

SCHEDULE OF GROUNDS OF APPEAL

(AMPLIFYING SECTION 7 TO APPELLANT'S NOTICE)

Ground One

1. The judge wrongly dismissed Mr Wilkey's evidence that the design of the Kunsthal was copied from the claimant's drawings. This was a case where the defendants made use of parts of the claimant's drawings that they intended to keep, and that resulted in copying those parts.
2. The recent report of the expert, Mr Salisbury asserts that from the analysis he made the similarities are almost certainly derived from copying – Report para 96(b); para 116 (a). He states that using mathematical precision it is almost certain that the one design has been copied from the other – para (d p. 42 and para (n) p. 45.
2. It was common ground that the Kunsthal was built from the defendants' drawings. (D's defence) The Kunsthal was built in accordance with the design for the Kunsthal created by Mr Hoshino under the guidance of the second defendant. The issue was whether the second and third defendants copied the claimant's drawings. The issue for the judge was therefore the comparison of the drawings. The consent order of the 18th December 2000 identified as a discrete issue whether the design drawings for the Kunsthal or any of them infringed the claimant's copyright in his Docklands Plans. In rejecting Mr Wilkey's evidence the judge misdirected himself as follows:
 - i. The judge should in the circumstances have restricted himself to a comparison of the drawings and should not have allowed the defendants to mount a case relating to that issue on the 3D built structure, alternatively he overestimated and/or attached far too much weight and significance to the Kunsthal as built;
 - ii. The fundamental criticism of Mr. Wilkey (that he had not visited the Kunsthal) at para 58 (a) of the judgment is based on a false premise:

The 3D building was not central to the case. The judge should have decided whether the drawings were copied without recourse to the Kunsthal as built.

- iii. The expert's suggestion that the spiral circulation of the Kunsthal is a post copying rationalisation is 'fantastic' – Judgment para 38.

The description of Mr Hoshino's work as post copying rationalisation is appropriate. There was no basis for the use of those words to have attracted any criticism. This was a matter of fact. His words were neither incorrect nor pejorative.

- iv. Why Mr Wilkey abandoned reliance on some of the 52 similarities pleaded and abandoned others made no sense – judgment para 40

Mr Wilkey did not himself prepare the list of particulars of similarities. If Mr Wilkey could not then support all the allegations he was correct to say so. He was in compliance with CPR r 35(1). Furthermore neither the judge nor counsel enquired why he did not support some of the alleged similarities. It is thus wholly improper and unfair to criticise him for remaining silent. Moreover, if it is suggested that Mr Wilkey was thereby vacillating or being capricious, that is not rational. It was incorrect and unfair to state that he had 'abandoned' any allegation. It demonstrates the judge's animus towards Mr Wilkey rather than a defensible intellectual proposition.

- v. I have little to say about [the pedestal and the slab] – they are obviously very different – judgment para 41

The judge appeared to be overly influenced by the differences and not the similarities. Dissimilarities can prove nothing by themselves. It does not discount the possibility of there being similarities as well. The usual process is either to countenance or dismiss the alleged similarities. In this regard the Court of Appeal in **Pearce v Ove Arup Partnership Ltd et al [2000] 3 WLR 332** already pointed out that -

it is not usually possible to allege copying other than as a deduction by inference from all the surrounding circumstances. In Copinger and Skone James on Copyright, 13th ed. (1991) p, 168, para 8-13 it is said: The proper

test in all these cases probably involves four propositions: (1) In order to constitute reproduction within the meaning of the Act there must be (a) a sufficient degree of similarity between the two works and (b) some causal connection.....(3) Where there is substantial degree of objective similarity this, of itself will afford prima facie evidence to show that there is a causal connection between the plaintiff's and the defendant's work; at least it is a circumstance from which the inference can be drawn, (4) The fact that the defendant denies that he consciously copied affords some evidence to rebut the inference of causal connection arising from the objective similarity, but is in no way conclusive. Thus if there is a sufficient similarity in the plaintiff's work and the defendant's, and the defendant has had an opportunity to copy the plaintiff's work directly or indirectly, this will establish a prima facie case of copying which the defendant has to answer.

