



Easter Term  
[2015] UKPC 17  
Privy Council Appeal No 0031 of 2013

## **JUDGMENT**

**Gold Rock Corp Limited and another (Appellants)  
v Nylund Hylton (Respondent) (The Bahamas)**

**From the Court of Appeal of the Commonwealth of The  
Bahamas**

before

**Lord Mance  
Lord Wilson  
Lord Sumption  
Lord Carnwath  
Sir Kim Lewison**

**JUDGMENT GIVEN ON**

**20 April 2015**

**Heard on 9 March 2015**

*Appellants*

Robert K Adams Esq  
Dwayne E Fernander  
(Instructed by Sheridans)

*Respondent*

Harvey O Tynes QC  
Ntshonda L Tynes  
(Instructed by Marcus  
Sinclair)

## **SIR KIM LEWISON:**

1. The principal issue raised by this appeal is whether a technical drawing containing details of a septic tank is capable of protection under the Copyright Act (Chapter 323). The Court of Appeal (Allen P, and John and Conteh JJA) in a brief extempore judgment held that it was not; and reversed the decision of the trial judge (Gray-Evans J) who had held that it was.
2. Gold Rock Corp Ltd and Del Zotto Products of Florida Inc are in the business of manufacturing concrete septic tanks. The origin of the drawing in the present case is a technical drawing created by Mrs Del Zotto for a 900-gallon septic tank. One of Gold Rock's employees then used that drawing to create a technical drawing for a 950-gallon septic tank. It is the latter drawing (referred to at trial as LAD5) which is the subject of the dispute. The drawing depicts a top view and a side view of the septic tank; details of various components such as the rise, the baffle, and the lid; constructional details such as the use of wire mesh and steel bars and so on. Each part of the drawing has measurements of the various components.
3. Mr Nylund Hylton is a former employee of Gold Rock. While employed by Gold Rock he acquired intimate knowledge of Gold Rock's mould for making septic tanks; and he made sketches and took photographs which he took away with him when he left. The trial judge found that while employed by Gold Rock Mr Hylton had seen drawings of almost every concrete product that was produced; and he admitted that he had seen a drawing similar to LAD5. She found that Mr Hylton had direct access to Gold Rock's technical drawings. Since leaving Gold Rock Mr Hylton had become involved (to use a neutral expression) with an enterprise called Hylton's Concrete Products which he said was owned by his brother Ferris Hylton and which was his current employer. Indeed, Mr Nylund Hylton said that he was Hylton's Concrete Products' only employee. A draftsman called Brian Rolle had made a technical drawing for a septic tank (HC8) ostensibly for Hylton's Concrete Products. Based on the overwhelming similarities between that drawing and LAD5 (including the reproduction of spelling errors) the judge concluded that HC8 was a copy of LAD5. She also found that since Mr Nylund Hylton was the only person associated with Hylton's Concrete Products to have had access to LAD5, Mr Nylund Hylton was the only link between LAD5 and HC8. She therefore found that Mr Rolle had indirect access to LAD5 via Mr Nylund Hylton. She noted that on a number of occasions in giving his evidence Mr Nylund Hylton had given answers that suggested that he owned or controlled Hylton's Concrete Products. She found that he had received payment personally for the supply of

septic tanks; and that he issued receipts for septic tanks in his own name rather than in that of Hylton's Concrete Products. She also recorded that Mr Nylund Hylton had told the police that he was using premises for constructing septic tanks; and accepted Mrs Del Zotto's evidence that Mr Nylund Hylton had told her that he had gone into business for himself. Based on those findings she concluded that the "only rational and reasonable conclusion" was that Mr Nylund Hylton was the person who had infringed the copyright in LAD5 by preparing or giving instructions for the preparation of copies of LAD5. This is not a finding of reverse engineering, or indirect copying by the reproduction of an artefact without sight of the technical drawing by reference to which the original artefact was made. It is a finding of direct copying of the technical drawing itself.

