

GARETH PEARCE

Applicant/Claimant

- and -

(1) OVE ARUP PARTNERSHIP

Respondents

**(2) REMMENT LUCAS KOOLHAAS
(sued as REM KOOLHAUS)**

**(3) OFFICE FOR METROPOLITAN ARCHITECTURE
STEDBOUW BV (sued as OFFICE FOR
METROPOLITAN ARCHITECTURE)**

(4) CITY OF ROTTERDAM

**CLAIMANT’S/APPLICANT’S
SKELETON ARGUMENT**

1. Background facts and chronology

- i. The claimant created original drawings and plans for a town hall for the Docklands Development, London.. This was an exercise as an architectural student. He completed the drawings in June 1986.
- ii. Mr Koolhaas, the second defendant was alleged to be a director of the third defendant. The claimant alleged that one of his tutors was a Mr Wall, who also worked for the third defendant in 1986. In the autumn of 1986 the claimant was employed for about 6 weeks in London by the third Defendants at Mr Wall’s invitation to complete the construction of a model.
- iii. It was alleged that copies of the claimant’s drawings were taken by the third defendant at that time. He could not prove directly that they had been copied but alleged that the second defendant or an employee of the third defendant had the opportunity to do so and in fact did so. They were returned to him in a condition that suggested that they had been copied by being passed through a copying machine.

- iv. The claimant visited Rotterdam in 1992 and saw the Kunsthal in the course of construction and believed features of the design had been copied from his Dockland plans. He was immediately struck by the similarity between it and his Docklands Town Hall.
- v. The designs and plans for the Kunsthal were produced by the third defendant (a Dutch company) and the second defendant was the principal architect responsible for those designs and plans.
- vi. The claimant brought an action for breach of his UK and Dutch copyright alleging that the second and third defendants had used his drawings in designing the Kunsthal, owned by the fourth defendant in Rotterdam, and constructed between 1990 – 1993 by the first defendant civil engineers who were domiciled in the UK.
- vii. He alleged that each defendant had infringed his UK and Dutch copyrights.
- viii. When he sued in the UK in September 1996, he accepted that his damages claim in respect of his UK copyright was statute barred. Accordingly, the main claim was for infringement in Holland, of his Dutch copyright.
- ix. The claimant alleged that the English Courts had jurisdiction regarding his claims against the defendants not domiciled in the UK by virtue of Article 6(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 – the Brussels Convention 1968.
- x. In December 1996 the second, third and fourth defendants applied to have those parts of the amended claim that concerned alleged infringements of Dutch copyright, struck out on the ground that they were not acts which constituted torts actionable under English law. It was also contended that the whole claim was speculative and should be struck out under the inherent jurisdiction of the Court.
- xi. The matter came before Lloyd J on the 12th February 1997 – **[1997] Ch. 293**. He upheld the defendants' submission that on the facts alleged the claimant's claim was bound to fail. In particular he found that the degree of similarity between the claimant's Dockland design and the Kunsthal drawings was not sufficient to give rise to an inference of copying.
- xii. The matter was subsequently considered by the Court of Appeal, leave having been given by Aldous LJ. The matter is reported in

[2000] Ch 401. The Court held that the English Court had to accept jurisdiction against the defendants to hear a claim for infringement of Dutch copyright in the circumstances of this case. The significant holding by the Court of Appeal was that on the evidence before Lloyd J., the judge had erred in striking out the claim as speculative and an abuse of process and that the action should be allowed to proceed to trial.

- xiii. The pleadings were amended and particulars as to similarity were sought and given.
- xiv. On the 18th December 2000 the parties agreed a consent order which stayed the action against the first and fourth defendants. In terms of the agreed order, which in substance reflected the claimant's averments as cast in the re-amended statement of claim dated 9^h November 2000, the following questions were to be tried as preliminary issues:

Subsistence of copyright

- 1. Whether copyright and/or moral rights subsist in the Dockland Plans as original artistic works pursuant to Dutch law

Authorship of the dockland Plans

- 2. If yes to (a) whether the Kunsthal or the design drawings for the Kunsthal (or any of them) infringe the claimant's copyright in his Docklands Plans or infringe any of the claimant's moral rights subsisting in the Docklands Plans, pursuant to Dutch law

- xv. The defendants ultimately admitted that copyright subsists in the Docklands Plans and that the claimant is the author of and owns the copyright in them. In addition there were agreed propositions as to the applicable Dutch law governing this dispute.
- xvi. The matter thereafter proceeded to trial and came before Jacobs J. in October 2001 and the only issue to be tried was whether there had been infringement. The court's task was therefore to identify those parts of the claimant's work which have been taken i.e. the similarities. If these are sufficiently close, numerous or extensive, then unless defendants show independent derivation, the claimant should succeed. It matters not (and indeed it is entirely irrelevant) that the overall impression of the two buildings is different.