See further Lord Millett in **Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416** was to the following effect:

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying. But differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material. In the present case the disposition of the flowers and (except in one instance) the colourways of the defendants' design are very different from those of the plaintiffs' design. They were not taken from the copyright work, and the plaintiffs make no complaint in respect of them. They make a significant difference to the overall appearance of the design. But this is not material where the complaint is of infringement of copyright and not passing off. Once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants' work, as I have already pointed out.

In any event Mr Wilkey only referred to the 'general overall similarities' in his report. The description by the judge of the difference as 'vast' is to overstate the position: It does not remove the presence of objective similarity – Salisbury para (b) p, 42.

vi. **The judge in para 41 of his judgment again misdirects himself**

He again makes the mistake that a difference can be taken to counter an allegation of similarity.

- vii. Mr Wilkey is criticized by the judge for failing to give expert evidence as to how architects think conceptually: judgment para 45

This was again unfair as Mr Wilkey had never been instructed to give such evidence as to how architects proceed conceptually nor was he asked to give an account of this to the court. The judge from time to time inappropriately and unfairly intervened and asked an unusually high number of questions. The nature of his interventions were moreover harassing and sometimes pejorative.

At one stage the judge declared that he 'will rise for five minutes while the witness considers very carefully'. Mr Wilkey was then left standing in the witness box under the gaze of all the parties present and their counsel for some minutes. This is to be contrasted with the lack of even-handedness when the Defendants' expert, Professor Dijkstra was cross-examined by counsel for the claimant. The judge answered many of the questions for the witness: See Salisbury report: para (i) p51. It is not without significance that the impression left with Mr Salisbury from the exchanges between the judge and the respective expert witnesses is that the judge had a fixed view of the case from the outset; that he possibly therefore assisted the defendants' expert and intervened at key moments during the cross examination of Claimant's counsel's cross examination. (This criticism is particularly germane to Ground 2 herein. (Mr. Salisbury is akin to a reasonable and informed observer).

- viii. The judge stated that it was sufficient to observe that what the court of appeal in **Pearce v Ove Arup Partnership Ltd et al [2000] Ch 401** was presented with, namely a near exact fit of overlays, gives a false impression - judgment para 44. The overlays were however useful to the Court of Appeal and the expert, Mr Salisbury in assessing whether copying had taken place. The better assessment of similarity is to be made by comparing drawings that are as close to the originals as possible. Mr. Salisbury examined the full-sized prints, taken he assumes from the original drawings and has concluded that the

similarities are almost certainly derived from copying – Report para 96.

- ix. The next level of generality is in two dimensions only. It thus ignores the essentially three-dimensional nature of the Kunsthal.....No-one ever explained how this 2D process could begin to lead to the complex ramp structure of the Kunsthal. The Court of appeal expressly indicated that expert evidence as to how architects think conceptually might assist. Even so, none was forthcoming from Mr Wilkey – judgment para 45

As well as in para 48 of the judgment, the judge in para 45 is fixated on the building in its built form when a discrete issue in the case is essentially about similarities between drawings. Nor did the judge ask Mr Wilkey that question – Salisbury para 98(a). In any event, it was irrelevant. The judge should not have been so concerned with the physical building of the Kunsthal. The allegations are of plagiarism of the graphic work and interpretation of the drawings as representations of three-dimensional objects is therefore irrelevant. The judge and Prof Dijkstra appear to have been influenced strongly by the *functionality* of the buildings. But where the allegations are of infringements by graphical reproduction, and where the parties have agreed that the judge should consider this as a discrete issue, this is an irrelevant consideration.

- x.. 'Comparing apples and Thursdays' – judgment para 49

Again, the judge was wrong to take the Kunsthal building into account and was wrong to criticize Mr Wilkey for not doing so. The judge was driven to say that

the dimensions of the claimant's small balcony at the front....are taken exactly for the length and width of the right-hand part of the steps on the Kunsthal.....The similarity only has to be stated to be seen as absurd'

But as Mr. Salisbury has stated: This is not at all absurd when the drawings alone are compared - para 101 (a) and (b).