4. The first issue is whether LAD5 is capable of being protected by copyright in the Commonwealth of the Bahamas. This turns on the interaction of four parts of section 2 of the Copyright Act. Section 2(1) defines "artistic works" as follows:

"artistic works' include two-dimensional and three-dimensional work of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, architectural plans and technical drawings;"

5. Section 2(1) contains a further definition:

"useful article' means an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or convey information and an article that is [not] normally a part of a useful article is considered a 'useful article;'"

6. The word "not" in that definition is an obvious error; but it does not matter for present purposes. Section 2(1) also says:

"the terms 'including' and 'such as' are illustrative and not limiting;"

7. Finally section 2(3) provides:

"The term 'artistic works' as defined in subsection (1) shall include works of artistic craftsmanship in so far as their form but

not their mechanical or utilitarian aspects are concerned; and the design of a useful article, as defined in this section, shall be considered an artistic work only if, and only to the extent that, such design incorporates artistic features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article.”

8. It is clear that LAD5 is a technical drawing and thus it falls within the primary definition of “artistic work” unless it is excluded, either wholly or partly, by section 2(3). But section 2(3) is, in the Board’s view, intended to widen the scope of the definition of “artistic works” in section 2(1) which does not, for example, refer to works of artistic craftsmanship. That is why it begins by saying that “artistic works” as defined “shall include” what follows. In the Board’s view it is clear that, whatever the word “artistic” means, a work of artistic craftsmanship is a three-dimensional physical artefact (such as a piece of furniture or jewellery) rather than a drawing of such a work. This colours the remainder of the subsection. A “useful article” is likewise a three-dimensional physical artefact. A technical drawing which gives instructions about how to make such an artefact is not itself a “useful article”; not least because its function is merely to convey information about how to make it. In the Board’s view the “design” of a useful article is a reference to the physical aspects of the article itself, rather than a technical drawing conveying instructions about how to make it. Any other interpretation would mean that it was almost impossible for any technical drawing to be protected by copyright, even though technical drawings are specifically included in the primary definition of “artistic works.” Moreover, to interpret section 2(3) as cutting down the scope of the primary definition of “artistic works” runs contrary to the explicit instruction in the Act that the word “including” is not limiting.
  
9. Mr Tynes QC for Mr Hylton relied on the definition of “design” in section 30(1) of the Industrial Property Act (Chapter 324). Both the Copyright Act and the Industrial Property Act are parts of the legislature’s enactment of the principles underlying the Berne Convention; and it made sense to read the two Acts consistently. Section 30(1) reads:

“In this Act the expression ‘design’ shall mean features of shape, configuration, pattern or ornament of an article or features of pattern or ornament applicable to articles in so far as such features appeal to and are judged solely by the eye.”
  
10. In the Board’s view this definition is clearly referring to physical aspects of a three-dimensional artefact: in short “features of ... an article”. Moreover, the purpose of the Industrial Property Act is to confer design copyright on three-

dimensional artefacts; not on drawings of artefacts. The more limited scheme of protection under the Industrial Property Act is consistent with a general legislative concern to prevent copyright from becoming the means of acquiring a monopoly over a manufacturing technique or a manufactured article, which would not qualify for (in any event much shorter) patent protection. However, far from supporting Mr Hylton's case, the definition in section 30(1) undermines it.

11. The Board's interpretation is also borne out by consideration of the American case law interpreting section 101 of the US Copyright Act 1976. That section defines "Pictorial, graphic and sculptural works" as including technical drawings but goes on to provide that:

"... the design of a useful article ... shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."

12. In *Imperial Homes Corp v Lamont* (1972) 458 F 2d 895 the Court of Appeals for the Fifth Circuit considered the application of section 101 to architectural drawings. The court held that although the architectural plans did not give their author the right to prevent reproduction of the building itself nothing prevented him from having the exclusive right to make copies of the drawings themselves. The court's conclusion, at p 899, was that:

"The exclusive right to copy what is copyrighted belongs to the architect, even though the plans give him no unique claim on any feature of the structure they detail."

13. In *Warren Sign Company Inc v Piros Signs Inc (No 4)*: 09-CV-1984 (CEJ) the same point arose in front of the District Court for the Eastern District of Missouri. The case concerned a technical drawing for a sign to be erected at the Eagle Bank. The court held:

"Even if the Eagle Bank Drawing does depict a 'useful article' plaintiff would still be protected against the unauthorized copying of the drawing itself."

14. