

## **The Effect of Copyright in Architectural Plans**

A recent [decision](#) of the British Columbia Supreme Court deals with an architect's right to seek payment from a purchaser of an apartment development constructed using the architect's plans, after a foreclosure of the property had taken place.

### **The Facts**

The plaintiff, a small architectural firm, prepared architectural plans and related material (Work Product) for an apartment development. The plaintiff continued to own the copyright in its Work Product which was marked with its stamp asserting copyright ownership.

The architect's initial task was to prepare a drawing package sufficient to apply for a building permit application. The project encountered financial difficulties and at that time in excess of \$190,000 was outstanding to the plaintiff. As a result, the plaintiff told the developer that it could not submit the drawing package for the building permit until its invoice had been paid. Eventually the architect filed a lien against the lands. The plaintiff's claim was eventually paid and the lien released.

The project started again and the plaintiff prepared additional working drawings. As a result, a development permit was issued but again the plaintiff told the developer that it required full payment of its outstanding accounts before it would release the drawings to support an application for a building permit. An arrangement was arrived at where the plaintiff agreed to the submission of its drawings in exchange for an undertaking that it would be paid from the first mortgage draw.

The permit was issued and construction commenced but the plaintiff was not paid. The plaintiff filed an additional lien. Shortly afterwards the lender commenced foreclosure proceedings against the developer. Pursuant to a court order, the project site and all of

the developer's present and after acquired personal property was conveyed to the defendant. The plaintiff's second lien was discharged but it was not paid.

The plaintiff advised the defendant that if they wished to use its Work Product the plaintiff would have to be paid. However, the defendant hired a new architect whom they told that the plaintiff had no rights in the Work Product. The new architect used the plaintiff's Work Product and the project was completed.

### **The Action**

The plaintiff commenced an action for copyright infringement against the defendant and the new architect.

It was clear that the plaintiff owned the copyright in its Work Product. In the typical situation where payment was made, the defendant developer would have acquired the right to use the plans for the purpose of constructing the apartment development. It was agreed that the defendant's rights, if any, to use the plaintiff's drawings and plans arose out of an implied licence from the plaintiff to the original developer. This licence was non-proprietary in nature and operated as a permission to do that which would otherwise be infringing.

The judge applied the following statements from *McKeown, Fox on Copyright and Industrial Design* (drafted by the writer)

“....a non-proprietary licence, where consideration has not been given, can be revoked at will.... Where a licence has been given for consideration, it may only be revoked in accordance with the terms of the contract under which it had been granted....”

It appears that the standard form of contract, prepared by the Architectural Institute of British Columbia, provides that payment of all outstanding fees is an express precondition to the client's use of an architect's Work Product. However, in this case the plaintiff did not use the standard form but used its own form of contract which was less clear. However, the agreement did give the plaintiff the right to discontinue services if payment was not made.

The judge reviewed all the facts and concluded that the consent given by the plaintiff to the original developer for the use of its Work Product was conditional on payment of the plaintiff's fees in full. When the payment was not made the licence ended. The terminated licence was not capable of being transferred to the defendant, who as a result used the drawings without consent.

When the plaintiff filed the second lien this signified that its Work Product could not continue to be used until its debts were settled. The judge said that the plaintiff had a right to revoke its consent and did so before the defendant used the drawings. In addition, the judge was also prepared to find that the implied licence granted to the original developer included, as a condition, of the continued use of the drawings, an implied condition that all the plaintiff's fees be paid in full.

The defendant was aware of all the material facts and the plaintiff's rights before it completed the purchase and could not take the position that it was a purchaser for value without notice.

The judge did not agree with the defendant that the purpose of the foreclosure proceedings was to enable the defendant to "complete the project free and clear of the claims of initial developer's creditors". The purpose of the proceedings was to realize on the lender's mortgage.

In the foreclosure proceedings, the title to the land was not transferred free and clear of all claims but rather free and clear of the charges that have been registered against title that subsequent in priority to the lender's mortgage. The second lien provided the plaintiff with a statutory right to encumber the lands because it had provided services in respect of the lands and in that way provided some security against the land for the plaintiff's fees. After the plaintiff's lien it had no right to claim against the lands, but this did not prevent it from pursuing other remedies.

As a result, the defendant was ordered to pay damages to the plaintiff representing the amount that the defendant would have been required to pay in order for the new architect to provide services based on the Work Product. This was based on time and expenses incurred by the plaintiff in generating the Work Product.

### **Comment**

The result in the case is consistent with existing principles and case law but is still may be somewhat surprising for those unaware of the rights associated with copyright.

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*These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.*