- xi. All that has been adduced is a collection of 'similarities' amounting individually and collectively to nothing – judgment para 56

This constitutes a serious error because the judge has not considered the unlikely probability of several graphic similarities occurring in related juxtaposition. The judge was wrong to ignore Mr Wilkey's valid intuitive assessment in favour of the mistaken and faulty premise that was the basis of Prof Dijkstra's opinion.

Moreover, reference is had to the Court of Appeal's assessment of the case in 1999- [2000] Ch 401. Mr Salisbury indicates as an expert that the approach of the Court of Appeal is correct and that Mr Wilkey got it right. The relevant passages from that judgment, are to the following effect:

The critical question remains whether the judge was right to conclude that the inferences necessary for the plaintiff's case to succeed could never be drawn. In our judgment, he was not. We have, as we say, had the advantage of the plaintiff's portfolio which we are sure explains his case forensically far more clearly than did the material before the judge.

The essential case is that there are so many examples where dimensions and their shapes coincide on drawings of a different scale that the inference should be drawn that the defendants used a graphic copy of the plaintiff's plans as a starting point for their own plans. The allegation is not, as we understand it, limited to dimensions in plan only but to the conceptual juxtaposition of shapes and spaces – 346H-347B

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Portfolio plans C seek to show that a triangular element in the Kunsthal plans is congruent with a triangle in the plaintiff's Docklands plan. This was one of the elements which the judge considered in detail and found quite unpersuasive. The plaintiff's version of this triangle is shown on his drawing JKM 6 to be a narrow right angled triangle. The long side running vertically up the plan is on the line of a structural wall which, for about half its length, is the side wall of a widening and rising ramp. The acute angled apex of the triangle is at one side of the entrance to the ramp. Beyond the top of the ramp the wider part of the base of the triangle represents a conference chamber or cinema with rising tiers of seats. The short base of the triangle is a projection of the conference chamber behind the tiers of seats beyond the main line of the building at this level. The hypotenuse of the triangle is the line of the side of the conference chamber projected down the ramp. In the Kunsthal drawing V-04A, the triangle on which the plaintiff relies has been flipped over and moved substantially down the building, so that the acute angled apex of the triangle is a notional point outside the relevant line of the structure. The hypotenuse of the triangle is on the line of a ramp coming up from below to a balcony and the short base of the triangle is on a line where this ramp arrives at the balcony. The ramp itself is not triangular but has parallel sides. The long vertical side of the triangle is a different part of the structure altogether. *The fact however remains that each of these designs has a triangular spacial concept which, according to the plaintiff, when appropriate projections are made, constitute in plan graphically congruent*

triangles. Additionally, a main element of each of these triangles in plan is a plane rising through the building.

A judge at trial may conclude that these and other similarities alleged by the plaintiff were coincidental. But we have all reached the clear conclusion, with the aid of the plaintiff's portfolio, that the plaintiff's allegations of similarity are not so fanciful that his claim as a whole should be regarded as speculative – (emphasis added)

- xii. Regard is also had to Mr. Salisbury's application to this case of mathematical probabilistic theory. This constitutes a corroboration of the intuitive arguments that an expert architect brings to bear on the analysis as to similarities. The conclusion at para 116 of Mr Salisbury's report is the following:

It is my opinion that the similarities between the two schemes are so close and so frequent that there can be just one explanation. Which is copying.The points made in the defence....relate mostly to the built Kunsthal and not to its graphic representation which was the case before the judge....Given Mr Hoshino's 'iterative' approach to his work,.....it is perhaps not unsurprising that if copying had taken place, then those copied parts should fetch up as 'unrelated features in unrelated areas'. If there was a similarity in dimensions, then Mr Wilkey was correct to say so. He was following his instructions and not misleading the court.

Ground 2

1. The claimant did not have an impartial tribunal as guaranteed under Article 6(1) of the European Convention on Human Rights and Freedoms. From the matters referred to herein (as set out in the post-trial evidence), the trial judge at the very least might have been unconsciously inclined to favour the interests of the defendants over the claimant's.
2. There is a real possibility that the judge did not make an objective and impartial appraisal of the evidence, but came to a conclusion consistent with his prejudgments rather than based on a fair analysis of the evidence in the light of the pleadings. In other words the judge was identified or apparently identified with the objectives of one side's case – **Reg v S (R.D.) (1997) 151 D.L.R. (4th) 193 at 227.** The factual basis for this ground is contained in and referred to in the evidence

sought to be adduced in this appeal. The facts were discovered post-trial.

3. The inference to be drawn is that the judge had come to the case with a view already formed. This bias prejudiced the claimant's case and coloured his view regarding Mr Wilkey, as expert witness. The judge had demonstrated an intemperate and confrontational approach in relation to Mr Wilkey and his testimony.

Evidence of bias and inappropriate conduct

4. The Court of Appeal had already found that there was indeed cogent evidence of graphic copying - **Pearce v Ove Arup [2000] Ch 401**. In those circumstances the subsequent trial judge would be expected to have been less inclined to form an a priori or at the very least, a negative, opinion, before he had even had the benefit of hearing all the evidence and submissions. Before being appointed to try this case the judge had already made remarks in two lectures in 1997 and 1998 about this very case, criticising the basis on which the claimant had invoked the jurisdiction of the English Courts and asserting that that he had apparently done so for the purpose of being granted legal aid and deprecating the fact that the successful defendants would accordingly not be able to recover their costs from the claimant. The judge, as he should have, failed to disclose such remarks to the claimant at trial.
5. At a very early stage in the proceedings – possibly the second day out of a six day trial, and whilst the claimant's case was in progress – the judge got his clerk to contact the chambers of the claimant's barristers to 'give advice' in a private discussion with the about –to-be- appointed- new senior clerk. The advice was that he did not think that Mr Pearce's counsel, Ms Clarke, was up to the job. The senior clerk, who was about to retire, happened to overhear the discussion and insisted that the matter be put in writing and that the note be given to Ms Clarke. The judge also subsequently admitted in writing on the 8th October 2003 that at some point during the trial he formed the view that his case was so untenable that Mr Pearce should never have

been granted legal aid. The judge did not inform the claimant of the above-mentioned activities. On his own admission it is clear that the judge had formed a hostile opinion of the claimant's case which was bound to cloud his whole approach, vision and judgment as to the issues raised and their merits. It is accordingly a matter of concern that the judge had allowed his preliminary prejudices to colour his whole approach to the evidence that was to unfold before him. His mind was to all intents and purposes already closed.

6. It was discovered after the trial that the judge's son, Sam Jacob, also an unqualified architect, has an architectural firm called FAT. He has a website at www.fat.co.uk. Article 10 of the FAT manifesto states that "Once upon a time there was this liar who said 'the plan is the generator'. He was wrong."*. There was a debate as to the creative processes in the case. The approach of Sam Jacob is an unusual. It is however similar to the 'iterative' process that Mr Hoshino for the defendants described in his evidence. This is contrary to the conventional approach. This is not a usual process in an architect's office. Mr Hoshino's explanation does not exclude the possibility that the starting point was the claimant's design. In any event it was argued that one would expect there to be recorded in some concrete manifestation, whether graphically or otherwise, evidence of the progress of Mr Hoshino's process, to a greater extent than the material disclosed by defendants. The judge might have consciously or unconsciously been influenced by the fact that his son had expressed views as to the limitations of the 'plan as generator'. The concern is that the judge might have been misled or influenced by his son's unusual views.

*The judge referred to his son during the course of the trial. He stated that his own son was an unqualified architect who was no less an architect for not being qualified. That was in the context of the revelation that Mr Koolhaas is not qualified either.

7. The preconceptions of the judge explain but do not excuse the manner in which the witness, Mr Wilkey was treated by him. This refers to the intemperate and unfair interventions when he gave his evidence, the humiliating ten minutes when the judge stated that he should think about his evidence, leaving Mr Wilkey alone in the witness box under the gaze of the parties and their counsel. There was not a consistent, symmetrical or even-handed approach to the Defendants' witnesses.

8. The judge appeared to have been overawed by Mr Koolhaas. His approach represents little more than the instantiation of the Fallacy Of The Argument From Authority. An argument must have logical validity as to its foundation, not merely the contingent reputation of its proponent. The judge's predispositions as referred to above consequently resulted in an undue weight being placed on Mr Koolhaas's evidence and assertions.