Houses were built to the new designs. The McAlpine houses were referred to in very flattering terms in a magazine called 'What House?' in 1993 in an article entitled "Time to get the cheque books out". The first paragraph of that article reads:

"Kate Botting went to Essex to see some exciting new house designs and came back with Alfred McAlpine Homes (East) as Housebuilder of the Month."

The article went on to say that househunters who visited McAlpine's site would find "distinctive looking homes" surrounded by open countryside. Cala however thought that the McAlpine designs were close copies of some of the houses in their New Standard House Range.

At the same time as preparing the modified drawings, McAlpine enlisted Crawley Hodgson's assistance in designing the layout of the houses to be put on the Higgs & Hill site. The layout of a site is a matter of some importance to the viability of a project. In essence the developer wants to get as many houses on a site as possible without reducing significantly the saleability of and price to be obtained from each house. In this way the greatest profit ought to be recovered from the site. The site needs to be attractive, with a mixture of different but complementary designs and the number of houses possible on a site depends not only on the square footage of each house to be erected but also the design of the footprint of the houses to be erected. Crawley Hodgson put forward two proposals in July 1992. Each of these involved the use of Cala house footprints. The footprints were referred to by the house names which were used in Cala. The relevant McAlpine witness who was concerned with deciding the site layout, Mr. Karl Pickering, says that he did not realise that the layouts produced from Crawley Hodgson were based on Cala house footprints and that he did not know the names which Cala used for their houses.

The plaintiffs' claims

The plaintiffs claim that the design derivation for the drawings of the elevations and floor plans used by McAlpine are as set out below:

Table 1:

<u>Mr. Date's March 1985 designs</u>		<u>New Standard House designs</u>		<u>Alfred McAlpine designs</u>
1. HOLMBURY	—————>	CAVISHAM	—————>	ELMHURST ¹
2. LAMBOURN	—————>	COURTENAY	—————>	ASHWELL
3. IVER	—————>	CLAREMONT	—————>	OAKLEIGH
4. KENDAL	—————>	MONTROSE	—————>	TEMPSFORD
5. HOLMBURY	—————>	ARDINGLEY	—————>	TERLING
6.		LYNTON	—————>	GOSFIELD
7.		MELBURY	—————>	CLARE
8.		ROTHERFIELD	—————>	BRAXTED
9.		BUCKINGHAM	—————>	HINTLESHAM
10.		ASCOT	—————>	FLATFORD
11.		BEAULIEU	—————>	ARDLEIGH

The 1985 drawings by Mr. Date:

In relation to these, the plaintiffs' claim is simple. It is said that each of the drawings for the floor plans and elevations is copyright, that copyright belongs to the plaintiffs and

¹ This house was also built under another name. Similarly there were alternative names used for other McAlpine and Cala houses. For convenience only one name for each house type is used in this table.

that the relevant McAlpine drawing and house built to it is a substantial reproduction of it. Reproduction in each case is said to have been indirect by copying through the relevant intermediate New Standard design.

The New Standard House designs:

In relation to these, the plaintiffs have two claims, one in copyright and the other for inducing breach of contract.

Copyright:

As far as the copyright claim is concerned, the plaintiffs put their case in two alternative ways. Their primary case is that the drawings produced by Crawley Hodgson are works of joint authorship within the meaning of s. 10(1) of the Copyright, Designs and Patents Act, 1988 ('the 1988 Act'). They say that the joint authors are Crawley Hodgson employees and Mr. Date. If this is so then it is an infringement of copyright for McAlpine to have reproduced a substantial part of those drawings, either in the form of drawings or houses, without the plaintiffs' consent. Alternatively they say that one of the terms which must be implied as a matter of necessity into their terms of engagement with Crawley Hodgson is that Crawley Hodgson agreed to hold the copyright in the drawings on trust for Cala. They are therefore equitable owners of the copyright. They say that they are entitled to sue for infringement.

Inducing breach of copyright:

As far as contract is concerned, the Cala claim is as follows. When they engaged Crawley Hodgson it was an implied term of that engagement that Crawley Hodgson would not use the designs embodied in the drawings made for the Cala New Standard House Range for any third party. Mr. Rosier was aware of that implied term and, through him, so was McAlpine. When Crawley Hodgson was asked to produce its designs for McAlpine, McAlpine was aware that Crawley Hodgson was breaching that term and this was confirmed when Crawley Hodgson produced the marked up Cala drawings at the meeting of 21 July 1992. Cala says that this is inducing breach of contract. Further it is claimed, on the basis of evidence given for the Cala by Mr. Hodgson, that at the meeting of 10 July 1992, the question of Crawley Hodgson's entitlement to modify the Cala designs for use by McAlpine was raised by Mr. Hodgson and that Mr. Rosier gave him an assurance that there was nothing wrong in doing so. Mr. Rosier knew that he should not have given such an assurance.

Relief sought:

Finally it is said that in relation to relief, McAlpine's actions were committed flagrantly and come within the provisions of s. 97(2) of the 1988 Act entitling the Cala to an inquiry as to damages for flagrant infringement of copyright in addition to all the other normal forms of relief to which a successful plaintiff in a copyright action is entitled.

The defence

Re Mr. Date's 1985 drawings:

McAlpine denies that any of the 1985 drawings are proved to be the subject of copyright. Mr. Hobbs, who appeared on their behalf, says that the onus is upon the plaintiffs to prove originality and that on that issue the evidence is unsatisfactory. To a lesser or greater extent Mr. Date merely copied pre-existing works. Furthermore even if there is copyright in the 1985 drawings, no substantial part of them has been reproduced in the McAlpine drawings and buildings. In particular, even if they are original artistic works, no substantial part of what gives them originality has been proved to have been carried through into the McAlpine drawings and houses.

Re New Standard House designs:

Copyright:

It is denied that any of the floor plan drawings are original on the same basis as originality in the 1985 drawings is attacked. No attack is levelled at the originality of the drawings of the elevations of these houses. However it is disputed that Mr. Date was a joint author. In so far as any Crawley Hodgson drawing (floor plan or elevation) has copyright, that copyright belongs to Crawley Hodgson and the latter firm was entitled to use them to design new house types for McAlpine. McAlpine says that the relationship between Cala and Crawley Hodgson was, in effect, the relationship between a client and an architect and that the normal RIBA terms applied including, in particular, the standard term that copyright is retained by the architect, in other words by Crawley Hodgson. McAlpine disputes that Crawley Hodgson hold the copyright on trust for Cala. There is no necessity to imply any such trust. Furthermore, even if such a trust is to be implied, Cala cannot sue in the absence of the legal owner being joined as a party². Although Mr. Hodgson has attended the trial as a witness he has not been joined. Furthermore, even if there is an equitable title, McAlpine had no notice of it when it took the licence from Crawley Hodgson in respect of its own house designs and therefore the copyright cannot bite.

As far as substantial reproduction is concerned, there is only a challenge to the plaintiffs' case in relation to Courtney/Ashwell, Claremont/Oakleigh and Montrose/Tempsford.

Contract:

McAlpine disputes that there was any implied term as to exclusivity and challenges the Cala assertion that there was any inducement to Crawley Hodgson to breach any contract. On the contrary it is said that it was Crawley Hodgson's idea to use drawings of the Cala house types as the starting point for the designs for McAlpine. What McAlpine wanted was its own new and distinctive designs.

Re Relief:

The assertions concerning flagrancy are disputed as is the legal basis for a claim to additional damages under s. 10(1) of the Act.

Re identifying the copyright work sued upon:

² Mr. Hobbs relied on *Performing Right Society v. London Theatre of Varieties* [1924] AC 1, *Harmer v. Armstrong* [1934] 1 Ch 65, *'The Aiolos'* [1983] 2 Lloyd's Rep. 25 and *Bookmakers' Afternoon Greyhound Services Ltd v. Wilf Gilbert (Staffordshire) Ltd.* [1994] FSR 723.

Before turning to consider each of the issues set out above, I should consider one other general point raised on behalf of the defendant by Mr. Hobbs. He says that the particular works for which protection is claimed must be identified. In this case it is not in dispute that each of the plaintiffs' designs for each of its house types has been subject to ongoing modification. For example in the case of the Cavisham the location of the garage may have been changed slightly as between two houses built to that general design on the same site. Furthermore from site to site, feedback from the sales force will be taken into account and, where possible, each design will be refined so as to be even better than its immediate predecessor. This applies both to floor plans and to elevations. Each design is therefore in a state of constant evolution. The drawings of the Cavisham produced in 1992 may be different in a number of small, but commercially important, respects from the equivalent drawings for the Cavisham of 1990 or 1988. Mr. Hobbs therefore says that the plaintiffs must identify the particular drawings of, say, the Cavisham which are alleged to have been infringed. He says it is not adequate for the plaintiffs to allege infringement, as they do in the Statement of Claim, in "original drawings for the buildings whose names are set out [below]". For example the drawings of the elevations and floor plans of the Ascot house examined during the course of the trial carries wording which indicates that they were used for plots 2, 32H and 36H to be erected on a particular site in Horsham. There may well be earlier and later drawings of houses bearing the name Ascot, each of which will be different in small respects from the other.

There are, I think, three answers to this point. First, in many cases the precise drawings from which the McAlpine designs were derived can be identified. These were the Cala drawings marked up in manuscript and produced to McAlpine on the 21 July meeting. They were called the 'Smoking Gun' drawings during the course of the trial. Secondly, in most cases the drawings on which the plaintiffs relied were not site-specific. They bore legends which suggested that they were the very first drawings to a particular design. There was no evidence adduced suggesting that they were not. Thirdly, even in the one or two cases, such as the Ascot, where site-specific drawings were produced, I think the objection is misconceived. In a case where the plaintiff produces many versions of a copyright work, for example drawings, each differing only slightly from the others, it will frequently be almost impossible to identify precisely which one was copied by the defendant. Even if that is possible, it is likely that that drawing was not the first in the sequence and that it therefore was largely copied from preceding drawings. It might not be the subject of copyright³. Of course if the very first drawing could be identified then copying of a derivative of it would indirectly infringe the copyright in it. This was what happened in *King Features Syndicate Inc. v. O. & M. Kleeman Ltd*⁴. In that case the plaintiff had relied on fifty five drawings of the Popeye character out of the many thousands of such drawings in the cartoon series. The defendant could have copied from any one of those thousands. The Courts accepted that the fifty five drawings included the earliest from which all the many thousands of others were subsequently derived. Copying of a subsequent drawing was an indirect copying of one or more of the first fifty five. But what if the very first drawing cannot be identified? I cannot believe that in this case

³ See *Interlego AG v. Tyco International Inc.* (below).

⁴ [1940] Ch 523 (High Court), [1940] Ch 806 (Court of Appeal).

that makes any difference. Either the drawings actually examined in court during this action are the ur-drawings for each type of house or, if they are not, they are evidence of the main visual features which were present in the ur-drawings. Copying of a substantial part of the design depicted on one drawing will therefore infringe the copyright in that drawing or, if it was not the first in the series, the copyright in the first in the series. In a case where the design has been profoundly changed over a period of time, this analysis may well not hold true. But in this case it is apparent that the modifications in design of the elevations and floor plans from one version of, say, Cavisham to another are very small.

Subsistence of copyright in the 1985 drawings

Mr Hobbs argues that there must have been antecedent works from which Mr. Date drew his elevations and floor plans in 1985. He could not have simply designed these drawings on a blank piece of paper with a blank mind. As was stated in *Interlego AG v. Tyco International Inc.*[1988] RPC 343;

“Skill, labour or judgment merely in the process of copying cannot confer originality. In this connection some reliance was placed on a passage from the judgment of Whitford J. in *L.B. (Plastics) Limited v. Swish Products Limited* (at pages 568-569) where he expressed the opinion that a drawing of a three dimensional prototype, not itself produced from the drawing and not being a work of artistic craftsmanship, would qualify as an original work. ... It by no means follows, however, that that which is an exact and literal reproduction in two dimensional form of an existing two dimensional work becomes an original work simply because the process of copying it involves the application of skill and labour. There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work” (pages 371-372)

In support of his case Mr. Hobbs relied on the evidence of a Mr. Derek Ridley who had worked with Mr. Date in the past. His evidence was not specific. The message conveyed was that there were other designs around, some used by the Cala group companies and others from competitors, which were made use of by Mr. Date. The only case where details of prior designs were known to exist and to have been used as a starting point for Mr. Date’s designs relate to the Lambourn. This was based upon an earlier design called the Lauriston. Mr. Date gave the following evidence in relation to it:

“ Q Can you say what the Lauriston is or was? A. Principally the Lauriston house type was a house that was being built in Scotland at the time of the 1985 drawings that I prepared.

Q So you are saying it pre-dated the 1985 ----- A. It pre-dated the 1985 drawing.

Q What relationship does the Lauriston have with your 1985 exercise ? ... A. It bears no relationship in physical terms. I drew the [Lambourn] on a fresh piece of tracing paper in 1985 for a development at Wokingham - one of a number of houses I designed for that development at Wokingham.

MR. JUSTICE LADDIE: Are you saying you did not have the Lauriston in front of you? A. Yes, I had the Lauriston and the connection is that it was a house that was being built in Scotland. It had not been built in England at that time. It was a well-respected Scottish house. Principally I had a copy of that Lauriston in the office with me at that time which gave me the principles of how that house worked. It was a larger house and not one that was going to be suitable for the particular development that we had in mind. I set about literally from scratch on a fresh piece of paper. I didn't use a tracing medium. I physically drew it in pencil and then in ink to the proportions that I required for that development in Wokingham. There are obviously some quite distinct differences between the actual dwelling - not the least the size of it.

MR. HOWE: But it is fair to say, Mr. Date, that there is some relationship particularly in the general arrangement of the rooms and so forth. A. Yes, principally my ideas and my conception of the Lambourn house type came from the principles of the Lauriston house type.

Q What is the relative size of the two houses in terms of square feet? A. The Lambourn house type, I believe, is about 1,692 square feet and the Lauriston is larger, something, I believe, in the order of around 2,000 square feet - something like that."

The sequence of designs leading from the Lauriston to the Ashwell is illustrated in Annex 1 to this judgment. Although there are strong similarities between the Lauriston and the Lambourn, there are also pronounced differences. Normally an architect of a house will try to produce a design which is coherent. Even though he may utilise a feature or features from preceding designs, if he has put significant effort and skill into producing a new design with a new combination of features, that new design will be the subject of copyright. In my view Mr. Date did employ significant relevant skill and effort in producing the elevations of the Lambourn. They are not a mere copy of the Lauriston. They incorporate material alterations or embellishments. They have copyright of their own.

Furthermore Mr. Date gave evidence that in designing a floor plan it was not simply a matter of scaling up or down from the floor plan used in a larger or smaller house. Space has to be carefully managed in a modern house to ensure that the customer feels he is getting as much as possible for his money. It is a very skilled job. In my view the floor plans for the Lambourn also are copyright works.

As far as the other three 1985 house designs are concerned, I do not think it is good enough for Mr. Hobbs to suggest that there must have been something very similar in appearance which pre-dated them and from which they were derived. There has been no complaint about the discovery given in this action nor has any specific example of an earlier design been put to any of the witnesses. Mr. Date gave express evidence that these three designs were produced without the aid of prior designs (Transcript Day 3 page 11). This was not challenged in cross-examination. These drawings also are the subject of copyright.

Substantial reproduction of the 1985 drawings by McAlpine

As far as substantial reproduction indirectly through the New Standard House Range drawings is concerned, the approach I have adopted to comparing the drawings and my findings in relation to this are set out in Annex 2 to this judgment. In summary I find that there has been substantial reproduction of all of Mr. Date's 1985 drawings in the McAlpine drawings and the houses constructed in accordance with them save that there is no substantial reproduction of the elevation drawings of the Holmbury in the Terling drawings.

It follows that in respect of each of the McAlpine house types numbered 1 to 5 in Table 1 above there has been substantial reproduction of some or all of the plaintiffs' 1985 copyright drawings. It is not disputed that any copyright in those drawings is owned by one or other of the plaintiffs. Infringement is therefore established.

Subsistence of copyright in the New Standard House Range drawings

The only challenge to the subsistence of copyright in these drawings relates to the floor plans. Once again Mr Hobbs asserts that there must have been unidentified predecessor drawings. For the same reasons as are set out above in relation to the same argument levelled at subsistence of copyright in the 1985 drawings, I reject this submission. All these drawings are the subject of copyright.

Substantial reproduction of the New Standard House Range drawings

Save in respect of the Courtney/Ashwell, Claremont/Oakleigh and Montrose/Tempsford, substantial reproduction is admitted for the purpose of this action. As far as those three pairs of sets of drawings are concerned, this also is considered in Annex 2 to this judgment. In summary I find that each of the McAlpine drawings is a substantial reproduction of the earlier New Standard House Range drawing relied on by the plaintiffs. However this does not mean that McAlpine has infringed the copyright in these drawings unless one of the plaintiffs owns the whole or a part of that copyright. It is to that issue that I now turn.

Works of joint authorship

As mentioned above, the plaintiffs' primary case is that Mr. Date is a joint author of the copyright in the 1988 drawings produced by Crawley Hodgson. Through Mr. Date, Cala becomes a joint owner of that copyright. Before considering the law on this issue, it is convenient to consider how the 1988 drawings came into existence.

The relevant facts:

It is not in dispute that all of the 1988 drawings were drawn solely by employees of Crawley Hodgson. Mr. Date drew none of them. Mr. Date gave the instructions which were followed by Crawley Hodgson. However this does not adequately describe Mr. Date's contribution to the design process. The evidence on this issue was given primarily by Mr. Date and Mr. Hodgson. Mr. Date was a careful, clear and straightforward witness. I accept his evidence. Mr. Hodgson was in an uncomfortable position which was apparent during his cross-examination. He had done a lot of work for Cala in the past. When they discovered his involvement in the McAlpine project, Cala were angry, declined to place

any more work with his firm and cancelled a new project for which it had been engaged but in relation to which it had not yet commenced work. It appears that at least at one stage Cala considered bringing proceedings against Crawley Hodgson. In any event on 20 April 1993 Crawley Hodgson and Cala settled their dispute in a memorandum in which Crawley Hodgson said that they acknowledged Cala's ownership of the copyright in the plans and related materials prepared by them for Cala. Crawley Hodgson also agreed to co-operate with Cala in providing evidence and documents for use by Cala in these proceedings. Since then, Crawley Hodgson has received further work from Cala although it was apparent that Mr. Hodgson still considered himself to be on probation as far as Cala was concerned. He certainly did not want to upset Cala again. On the other hand on 16 March, 1995, Mr. Hodgson and Crawley Hodgson were sued by McAlpine for negligence and breach of contract. They are said to be responsible for any breach of copyright found against McAlpine in these proceedings. As Mr. Howe put it, Mr. Hodgson is therefore between a rock and a hard place. Whichever horse he decided to back, the other side would cry 'foul'. He has decided to support Cala and, no doubt, feels that it is in his firm's interest to be seen to be helpful to them. I have had that well in mind while assessing his evidence. Nevertheless, in relation to the issue of how Crawley Hodgson worked with Mr. Date in the creation of the New Standard House Range designs, it is my view that Mr. Hodgson's evidence is accurate.

Mr. Date's evidence was that he was a workaholic who only passed the drawing exercise to Crawley Hodgson because he no longer had sufficient time to put the lines on the paper. However, save in this respect, it was clearly his view that he was responsible for deciding, in detail, what those drawings were to look like. Having seen Mr. Date in the witness box I have no doubt that he is a man who has very firm views of what he does and does not like and of the designs which he thinks are suitable for Cala. His evidence was that he told Mr. Hodgson precisely what features were to be incorporated into each house. In many cases this was done with the aid of sketches, which no longer exist, drawn by him. The relationship between Mr. Date and Crawley Hodgson is illustrated by this passage from his cross-examination:

“Q And you used them for that purpose, I think. You used the draftsmen in Crawley Hodgson to prepare drawings, did you not? A. Basically, the draftsmen in Crawley Hodgson's office work to a brief from myself. That brief is extensive. Crawley Hodgson's architectural people in their drawing office do not have a free hand to actually draw whatever comes into their mind.

Q Is the answer "yes", that you did use the draftsmen at Crawley Hodgson for architectural drawing services? A. We used Crawley Hodgson as a practice through Phil Hodgson to my very, very strict brief as to what I required them to do, in a similar manner to the way the standard house-type range was prepared.

Q Am I right in understanding that the reason you went to outside consultants -- that is you personally -- was because you yourself were too busy to do the design work; you had other managerial responsibilities. Is that correct? A. I had been made a director of Cala Southern at that particular time and my role was becoming more of an administrative role. Consequently, I could not physically draw the lines on a piece of tracing paper.

Q That is right. You were too busy to do the job yourself. Is that correct? A. That is what I have said in my statement. That is not necessarily the whole job. I mean, clearly, as I have said in my statement, over a period of time my role turned on a percentage from over 50% of physical drawing to under 50% of physical drawing.

Q And when would that have been? Time-wise, when would that have been?

A. At the time that Crawley Hodgson were employed as architectural consultants.

Q So that is the period we identify as about '85 or '86? A. Around that time, more '86 I believe.

Q Now, you do not pay a dog and bark yourself. There is just no point in getting outside workers to work for you if you are in fact going to do all the work yourself. Would you agree with me? A. No. I would strongly disagree. I mean, I am actually a workaholic, myself. I like to cram as much work as I possibly can into the day and often the evenings as well. I have strong design concepts and views and I was not prepared to see external consultants design houses for us that didn't fit an image of Cala's product or were [not] of sufficient standard to meet my aspirations, as if I had drawn it myself.

Q Would it not have been quicker and cheaper then to do it yourself, in the evenings? A. Not at all."

Although he said that he was not blinkered enough to ignore a fellow architectural consultant's views, if he considered it had merit (Transcript Day page 31), it is clear that he was fairly unyielding in what modifications he would accept. He checked each of the drawings produced by Crawley Hodgson. The following passage from his cross-examination indicates what he said happened:

"Q Let us put it this way, you were not at the shoulder of the draftsman when he did the work, were you? A. No.

Q What you saw was the draftsman's output from time to time when you were sitting down with Mr. Hodgson to discuss matters that were on hand between your company and his company? A. As far as the working drawings are concerned?

Q Yes. A. Principally, the working drawings would have been worked out from the planning drawings that by then had been agreed, and when they were presented to me they would often be presented in a sort of line drawing with not necessarily all of the details on them, and I would then address those drawings and nurture them into the way I wished them to be presented.

Q What does that mean, "nurture them"? A. Each individual house is different. I would analyse whether the instructions had been interpreted correctly. If not I would take a paper copy, as I had all the time anyway, to use as a guide, and I would mark on that the alterations that I wished to be undertaken to the drawings in their progression.

Q How would you convey that information to whoever it was in Crawley Hodgson that was doing this? A. In the same manner. Normally, at one of our design meetings we have on a regular basis I would take all the drawings and say, "This is what I wish to have undertaken".

Q So you are exercising, I think, editorial control over the output over whoever it was that was doing the work within Crawley Hodgson. Is that the way you would ---- A. Principally, all the draftsmen in Crawley Hodgson were working to my specific brief. They were not given authority to actually design what they wanted to, and if they did then I would alter it.