- xvii. Judgment was given on the 2nd November 2001 dismissing the claimant's claim.
- xviii. The trial judge referred the claimant's expert, Mr. Wilkey to the ARB and the RIBA directing the professional bodies to consider whether Mr. Wilkey had seriously breached the Standards of Conduct of the architect's profession and his duties as an expert witness when giving evidence as an expert architect.

2. **Post-trial events**

- i. On the 5th February 2003 the Professional Conduct Committee of the Architects Registration Board found that Mr. Wilkey had not been guilty of any unacceptable professional conduct or serious professional misconduct. Having regard to all the evidence as well as his written and oral reports the tribunal found that there was nothing there to support such charges. Indeed, it was agreed between the parties to the tribunal that an architect acting reasonably could have found similarities in the drawings. It was perfectly proper to reach that agreement in the light of the Court of Appeal judgment **[2000] Ch 401** and the report of Mr Hill, (an architect) which that Court had not read.
- ii. On the 22nd July 2003 the claimant wrote to Jacobs J. seeking in this informal manner to request leave to appeal his judgment. Amongst other matters referred to in the letter the claimant stated that when Mr. Wilkey's solicitors had defended Mr Wilkey before the Board they had discovered from his files a set of his solicitor's attendance notes detailing an undisclosed event that had occurred during the claimant's trial. He alleged in that letter that the judge had sent his clerk to the claimant's counsel's chambers during the course of the trial itself the effect of which was to intimidate counsel. His counsel had not informed him of that intervention. Had that occurred he would have insisted on a 'stay' of proceedings and would have sought the recusal of the judge.
- iii. On the 28th July the clerk to the Jacob J. wrote to the claimant indicating that an application for leave to appeal has to be supported by a proper notice. She added that the judge 'can see no reason for any formal application ever being successful'.

- iv. On the 8th October 2003 Jacobs J. personally wrote directly to the claimant. In his response to the claimant's allegations the judge stated that from his recollection of events he had known a Ms Harding for many years. She had in fact been a junior typist at the judge's chambers and she was about to become senior clerk at those (i.e. claimant's counsel's (Ms Clark's) chambers. Ms Harding was a friend of the judge's clerk and they see each other frequently. The judge goes on to state that

at some point during the trial (I cannot say when) I formed the view, based on the papers and evidence thus far, that your case was so untenable that you should never have been granted Legal Aid I also thought that Miss Clark was too inexperienced to be conducting a case with charges as grave as were being made.

I asked my clerk to have a private word with Miss Harding – advice to a new Senior Clerk of an important set of Chambers. The advice was that I did not think Miss Clark, at that stage in her career, was up to conducting such a substantial case with such grave charges. The private word was only intended to assist Miss Harding in the future.....It is not in the interests of individual counsel, their chambers or the administration of justice that they conduct cases well beyond those capabilities. Both Miss Harding and my clerk knew that there was no intention to communicate any of this to Miss Clark.

It seems that the shortly to retire Senior Clerk overheard part of the conversation He insisted, overruling Miss Harding that the matter be put in writing and that he note be given to Miss Clark.....

(The judge denied that he instructed his clerk to deliver any comments on the validity of the claimant's claim.)

- v. There is furthermore an attendance note dated 26th October (presumably 2001) from Ms Rajinder Mann formerly employed at the claimant's solicitors (Anthony gold Solicitors) to the following effect: The draft judgment had been handed to the parties in anticipation of the hearing on the 2nd November 2001. It appears to refer to a telephone conversation between Ms Clarke and the solicitor. Reference is made to the 'unprofessional' approach made by the judge during the trial. It also refers to an occasion – before judgment - where the judge saw his old clerk from the same chambers, a Mr Ian Duggan, and referred to the claimant's case. The clerk defended Ms Clarke. Mr Duggan subsequently rang up Ms Clarke's clerk indicating that the judge would not criticise counsel in the judgment. All this predates judgment but was not drawn to the attention of the claimant at the time.

- vi. Furthermore, the claimant discovered after the conclusion of the trial that the judge had given two lectures in 1997 and 1998 respectively. The first was a paper for the 1997 Fordham University Law School Conference on Intellectual Property. The second was the Upjohn Lecture, 1998. In both these lectures the judge expressly refers to and is highly critical of the effect of the Court of Appeal decision in **Pearce v Ove Arup [2000] Ch 401**. He stated that

.....by the adventitious fact that the civil engineers were in England these defendants were being made to play away and not at home. The plaintiff's purpose in this was probably that he could get legal aid in England which had the additional advantage that even if he lost he would not have to pay the other side's costs – (1997)

.....Thus you have got the absurdity of a case such as Pearce v Ove Arup.....The natural forum by any standards was Holland.....Yet the plaintiff contrived to sue in England. He did so by the expedient of joining in the consultant engineers.Why did he want to do this? Because he could get legal aid here. And he could also get the benefit of the unjust legal aid rule that successful defendants do not get their costs from the plaintiff or the legal aid fund – (1998)

3. **Chronology: Delay in prosecuting application for permission to appeal**

- i. The claimant had legal aid to the conclusion of his trial but not for an appeal. It was Mr. Wilkey who informed him of the attendance notes he had discovered in the claimant's solicitors' files. The claimant was not satisfied of his treatment by his erstwhile solicitors. He was however informed that his solicitors could not form a proper view as to his prospects on appeal until the disciplinary hearings of Mr. Wilkey had been disposed of.
- ii. Some 16 months had by then passed. After the ARB dismissed the complaint against Mr. Wilkey on the 5th February 2003 it became apparent that the expert report given by Mr. Ian Salisbury at Mr. Wilkey's hearing was crucial. The claimant was informed by Mr. Wilkey that the report was especially important insofar as the alleged similarities were concerned. However, the claimant was not then allowed to see the report. Mr. Wilkey had commissioned the report. The claimant would have to pay for it.
- iii. Following the Wilkey decision there was still inaction from Anthony Gold Solicitors. The solicitor who had had conduct of the matter during trial, Ms

Mann, was made redundant in May 2003. The file was handed over to a Mr. Cornish, a relatively junior solicitor. Although the claimant was led to believe that a conference would be held with a partner of the firm this never materialised.

- iv. The claimant then approached the Law Society on two occasions in February 2003 who recommended sets of solicitors based on expertise. A meeting was then arranged with a partner at Charles Russell solicitors on the 9th February 2003. He was told to contact the firm again once Mr. Salisbury's report was to hand.
- v. Thereafter, he attempted to obtain access to that report. He attempted to obtain the report from the tribunal itself. He also wrote to individual members of the ARB. Mr. Salisbury refused to send him the report as Mr. Wilkey was the client. He tried to get the report from Mr. Wilkey himself. The latter however insisted that the claimant contribute financially to Mr. Salisbury's fees that he (Wilkey) was responsible for. The claimant was unable to afford the cost.
- vi. He wrote to the commissioner for information under the Freedom of Information Act seeking assistance in the obtaining of the report. He contacted the Welsh Assembly, his local M.P., Mr. Mark Fied who made representations to the ARB prompting a response from the Deputy Prime Minister's Office and the Parliamentary Ombudsman advising him that this was a Privy Council matter. None of these attempts proved fruitful. He asked his MP to refer the matter to the Privy Council.
- vii. In the meantime as referred to above in para 2 (ii) the claimant wrote directly to the judge in July 2003 after he had been made aware of some of the post-trial facts.
- viii. By then he had followed-up the law society's leads and contacted those firms which did take an initial interest. He contacted i.a. Eversheds, Gareth Pearce Solicitors and Patrick Isherwood in March 2003 who told him they did not have the relevant expertise. They did however make attempts to obtain Mr. Salisbury's report. It was invariably regarded as essential that that report be obtained before launching an appeal.

- ix. He then instructed Briffa Solicitors in July 2003 and they set about trying to obtain evidence from Anthony Gold Solicitors and the Salisbury report. When that proved fruitless as well they parted company.
- x. In mid-2003 he consulted his current firm of solicitors, Richard Wilson & Co who have been able slowly to progress his case. A substantial amount of the relevant paperwork, amounting to several thousand pages, as well as discs and exhibits were obtained after considerable effort. This has been sifted through by the solicitors and in excess of 15 files were finally sent to counsel in about June 2004 with instructions to digest the material and provide an opinion on the matter. This was obviously counsel who had had nothing to do with the case prior to this. He had to familiarise himself with the huge quantity of material and from time to time has had to ask for additional information to be sought and supplied, such as the updated pleadings, reports and transcripts of some of the evidence at the trial which at that stage were not in the possession of his solicitors. Counsel advised comprehensively in writing in mid-July 2004 and required a whole host of matters to be attended to and statements that would need to be sought and taken before launching an application for permission to appeal.
- xi. Since then additional information sought has been furnished although further matters are still outstanding. Further, a conference has been held recently with counsel resulting in further requests to attend to various matters.

4. **Appeal out of time: Submissions**

- i. The letter to the judge dated 22nd July 2003 (itself well out of time) is not a compliance with the procedures governing an appeal as mandated by Rule 52.3 and 4.
- ii. Accordingly the applicant makes the application to vary the time limit for filing an appeal notice to the Court of Appeal¹ pursuant to R52.6.
- iii. Rule 3.1(2)(a) provides that the court may extend or shorten the time for compliance with any rule, practice direction or court order even if an application for extension is made after the time for compliance has expired

¹ As required by R52.4 (2).

- iv. The applicant accordingly seeks relief from sanctions. The proper approach and check-list are set out in **Sayers v Clarke Walker (a firm) [2002] 1 WLR 3095 (CA)**. Brooke L.J. was to the following effect at p. 3102:

So far as the defendants are concerned, the effect of their failure to comply with the rule means that they cannot appeal unless they obtain the relief they are now seeking. In cases where the arguments for granting or refusing an extension of time were otherwise evenly balanced, a court will have to evaluate the merits of the proposed appeal in order to form a judgment on what the defendants will be losing if time is not extended. The pre-CPR rule in the *Palata Investments* case (see para 11 above) is no longer relevant, because the court will not now entertain any appeal unless it is satisfied that there is a real prospect of success (or there is some other compelling reason for entertaining it). The consequence of the new requirement for permission to appeal is that if other factors militate towards the refusal of an extension of time, the likely prospects of success will have to be weighed in the balance. In other words the consequence of the appellants' failure to comply with the rule will be more serious for them if the court thinks that it is more probable than not that their appeal will succeed if it is allowed to proceed than if its prospects of success are smaller, even though they are just past the threshold at which it can be said that they are "real" rather than fanciful. In the present case I will consider the merits of the proposed appeal in Part II of this judgment.

- v. It is submitted that the Court will at this stage be satisfied that the consequence to the applicant of his failure to comply with the rule will be more serious for him where the court (as it is submitted it should) thinks that it is more probable than not that the appeal will succeed if it is allowed to proceed. Moreover, apart from those grounds attacking the substance of the decision, there is additionally 'some other compelling reason' for entertaining the appeal. That constitutes a discrete basis relating to the lack of impartiality manifested by Jacobs J. in trying the case. The applicant for leave is asserting that the judicial impropriety that he contends occurred, was only fully discovered and appreciated after judgment.

5. **Fresh Evidence**

- i. It is submitted that the court will receive the fresh evidence sought to be adduced pursuant to R52.11(2). Although the former requirement for 'special grounds' (RSC Order 59 r. 10(2)) has not been retained the principles reflected in **Ladd v Marshall [1954] 1 WLR 1489 at 1491 per Denning L. J.** remain relevant: **Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318.** They were - (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such, that if given, it would probably have an important influence on the result of the case,

though it need not be decisive; (3) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

- ii. They are matters which the Court of Appeal will consider in the exercise of its discretion when deciding whether to receive fresh evidence. The Court of Appeal in **Hamilton v Al Fayed (CAT, Dec 21, 2000)** did not consider itself placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in light of the overriding objective of the new CPR. The old cases will nevertheless remain persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. The task is one which accords with the overriding objective.
- iii. It is submitted that all three of the **Ladd** requirements are satisfied in this case.
- iv. The applicant furthermore places reliance on the general remarks about the function, nature and powers of the Court of Appeal and which are germane to this application, as set out in **Taylor & Anor v Lawrence & Anor [2002] EWCA Civ 90 (4th February, 2002) [2002] 3 WLR 640 C.A.**, where the Court of Appeal had to decide whether it had jurisdiction to reopen an appeal where a litigant had already unsuccessfully appealed against a county court judgment on the ground that the judge had been biased. The defendant discovered further evidence of supposed bias after judgment had already been drawn up. The Court granted permission to make the application to reopen the appeal. The Court of Appeal was thus prepared to reopen its own final decisions in a given case. It is submitted that it will be prepared to do so, even after a long delay, where there is fresh and compelling evidence and there has not been any appellate review of the impugned decision. In **Taylor** the following extensively quoted dicta are germane and instructive:

26. Before turning to Mr Eder's argument, it is desirable to note that, while, if a fraud has taken place a remedy can be obtained, even if the Court of Appeal has no "jurisdiction", it does not necessarily follow that there are not other situations where serious injustice may occur if there is no power to reopen an appeal. We stress this point because this court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong

decisions but also by clarifying and developing the law and setting precedents. (See the White Book Service 2001 paragraph 52.0.3.)

-
50. If, as we believe it is necessary to do, we go back to first principles, we start with the fact which is uncontroversial, that the Court of Appeal was established with a broad jurisdiction to hear appeals. Equally it was not established to exercise an originating as opposed to an appellate jurisdiction. It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court to which we have referred already (see para 26 above).
 51. As to these powers, Lord Diplock, who perhaps speaks on a subject of this nature with the greatest authority of any judge, has dealt with the inherent power conferred on a court, whether appellate or not, to control its own procedure so as to prevent it being used to achieve injustice.
 52. We would give an illustration of Lord Diplock's approach. It is taken from his speech in *Bremer Vulcan v South India Shipping* [1981] AC 909 at p.977C-H:

“The High Court’s power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff’s choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an “inherent power” the exercise of which is within the “inherent jurisdiction” of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.”

53. In our judgment the final words of Lord Diplock, “the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice” express the situation here under consideration exactly. If more authority is required, reference may be made in a very different context to the speech of Lord Morris of Borth-Y-Gest in *Connelly v DPP* [1964] A.C. 1254, 1301 where Lord Morris said:

“There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy

such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”

54. Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.
55. One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.

5. **Permission to appeal should be granted to the Claimant**

- i. It is submitted that permission to appeal should be given because the applicant has a real prospect of success; and/or there is some other compelling reason why the appeal should be heard: R52.3(6)(a) and (b).
- ii. The application for permission to appeal is based on two independent but nevertheless interrelated grounds which the applicant seeks to assert on appeal. The first ground contends that the judge fundamentally erred in his approach to the issues in the case. That first ground has its source in the pleadings and the terms of the consent order dated 18th December 2000.² The second and related matter is that the trial judge had already formed a view inimical to the claimant’s case even before hearing the evidence. In a word he was biased. That overarching bias and prejudice in turn manifested itself throughout the trial and informed, clouded and coloured the judge’s view concerning the expert, Mr Wilkey. This resulted in an unfair characterisation

² Para 1(xiv) above.

of the claimant's case, including the labelling of the evidence of the claimant's expert as 'fantastic' and 'absurd'. In the event, at the very least justice has not been seen to be done and there has been manifest unfairness within Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms requiring that the Tribunal be both independent and impartial. Impartiality means a lack of prejudice or bias.

- (a) As to Ground 1, it is submitted that the applicant has a real prospect of succeeding on appeal by demonstrating that Jacobs J. (as he then was) went wrong. The basis for these contentions are fully set out and dealt within the separate schedule to Section 7 of the Appellant's Notice. It is submitted that the judge materially misdirected himself as to the correct approach to the evidence. The post-trial report of Mr. Salisbury constitutes compelling expert evidence as to graphic copying. His conclusions are drawn from detailed and highly articulated reasoning. Accordingly there are substantial prospects that the appeal will be allowed pursuant to R52.11(3)(a);
- (b) As to Ground 2, it is further submitted that the applicant has a real prospect of succeeding on appeal by demonstrating that the decision of Jacobs J. (as he then was) was in any event 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court' within R52.11(3)(b). It must be a serious irregularity. It must have caused the decision to be unjust. The decision does *not* have to be 'wrong' however. The ground may apply even if the same decision would have been reached in the absence of the irregularity – **Storer v British Gas Plc [2000] 1 WLR 1237.** Many of the criticisms of the judge relied on under this head, are referred to and contained in Mr.Salisbury's report.

6. **Detailed summary of submissions as to Ground 1 and 2**

The effect of Mr Salisbury's findings relied on in this appeal is as follows:

- i. It is almost certain that the design of the Kunsthal was copied from the applicant's drawings.
- ii. The intuitive approach was his initial view. That is the approach normally taken by an architect expert witness in cases of copyright infringement.

- iii. He used as an independent tool, the mathematical theory of probability to corroborate the findings.
- iv. In the light of the amended defence (that the Kunsthal was built in accordance with the design for the Kunsthal created by Mr Hoshino under the guidance and supervision of the second defendant, it was unnecessary and irrelevant for the court or the experts to examine the Kunsthal. In any event one of the live issues was whether the design drawings for the Kunsthal or any of them infringed the claimant's copyright in his Docklands Plans. That had to be considered as a separate issue.
- v. One of the serious errors committed by the judge was that even though the issues had been restricted to the comparison of the drawings, the judge allowed the defendants to mount a case on the 3D built structure of the Kunsthal itself.
- vii. The judge impermissibly criticised Mr Wilkey, inter alia, for not going to Holland and damning his findings following this supposedly serious omission.
- viii. When counsel for the claimant sought to cross examine the defendants' expert on the crux of the matter, viz., graphical copying, the judge intervened and disrupted counsel so that the issue was avoided.
- ix.. Upon a detailed examination of the judgment, Mr Salisbury finds that the criticisms of Mr Wilkey are unfounded. He refers to the danger of judges who shut their minds to ideas they do not want to comprehend or of which they disapprove: The points made in this regard by Jacobs J are either mistaken or irrelevant – para 21.
- x. He is critical of part of the judge's reasoning as regards the vexed issue of 'similarity'. The judge refers to the presence of differences to disprove copying.
- xi.. Prof Dijkstra was relied on by the judge. However, he had addressed the wrong question. The judge was influenced by his mistaken and irrelevant approach, and in particular where he refers to the fundamental importance of

the design as a 3D building, which the judge said was central to the case – para 58(a) of the judgment. That approach is exemplified in para 6 of Prof. Dijkstra’s report where he sets out as his task an incorrect statement of the law. He stated that

an allegation of copying should not rest on similarities in overall composition or incidental use of materials of construction, but must in my view be proved by a precise comparison of the designs concerned, in all their dimensions and aspects.³

The underlying principle of copyright law asserts that a copier is not at liberty to appropriate the benefit of another's skill and labour. The test proposed in **Laddie, Prescott & Vitoria, The Modern Law of Copyright and Designs, 2nd ed. (1995) (pp. 92/93, para. 2-108)** to determine whether an altered copy constitutes an infringement is:

Has the infringer incorporated a substantial part of the independent skill, labour etc. contributed by the original author in creating the copyright work.?

In **Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416**, Lord Scott identified the judge’s task as follows:

.....the first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

- xii. The judge failed to direct himself properly or adequately to the issue of 2D copying, by finding that the design as a 3D building was central to the case.
- xiii. In the result Mr Wilkey was supporting neither the ‘fantastic’ nor the ‘absurd’.
- xiv. From an analysis of the transcripts of evidence coupled with the judge’s interventions, the judge had come to the case with a view already formed.

³ This is far removed from the test of infringement as expounded by Hall V-C in *Hoog v. Scott* (1874) LR Eq 444 at 458 – ‘*The true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work; that is.....merely to take away the result of another man’s labour or, in other words, his property*’.

This bias prejudiced the claimant's case and coloured his view regarding Mr Wilkey, as expert witness. The judge had demonstrated an intemperate, minatory and confrontational approach in relation to Mr Wilkey and his testimony.

- xv. Mr Wilkey was subjected to unfair treatment in the witness box. The questions were intimidating at times; some of the questions were irrelevant and should have been stopped, but the judge supported such questions and contributed to them himself.
- xvi. The judge also criticises Mr Wilkey for failing to answer questions that were not asked of him but which the judge himself could have asked had he been taking an objective view of the trial.
- 7. The remaining grounds of appeal relating to Ground 2 are set out in detail in the Schedule to the Appellant's Notice. They are incorporated and relied on in this skeleton argument.

8. **JURISPRUDENCE RELATING TO POTENTIAL BIAS AND PREJUDICE OF THE JUDGE**

Submissions

- i. The test to be applied in a case such as this is: Would a fair minded and informed observer, knowing the relevant facts as set out herein have a reasonable apprehension of bias or prejudice? In applying that test a crucial consideration is the desirability that in a democratic society the public should remain confident in the administration of justice. The submission is that such a fair-minded person would be unable to exclude legitimate concerns about the impartiality of the judge in the particular circumstances of this case. The judge carries out the functions of a jury in relation to the facts and the evidence as well as directing himself as to the applicable law.
- ii. **The Guarantee of an Impartial Tribunal**

Such guarantee is a central feature of post-War international human rights treaties: Article 10 Universal Declaration of Human Rights; Article 14 of International Covenant on Civil and Political Rights; Article 6 (1) of the European Convention on Human Rights – ‘EHCR’. The Court of Appeal in England has recently confirmed the importance of such guarantee: In **In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 (C.A.)** the Court of Appeal stated that -

the requirement that a tribunal should be independent and impartial is one that has long been recognised by English common law.

The Test for an Impartial Tribunal

(a) **English case law**

- i. The precise test to be applied to determine whether a tribunal meets the guarantee of impartiality has been extensively judicially considered in recent years:

R v Gough [1993] AC 646

R v Inner West London Coroner, ex parte Dallaglio [1994] 4 All ER 139

R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2) [2000] 1 AC 119

Locabail (UK) Ltd. V Bayfield Properties Ltd. [2000] QB 451

In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 (C.A.)

- (ii) In **ex p. Pinochet Ugarte (No. 2)** (supra), Lord Browne-Wilkinson stated that the fundamental principle is that a man may not be a judge in his own cause. This principle has been developed by the courts. It has two implications. Firstly, if he is a party to the action or has a financial interest in its outcome. That results in automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. This type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be benefiting, but providing a

benefit for another *by failing to be impartial* – at p. 132 H-133A. (emphasis added)

- (iii) That observation had already been made by Lord Widgery C.J. in **Reg. V Altrincham Justices, Ex parte N. Pennington [1975] Q B 549 at 552** The following passage is particularly pertinent:

.....but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matter in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned.'

