

The Builder, the Developer and its Architect

A lesson in the need for letters of intent and/or license agreements for works in contract negotiation stage

In a Nutshell

Developers and builders should give careful consideration to entering into licence agreements or letters of intent where pre-contractual works are performed or designs/plans are to be used while the parties are still negotiating the commercial terms of a design and construct contract.

In the matter of *Tamawood Ltd v Habitare Developments Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2015] FCAFC 65 (18 May 2015) the Federal Court found that a developer (Habitare Developments) and its architects (Mondo Architects) had infringed copyright in the designs for a single storey and double storey duplex which were held by a builder (Tamawood), which no doubt will have an adverse financial and reputational impact.

Tamawood had allowed Habitare Developments to use its plans to apply for development consent while Tamawood and Habitare Developments were in negotiations for Tamawood to build a low cost housing project. Complex and no doubt costly litigation which involved a hearing before a single judge in the Federal Court and an appeal to three judges in the Federal Court may have been avoided if the parties had during the contract negotiation stage clearly set out their rights and obligations either through a written licence agreement or a letter of intent.

Facts

Habitare Developments entered into negotiations with Tamawood for that builder to enter into a design and construct contract for the construction of low cost housing in Brisbane.

During the contract negotiation stage Tamawood produced two designs for the site Habitare Developments was looking to develop, being a single storey duplex ("the Dunkeld") and a two storey duplex ("the Torrington").

While the terms and conditions of the contract were being negotiated, Tamawood permitted Habitare Developments to use the Dunkeld and Torrington plans to lodge an application with Council. Development approval was granted by Brisbane City Council to construct dwellings on site which were generally in accordance with the approved plans.

There was one hitch to the project which was that Tamawood and Habitare Developments were unable to agree on terms for Tamawood to construct the dwellings on site. Habitare then approached Mondo Architects and requested that it develop construction plans which could be used with the Development Approval.

Mondo Architects produced construction plans for Habitare. The builder that Habitare initially engaged to build the project went into liquidation and it subsequently engaged Bloomer Constructions to complete the projects.

The issue that arose was whether the Mondo Architects plans infringed the copyright held by Tamawood in the Dunkeld and Torrington plans.

License To Use The Plans

At first instance, Collier J in the Federal Court found that Tamawood had licenced Habitare to use the plans for the purpose of obtaining development consent, however, there was an implied term in that licence that it would be revoked if Tamawood were not contracted to build the project.

Collier J found that the plans produced by Mondo Architects for a two storey duplex substantially reproduced the Torrington plans. Collier J found that Habitare and Mondo Architects had both infringed the copyright held by Tamawood in the Torrington plans.

It was found that the Dunkeld plans hadn't been substantially reproduced in Mondo Architects' one storey duplex plans.

The issue of whether there was an implied term was explored on appeal. Jagot and Murphy JJ, with Greenwood J agreeing, found that the evidence didn't support a contention that Tamawood's plans were licenced to Habitare to use to build the project if Tamawood wasn't appointed as the builder. It considered that the licence issue could be looked at in one of two ways, either:

1. That there was an implied term that the license to use the plans would terminate on Tamawood not being appointed as the builder; or
2. That the scope of the licence was for Habitare to use the plans for so long as Habitare intended to appoint Tamawood as the builder.

On appeal, the Federal Court also found that in addition to the double storey design, that copyright in the Dunkeld design had also been infringed. Although rooms had been moved around internally, it was found that there had been a substantial reproduction of Tamawood's plans given that the relationship between the exterior and the internal spaces was unchanged. Matters such as this involve a complex analysis of the facts and again this is a salutary lesson that an appropriately drafted document framing the rights and obligations of the parties may have avoided the parties becoming involved in this complex litigation.

Lessons Learnt

The parties in this matter have no doubt incurred significant legal costs that may have been avoided or reduced with documentation in the pre-contract negotiating stage setting out the rights and obligations of each party.

While it was common ground that Tamawood had allowed Habitare to use its plans to apply for a development application in the pre-contract negotiation stage, no doubt to avoid delays in the project, it would have been useful for both parties for an appropriate licence agreement or even a letter of intent to have been in place to define the use and scope of the licence to use the plans and map out what was to happen if Tamawood and Habitare were unable to agree on terms for Tamawood to construct the project.

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