Q But the bottom line here, if I can put it that way, is that you yourself did not move the pen on the paper at Crawley Hodgson when the designs were being executed, is that correct? A. That is correct.”

Mr. Hodgson’s evidence is consistent with that given by Mr. Date. He said that Mr. Date gave Crawley Hodgson a very detailed brief and that he was even specific as to the choice of materials to be used. The original briefing session with Mr. Date took a whole day in which the design of each of the first group of 12 house designs were considered in detail. He stated that in the case of some designs, his firm’s design input could be measured as a few per cent. Furthermore this evidence is consistent with a letter sent by him to Mr. Date in January, 1988 confirming the terms on which his firm was to work for Cala in the preparation of the drawings. That letter includes the following paragraph:

“... we will prepare all sketch scheme work on a cost + basis as this element of work cannot effectively be determined between ourselves on the extent of work likely to be required as, quite rightly, you and your colleagues will have a large extent of input on the finished product.”

It is clear from the evidence that much if not most of the design features to be found in the Crawley Hodgson drawings came from and were insisted upon by Mr. Date during the briefing and vetting sessions he had with Mr. Hodgson. However not only were the Crawley Hodgson drawings not produced by Mr. Date, they were also not drawn by Mr. Hodgson. The actual draughtsmanship was the responsibility of more junior employees of Crawley Hodgson. Although neither Mr. Date nor Mr. Hodgson was able to be certain, it is likely that one or more of these employees sat in on some of the Date/Hodgson meetings. One other employee who did attend the meetings was a Mr. Steadman. He was in charge of co-ordination between Cala and the junior draftsmen who actually drew the drawings. Mr. Steadman was Mr. Date’s contact with regard to the actual physical drawing side of the commission to Crawley Hodgson. However the evidence is that he did not make any design suggestions of his own.

The law:

S. 10(1)⁵ of the 1988 Act provides as follows:

“In this Part a "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.”

Mr. Howe says that there are two requirements which need to be fulfilled before a work can be said to be of joint authorship. First the work must be produced by the

⁵ Many of the drawings for the New Standard House Range were created before the 1988 Act came into force. Both parties agreed that there was no difference of substance between the law of joint authorship under the Copyright Act, 1956 and the 1988 Act.

collaboration of the authors. This would exclude the case where a work can be said to owe something to two or more different authors but they did not collaborate. He gave as an example the case where someone consults an encyclopaedia, finds a drawing and creates his own version by embellishing it. No collaboration is involved and the copyright in the resultant derivative drawing is owned by the embellisher alone. He says that there is no restriction on the manner in which collaboration can occur. It does not exclude a case where the authors are physically remote from each other.

The second requirement is that there must be some significant contribution from each of the authors. He says that the contribution must be “in the nature of authorship”. By that he meant that the contribution must be in the nature of originating and creating something that finds its way into the finished work. It must be some significant part of the skill and effort which is protected by the copyright in the final work. He said that there is no restriction on the way in which the contribution may be funnelled into the work. In particular there is no requirement that each of the authors must have exercised penmanship. He conceded that mere instructions such as “paint me a yellow flower” would not make the person who gives those instructions a joint author of the resultant painting. In that case all the skill and labour in composition would come from the painter. On the other hand if very detailed input was provided, then a work of joint authorship could be created.

In support of his submissions, Mr. Howe relied on two cases: *Murray v. King* (1983) 2 IPR 99 and *Prior v. Lansdowne Press Pty. Ltd.* [1977] RPC 511. However in both of these cases the passages dealing with joint authorship appear to be *obiter* and neither examines in any depth what is meant by the statutory provisions. At the outset he also relied on the following passage from *The Modern Law of Copyright and Designs* (2nd Edition) by Laddie, Prescott and Vitoria:

“In the case of works dependent on originality, each contributor must have contributed a significant amount of the skill and labour which entitled the work to copyright protection and must further be an ‘author’ in the sense of accepting responsibility for the contents.”

He maintained that the first half of that statement was correct but, correctly in my view, conceded that the second half which explains what an ‘author’ is, went too far.

Mr Hobbs on the other hand says that *prima facie* an author of an artistic work is the person who pushes the pen to create it. If the man with the pen has latitude for expression then he is the author. He accepted that in the case of a mere amanuensis, the person giving the instructions to the draughtsman or, in the case of a literary work, the writer is the author but in those cases the person with the pen exercises no independent judgment. Here, he says, there is no evidence to suggest that the Crawley Hodgson draughtsmen were mere scribes. They produced drawings to the instructions passed to them indirectly from Mr. Date but how they expressed those instructions on paper was up to them. Mr. Date no doubt had a power of veto but the skill in drawing and expressing the artistic ideas belonged to the Crawley Hodgson employees. He said this was a claim to copyright by remote control.

In support of his argument, Mr. Hobbs relied on *Walter v. Lane* [1900] AC 539 in which it was held by the House of Lords under the pre-1911 law that a reporter who had attended a public speech given by Lord Rosebery and had produced a report of it which was published in *The Times* newspaper was the author of that report which was the subject of copyright.

It should be noted that in *Walter v. Lane* the issue of joint authorship was not before the House. Indeed it could not have been because there was no question of any sort of co-operation between Lord Rosebery and the reporter. The case only goes to the point that the reporter was an author. Furthermore it is relevant to bear in mind that there may be considerable skill and expertise involved in attending a public lecture and taking down moderately accurately a speech. Anyone who has attended a trial and has read the daily transcript will marvel at how much clearer the transcript seems to be than what was said in court. This impression is confirmed by comparing the transcript with a tape recording of the proceedings. People frequently speak in half sentences. A good reporter or shorthand writer does more than act as a mere scribe. However *Walter v Lane* throws no light on how the court should decide who is a joint author of a work.

In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant. As Mr. Howe has said, where two or more people collaborate in the creation of a work and each contributes a significant part of the skill and labour protected by the copyright, then they are joint authors⁶. In this case Mr. Date was a joint author of the drawings for the New Standard House Range. Indeed not only was he a joint author, in my view he was the major author. It follows that Cala is the joint owner of the copyright in those drawings. It also follows that McAlpine has infringed that copyright.