- (iv) It matters not what the motives of the judge were: Even if he acted from excellent motives and feelings he still had done so contrary to the well settled principle of law, which affected the character of the administration of justice **Frome United Breweries Co Ltd v Bath Justices [1926] AC 586 at 618** approving the Divisional Court judgment in **Reg. v. Fraser (1893) 9 TLR 613.**:

- (v) There are two reported Scottish cases in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality. In **Bradford v. Mc Leod, 1986 SLT 244** the facts were that the judge and solicitor were present at a social function. At one point the judge made comments to the effect that he would not grant legal aid to miners. That was during the miners' strike 1984. A miner represented by the solicitor appeared for trial before that judge. The charge was a breach of peace at a picket line. The solicitor asked the judge to disqualify himself. The latter refused and the defendant was convicted. Before the High Court of Justiciary it was held that there had been a miscarriage of justice on the principle that justice must be seen to be done.

- (vi). In **Doherty v McGlennan 1997 SLT 444**, the defendant was charged with assault and breach of the peace. The complainer was a local MP. After the sheriff found the defendant guilty he adjourned the diet to a later date for sentence. After he adjourned his court he invited the complainer into his chambers as he had not met him before and wanted to be introduced to him formally, as one of the three MPs for his district. The conviction and sentence were suspended by the High Court on the basis that a reasonable bystander

could well form the suspicion that the sheriff was not being impartial in having a private meeting with the complainer before sentence had been imposed and before it was known whether there was to be an appeal.

- (vii). **Taylor & Anor v Lawrence & Anor [2002] 3 WLR 640 C.A.** This was a case of bias. The Court stated the following at paras 52 et seq:

THE BIAS

52. The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an “inherent power” the exercise of which is within the “inherent jurisdiction” of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.”
53. In our judgment the final words of Lord Diplock, “the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice” express the situation here under consideration exactly. If more authority is required, reference may be made in a very different context to the speech of Lord Morris of Borth-Y-Gest in *Connelly v DPP* [1964] A.C. 1254, 1301 where Lord Morris said:
- “There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”
54. Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.
55. The situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.

(b) **Convention case-law**

- i. A distinction is drawn by ECHR between a 'subjective' approach – i.e. an endeavour to ascertain the personal conviction of a given judge in a given case, and the 'objective' approach – i.e. determining whether the tribunal offered guarantees sufficient to exclude any legitimate doubts about impartiality:
Piersack v Belgium (1982) 5 EHRR 169, para. 30⁴
- ii. Post-**Piersack** cases repeatedly re-iterate the importance of appearances when deciding whether the impartiality guarantee has been complied with and the underlying rationale for the objective approach is based on the importance of maintaining the confidence of the public in the due administration of justice:
De Cubber v Belgium (1984) 7 EHRR 236;
Hauschlidt v Denmark (1989) 12 EHRR 266
- iii. In **Borgers v Belgium (1993) 15 EHRR 92**, the Court noted that the concept of a fair trial in Article 6(1) had undergone a considerable evolution in the Court's case law notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.
- iv. The High Court of Australia has adopted the same approach as the ECHR and *disagreed* with the approach taken by the House of Lords in **R v Gough [1993] AC 646**. Indeed, decisions in Canada, Australia and New Zealand had also refused to apply the test in Gough which emphasised the *judge's* perception of the event. In **Webb v The Queen (1994) 181 CLR 41**, Mason CJ and McHugh J esp. at 50-52 stated that -

.....Of the various tests used to determine an allegation of bias, the reasonable apprehension of test bias is by far the most appropriate for protecting the appearance of impartiality. The test of 'reasonable likelihood' or 'real danger' of bias tends to emphasise the court's view of the facts. In that context the trial judge's acceptance of explanations becomes of primary

⁴ Held that a purely subjective test not sufficient. Objective test recognises the fact that appearances are important;

The rationale for adopting the objective approach: '.....what is at stake is the confidence which the courts must inspire in the public in a democratic society.....' - para 30(a)

importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident....'

v. The recent review and analysis of the relevant principles by the Court of Appeal in ***In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 (C.A.)**, resulted in the restatement of the guarantee in the light of the Human Rights Act 1998 and the effect of the ECtHR's Art. 6(1) jurisprudence in the English domestic context:

- The common law test for bias laid down by the House of Lords in **Gough**, *supra*, (the 'real danger of bias' test) has not been universally approved outside England and Wales;
- Scotland and certain commonwealth jurisdictions preferred 'the reasonable apprehension of bias' test said to be more clearly in harmony with ECtHR jurisprudence;
- The Court of Appeal reviewed **Gough** in the light of the coming into force of the HR Act 1998. The English and Strasbourg authorities were thoroughly reviewed concerning 'apparent bias' on the part of a tribunal.
- In summarizing the principles to be derived from the Strasbourg line of cases it was stated (at para. 83) that the Court has to decide whether, on an **objective appraisal**, the material facts give rise to a legitimate fear that the Judge might not have been impartial and an important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.
- Accordingly, a 'modest adjustment' of **Gough** was called for – para 85. In effect the test applied is the same as in Scotland and most of the Commonwealth and amounts to whether the objective observer might have a reasonable apprehension of bias. The test has two elements:
 - (1) First, the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal is not impartial; and
 - (2) Then it must ask whether those circumstances would lead a **fair-minded and informed observer** to conclude that there was a real possibility, or a real danger, (the two being the same) that the tribunal was biased.

