

CONCRETE PTY LIMITED v PARRAMATTA DESIGN & DEVELOPMENTS PTY LIMITED & ANOR (S54/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 22 August 2005

Date of grant of special leave: 10 February 2006

These proceedings were commenced by Concrete Pty Limited ("Concrete") against Parramatta Design & Developments Pty Limited ("PDD") and Mr Ghassan Fares ("Mr Fares"). Mr Fares is a qualified architect and the sole director and shareholder of PDD. Concrete's application was brought pursuant to section 202 of the *Copyright Act* 1968 (Cth). That provision allows a person threatened with a copyright infringement action to move against the maker of that threat. It is a defence to such an action however if the allegedly offending acts would have constituted an infringement of copyright.

PDD conducted an architectural business. It also owned the copyright in architectural drawings ("the drawings") for a 14 unit development for a site in Nelson Bay. Concrete purchased that development site at auction but it did not purchase the drawings. It also did not obtain PDD's express permission to reproduce them. Nevertheless Concrete wished to construct the proposed development in accordance with those drawings. It further submitted that it could do so without infringing copyright. The issue therefore was whether PDD had conferred a licence upon Concrete to use its drawings.

The trial judge, Justice Conti, found that PDD had implicitly licensed Concrete to use its drawings. The Full Federal Court (Branson, Kiefel and Finkelstein JJ) however upheld PDD's and Mr Fares' appeal. Their Honours declined to imply a licence in favour of Concrete. This is because it had neither paid for the drawings, nor had it been induced into thinking that they were to be available for its use.

Their Honours also upheld PDD's and Mr Fares' submission that the trial had miscarried because of a reasonable apprehension of bias on Justice Conti's part. This allegedly arose from the cumulative impact of a number of his Honour's statements at trial and also in his reasons for judgment. The Full Court found that Justice Conti had "made statements open to be understood as suggesting that he considered that the claim made by [PDD] that Concrete did not have permission to use the drawings for the 14 unit development was legally and ethically unmeritorious".

The grounds of appeal are:

- The Full Court erred in holding that the Appellant did not have an implied licence to use, either directly or by implied assignment from the trustees of the subject land, the architectural plans that accompanied Development Application No.16-2000-103-1 for the purpose of undertaking development on the land at 5 Laman Street, Nelson Bay.
- The Full Court erred in holding that the trial before his Honour Justice Conti miscarried on the ground of apprehended bias.