Implied terms

There is no dispute between the parties as to the law in relation to the implication of terms in contracts. A term will not be implied unless it is in all the circumstances reasonable. However reasonableness alone is not sufficient. “The touchstone is always *necessity* not merely *reasonableness*”⁷

Since I have held that Cala is joint owner of the copyright in the drawings for the New Standard House Range, it is not necessary to consider the plaintiffs’ alternative argument that there is an implied trust. This leaves only the implied term as to exclusivity. At the heart of this is the assertion by Cala that at all times it was clear to Mr Hodgson and Mr. Rosier that it was important to Cala that the New Standard House Range should be

⁶ An interesting case where this approach appears to have been adopted is *Najma Hetulla v. Orient Longman Ltd.* [1989] FSR 598, a decision of the High Court at Delhi.

⁷ *Liverpool City Council v. Irwin* [1977] AC 239 at page 266.

attractive and distinctive to Cala and exclusive to them. I am sure that that was clear to all involved at the time Crawley Hodgson was commissioned by Cala. However my finding that Cala is the joint owner of copyright means that Cala have that exclusivity by virtue of the provisions of the 1988 Act. In those circumstances there is no necessity to imply a contractual term to the same effect. However, had I held that Cala were not the owners of the copyright I would have implied such a term. All the considerable time and effort put into the creation of the New Standard House Range would have been pointless if Crawley Hodgson, who were known to work for many competitors of Cala, could simply have supplied the same designs to, or modified them for the benefit of, others. Furthermore, for the reasons set out in relation to the issue of flagrancy, I would have held on the evidence that McAlpine procured Crawley Hodgson to breach that implied exclusivity.

There is one factual matter in relation to procuring breach of contract which I should deal with in case this matter should go further. As I have already mentioned, one of the allegations made by Cala is that Mr. Rosier during the 10 July meeting gave an assurance, based upon his knowledge derived from his having held the relevant managerial position in Cala, that Crawley Hodgson were entitled to modify the New Standard House Range drawings since the copyright in them belonged to Crawley Hodgson. This assertion is based solely on the evidence of Mr. Hodgson as to what passed between him and Mr. Rosier on 10 July. There was telling cross-examination of Mr. Hodgson on this issue. As I have mentioned, in April 1993, Crawley Hodgson and Cala resolved their differences by means of a settlement agreement. Clause 2 of that agreement provided that Crawley Hodgson would

“disclose to CALA the precise circumstances in which they provided Alfred McAlpine Homes (McAlpines) with plans and provide full details of all material thereby supplied”.

That agreement was signed by Mr. Hodgson and to it was appended a document entitled “Statement of Work undertaken for McAlpine Homes on Sites at Southend and Dunstable”. It contains the following paragraphs:

“During the course of the meeting [with McAlpine] photocopies of house type brochures were tabled by McAlpine which represented a portion of the range of house styles that were marked as being Cala Homes types.

[Crawley Hodgson] questioned whether McAlpines were aware that these house types designs had previously been prepared for Cala. This was confirmed.

Being concerned that there may be copyright issue, [Crawley Hodgson] enquired as to whether there was an intent to amend the house types such as to alter their design in terms of elevation, plan and detail format. The initial response was that this would not be the case.

[Crawley Hodgson] further questioned the copyright issue and McAlpines instructed [them] to prepare sketch proposals to introduce alterations to the elevation, plan and detail formats for discussions at a later meeting”

Nowhere in this statement, made shortly after the events to which they relate, is there any mention of an assurance given by Mr. Rosier. If, as Mr. Hodgson says, he only proceeded on basis of an assurance, it is almost certain that he would have recorded it in this Statement. Mr Hodgson could offer no explanation for its omission. At about the same time other documents were sent by Mr. Hodgson to McAlpine purporting to record what had happened at the July meetings. Once again no reference to an assurance is to be found in them either and, once again, Mr. Hodgson had no explanation for this omission. During cross-examination, Mr. Rosier denied that any such assurance had been given. He said that on another occasion he had simply told Mr. Hodgson that he did not intend to telephone Cala to tell them of McAlpine's plans.

On this issue I think it is likely that Mr. Rosier's evidence is nearer the truth. Crawley Hodgson were not in a position to demand an assurance. They desperately needed work and had been left in no doubt by Mr. Pickering during an earlier contact that when McAlpine said jump they were expected to jump. Probably at one of the meetings Mr. Rosier did say that he would not telephone Cala. I think that Mr. Hodgson has convinced himself that these words or words to similar effect amounted to an assurance. He wants now to believe that he did not simply give in to McAlpine's demands. It was quite apparent during cross-examination that he was not proud of what he had done for McAlpine. But his regrets cannot alter what has happened. I hold that no assurance was given.

Additional damages under s. 97(2) of the 1988 Act

The law:

Having found that substantially all of the copyrights in the drawings relied on by the plaintiffs have been infringed, I turn to the claim to relief under s. 97(2). This is in the following terms:

“ (2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to-

- (a) the flagrancy of the infringement, and
- (b) any benefit accruing to the defendant by reason of the infringement,

award such additional damages as the justice of the case may require. ”

Mr Hobbs argued that this provision only bites if it can be shown that the infringer was aware or at least had a strong suspicion that his acts amounted to infringement of copyright. On the other hand Mr. Howe relied on the decision of Templeman J. in *Nichols Advanced Vehicle Systems Inc. v. Rees* [1979] RPC 127 to support his argument that the court could have regard to all the circumstances and was not limited to cases where the defendant knew about the law of copyright. In my view Mr. Howe is correct. This anomalous power to award additional damages is not stated to be restricted to cases where the infringer knows or has reason to believe that copyright has been infringed. Such wording is to be found in the sections of the Act dealing with secondary infringement. Had the legislature intended s. 97(2) to be similarly limited it could and would have so provided.