(c) **Application of re Medicament's Test to the Facts of This Case**

- i. From the above analysis, the inquiry as to whether the test enunciated in **In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 (C.A.)** for impartiality is satisfied is conducted in two stages: first, what are the circumstances which have a bearing on the suggestion that the judge lacked impartiality; and second, would these circumstances lead a fair-minded and informed observer to conclude that there is a real possibility that the judge was biased.

As to (1): The Material Circumstances

- ii. These have been set out compendiously above. They are set out in greater detail in the ground in the Appellant's Notice. In all the circumstances the inference to be drawn is that from an analysis of the transcripts of evidence coupled with the judge's interventions, and his conduct during the trial, 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. .

As to (2): How does it look to Fair-minded, Informed Members of the Public?

- iii. Having identified the circumstances that have a bearing on the submission that the judge was not impartial, the second stage of the **Medicaments** test is to ask how those circumstances would appear to fair-minded and informed members of the public, bearing in mind in particular the importance of maintaining the public's confidence in the administration of justice.
- iv. It is submitted in this regard as follows:
- (a) The observer is both reasonable *and* informed. The principal concern in the mind of such observer would be that, knowing that there was such a deeply contested conflict and contest between two professional architects relating to charges of plagiarism, the judge has no pre-conceptions as to which case is to be preferred. .

- (b) The observer would at the very least expect the judge to come to the case with an open and unbiased mind. He would be expected to apply an even-handed approach to the evidence and the witnesses.
- (c) The judge would not be expected to have come to a firm conclusion, as he already had, on day two of a six-day hearing, that the claimant's case was hopeless. The observer would be particularly concerned that he had apparently closed his mind even though he had not yet heard all the evidence of the expert witness for the claimant, let alone submissions by counsel.
- (d) An informed observer would know that the Court of Appeal had been asked to rule on the supposedly speculative nature of the case at an earlier stage. That Court had already found that there was indeed cogent evidence of graphic copying. 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. Such observer would be concerned at the remarks the judge had made in two lectures in 1997 and 1998 criticising the basis on which the claimant had invoked the jurisdiction of the English Courts and assuming that he had done so for legal aid purposes. It is a factor of significance when viewed in the context of the factors as a whole.
- (e) An informed observer would, in all these extraneous circumstances have been concerned 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.
- (f) An informed observer would furthermore be very concerned and strongly believe that the judge should never have surreptitiously caused contact to be made to the chambers of the barrister representing the claimant during the trial and informed the clerk that she was too inexperienced for such a matter. He should have foreseen that this would in all probability be conveyed to her (as it was) with the inevitable dispiriting and demoralising consequences for the barrister, the claimant and the claimant's case.

- (g) The informed observer would be concerned that the judge had so early on formed a hostile opinion of the claimant's case as manifested in his letter to the claimant.
- (h) The informed observer would also have misgivings as to the judge's son having strong ideas in favour of the Defendants' approach to architecture. The fear is that there might have been discussion or that the son's predilections and ideas might have unconsciously at the very least, influenced his father's approach.
- (i) The informed observer would also be anxious about the possible link between a litigant and the judge's son as evidenced in his recent website, having applied at the time of the trial as well.
- (j) The informed observer would also have regard to the intervention by the judge when the expert for the Claimant gave his evidence. He would infer the existence of conscious or unconscious bias from the fact that there was not a symmetrical or even-handed approach to the Defendants' witnesses. The observer might reasonably believe that the interventions were partly prompted by the biased and closed-minded approach that the judge had already manifested. That anxiety would increase when the extra-curial events were disclosed.
- (k) The overriding concern of any fair-minded and informed observer would be that the judge in the disclosed circumstances might at the very least be unconsciously inclined to favour the interests of the defendants over the claimant's.
- (l) The fair minded observer would therefore apprehend that there is a real possibility that the judge would not be able to make an objective and impartial appraisal of the evidence, but come 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 – see **Reg v S (R.D.) (1997) 151 D.L.R. (4th) 193 at 227**
- (m) In considering what concerns would be raised in the mind of a fair-minded observer, the court must strive to put itself in the position of

ordinary, reasonably well-informed members of the public: It is the court's view of the public's view and not the court's own view, which is determinative – **Medicaments case para. 63** , approving High Court of Australia in **Webb**.

9. It is accordingly submitted that permission be granted to the applicant
 - (i) to adduce fresh evidence in the appeal;
 - (ii) to apply for leave to appeal out of time; and
 - (iii) to appeal against the judgment and order of Mr Justice Jacob (as he then was).

30th December 2005