Therefore the court is left to look at all the circumstances of the case. It should be noticed that although the court must have regard to the flagrancy of the infringement and the benefit accruing to the defendant by reason of the infringement, there is no requirement that both or indeed either of these features be present. It is possible to envisage cases where the infringer has gained no particular benefit from his infringement save for the satisfaction of spite fulfilled. In such a case, if the infringement was flagrant it appears that the court might well award additional damages. It is somewhat more difficult to envisage cases where there has been no flagrancy and the court would be prepared to exercise its discretion to award damages under the section.

The facts:

In essence the plaintiffs' case is that the defendants wilfully and blatantly copied Cala's designs. It is said that they knew that Cala considered the designs to be their exclusive property. They did what they did to avoid the work and risk involved in developing their own distinctive range of house designs.

It is not in dispute that at the very first meeting with Mr Hodgson on 10 July, 1992 Mr. Rosier had with him some Cala catalogues which he used to illustrate what he wanted. He says that he never asked Mr. Hodgson to copy. All he asked for was 'something along the same lines'. He says that Mr. Hodgson showed no discomfort at the request. Mr. Hodgson, on the other hand, says that he was quite clearly asked to copy and that his discomfort was clear for everyone to see. His evidence on this issue is consistent with the Statement of April 1993 which I have quoted above. I have no doubt that Mr. Hodgson's evidence is more accurate on this issue. It is inconceivable that if Mr. Hodgson had only received instructions to make designs to the same general feel as those used by Cala he would have decided merely to doctor Cala drawings. Even less would he have done so blatantly and supplied the same to McAlpine with drawings still bearing the Cala names on them. He would have expected a hostile reaction from any new client were he to have done that.

Furthermore Mr. Rosier's account of events is not consistent with a document of which he is the author. When the plaintiffs' statement of claim was received by McAlpine, Mr. Rosier wrote a memorandum to Mr. McCallum, his immediate superior, giving his responses to the allegations it contained. In that document he explained that he had decided to develop a new range of houses for McAlpine "using as a basis some of the existing shells that Cala were currently building but were not unique to Cala". In other words his explanation was that he decided to use the Cala designs but he thought Cala could not complain. Furthermore his memorandum contains the following statement:

“[Crawley Hodgson] readily accepted the commission from ourselves, and whilst we were aware that they were a little apprehensive, they had every opportunity to decline the commission, or advise us of the copyright issue.”

This is much more consistent with Mr. Hodgson's evidence. No adequate explanation was provided by Mr. Rosier under cross-examination as to why he said that Crawley Hodgson was apprehensive in that memorandum when his evidence before the court was that they were not.

Furthermore, whatever the precise instructions given at the 10 July meeting, it was quite clear, at least by the 21 July meeting, what Crawley Hodgson was doing. It was then that they produced the 'smoking gun' drawings. It is not suggested that any protest was made by any McAlpine personnel at that meeting that Cala drawings were being employed.

In addition the evidence shows that before the second July meeting, Crawley Hodgson had sent two draft layouts for the Higgs & Hill site, both using Cala footprints and marked up with the Cala house names. Furthermore on 20 July 1992 Miss Jennifer Huxley, who had been a senior sales executive in Cala until the end of 1991 and then took up a similar position in McAlpine, worked out a costing for the Higgs & Hill site using Cala names to work out whether the site with the proposed houses on it would be commercially viable. Miss Huxley was not called as a witness. I find it inconceivable that she did not know that the houses intended for the site were based on the Cala designs and that was why the Cala names were used for them on her report.

I should also deal here with the evidence of Mr. Pickering. He was particularly concerned with the layout of the Higgs & Hill site and attended both the July meetings with Mr. Hodgson. It was he who received from Crawley Hodgson the site layouts marked up with Cala footprints and bearing Cala house names. He said under cross-examination that although he was present at the 10 July meeting when catalogues were shown to Mr. Hodgson he did not realise that the names used on the site layout he received just four days later were Cala names. He went on to say that he could not recall seeing the name 'Cala' on most of the drawings considered at the 21 July meeting, even though that meeting lasted for some 2 hours and the drawings were inspected by the participants in detail. I had a chance to observe Mr. Pickering in the witness box. I do not accept his evidence. It was well understood by Mr. Pickering, as it was by Mr. Rosier, that the defendants were intending to put up a Cala-like estate with slightly modified Cala designed houses. Mr. Pickering knew where the names came from. He had seen them on the catalogues put to Mr. Hodgson at the first July meeting.

Had McAlpine wanted to produce a new range of houses from scratch, they could and would have instructed Crawley Hodgson to do so. It is not suggested that they did. Had it wanted to take existing McAlpine house designs and modify them to make them look pseudo-Edwardian, in other words do what Cala had done in relation to some of their own 1970's style houses, it could and would have instructed Crawley Hodgson to do so. It is not suggested that they did this either. It is clear from Mr. Pickering's evidence that McAlpine expected Mr. Hodgson to produce at the second meeting 'marked up' drawings, in other words existing drawings for houses which were not McAlpine's marked up to show the style features discussed at the 10th July meeting (Transcript Day 6 page 49). That is what McAlpine got. Having seen the witnesses in the witness box I am driven to the conclusion that the lack of surprise when Crawley Hodgson produced the marked up Cala drawings at the second meeting was not because McAlpine was indifferent as to what was to be marked up but because it expected that to be what Crawley Hodgson would do. I reject the suggestion in Mr. Pickering's evidence that in the two hours meeting on 21 July when he and others considered in detail the drawings produced by Crawley Hodgson the name Cala printed prominently on the bottom of many of them never registered. The design of the new house range for McAlpine was an

important project. I do not believe that Mr. Pickering's eyes took in everything on the drawings with the exception of the title blocks which occupied a large area on the bottom right of the drawings. If, as he says, he made no comment on seeing the drawings, it was not because he did not notice the Cala name but because he thought it unremarkable. McAlpine got what it, through Mr. Rosier, had asked for.

I should mention that in the report prepared on behalf of the Defendants by Mr. Goodall, an architect, the following was said:

“The style of the houses was to be similar to that drawn up for Cala, but the plans and elevations were referred back to McAlpine's existing house types and to their standard construction specification.”

Mr. Goodall said that this impression was given to him by Mr. Rosier. It was included in his report which, in draft form, was submitted to the Defendants. It has not been suggested as being true by Mr. Rosier.

I have no hesitation in concluding that the breach of Cala's copyright which I have found to have taken place was committed flagrantly. In my view this is an appropriate case in which the court should exercise its discretion to award additional damages under the provisions of s. 97(2) of the 1988 Act.

If the court comes to the conclusion that the discretion under s. 97(2) should be exercised in the plaintiff's favour, the scale of damages are at large and will, in most cases, be of a punitive nature. In this action an inquiry is sought. In many cases it may well be inappropriate for there to be a separate inquiry. The damages under the section are not compensatory. They are designed to allow the court to register in terms of a financial penalty its disapproval of the behaviour of the infringer. If, as is likely, in most of cases the major factor justifying the award of additional damages is the flagrancy of the infringer's actions, the damages should be geared to the level of disapproval of the court. However it is the trial judge who has decided that the actions of the infringer are flagrant and, no doubt, has come to a conclusion, based on the oral evidence, of just how heinous that flagrancy is. If there is an inquiry it is most unlikely that evidence relating to the level of flagrancy will be adduced. If it is, it will merely cover again ground which has already been the subject of judicial determination. In those circumstances it is difficult to see why in most cases the assessment of additional damages is not better dealt with by the trial judge rather than later on an inquiry. However in this case, since there has been no attempt to argue the question of quantum before the court, I will accede to the plaintiffs' request and direct that there be an inquiry as to damages under s. 97(2).

The position of the expert witness

Before ending this judgment there is one other matter which deserves comment. The defendants submitted as their expert Mr. Goodall. He is an eminent architect. He prepared a lengthy report which was served in this action.

In August 1990, Mr. Goodall wrote an article in the Journal of the Chartered Institute of Arbitrators. Its title is “The Expert Witness: Partisan with a Conscience”. It sets out, among other things, what Mr. Goodall believes is the appropriate approach an expert should adopt when preparing a report for use in litigation. He confirmed in court that the

principles set out there were applied to the drafting of the report on which the defendants relied in this action.

Mr Goodall speaks from a position of some experience. His involvement in civil arbitration and litigation work has been extensive. In 1971 he joined what was then the Institute and is now the Chartered Institute of Arbitrators and has served on its Council. He is a Fellow and Registered Arbitrator. He is on the Committee of the Society of Construction Arbitrators. He is a member of the 'Diploma in Arbitration Advisory Board' to the College of Estate Management; a member of the UK Chapter of the Construction Disputes Resolution Group and a Fellow of the Academy of Experts. He has been called upon to advise on over a hundred and twenty proceedings in litigation or arbitration and he has been appointed arbitrator in over fifty references. In his article, Mr. Goodall said the following:

“How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?”

“... the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.

If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them.”

...

“Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun', so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?'. The third phase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.

Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon on him.”

No doubt it is currently fashionable to say that our legal system makes no pretence to determining the truth. I accept that some people not only say it but also believe it. If it

were true then Mr. Goodall would be right in thinking that anything short of outright misrepresentation is permissible in an expert's report and that not only the other party but also the person trying to decide the issue, the 'rustics', are fair game. On reflection, if Mr. Goodall were right, I am not sure that even outright misrepresentation should be avoided. If litigation is to be conducted as if it were a game of Three Card Trick, what is wrong with having a couple of aces up your sleeve?

In support of his approach, Mr. Goodall relied in his article on a quotation from the Official Referee in a publication called *Construction Disputes. Liability and the Expert Witness* (Butterworths) as follows:

“... since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked at all, either by his client's opponent's counsel or by the Official Referee or arbitrator.”

It is apparent that this provides scant support for Mr. Goodall's approach. There is a world of difference between not volunteering evidence on topics on which you have not been asked to express a view and giving misleading answers on topics where you have.

The whole basis of Mr. Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by Mr. Goodall is a euphemism for 'misleading selectivity'. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being 'found out'. The reality, of course, will be somewhat different. An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined. Most witnesses would not be prepared to admit at the beginning of cross examination, as Mr. Goodall effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert's report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence of much of its value. I would like to think that in most cases cross-examination exposes the bias. Where there is no cross-examination, the court is clearly at much greater risk of being misled.

In view of the above, it is relevant to remind those concerned with the preparation of experts' reports of some of what Cresswell J. said in *The "Ikarian Reefer"* [1993] FSR 563:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan* [1981] 1 WLR 246 at 256, *per* Lord Wilberforce.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd. v. Commercial Union Assurance Co. Plc* [1987] 1 Lloyd's Rep. 379 at 386, Garland J. and *Re J* [1990] F.C.R. 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J, supra*)." [page 565]

It is clear that in saying that, Cresswell J. had just as much in mind the expert's report as the evidence given orally at trial.

Near the beginning of his report, Mr. Goodall says the following:

"I believe that the inspections I have made and the graphic and other material that I have seen are sufficient to enable me to reach an informed opinion on the matters in dispute in the present action that fall within my discipline.

I have no connexion with either of the parties in this action, nor have I any prior acquaintance with instructing solicitors or Counsel. I have no pecuniary or other interest in the outcome of the current litigation."

The clear purpose of these statements was to convey the impression to the plaintiffs and the court that the report was the independent unbiased product of the expert. Some may characterise this as pragmatic flexibility. In my view that impression is simply false.

In the light of the matters set out above, during the preparation of this judgment I re-read Mr. Goodall's report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues. I should point out that there is no material before me which suggests that the defendants' solicitors or counsel, or the defendants themselves, were aware of Mr. Goodall's attitude to the drafting of his report.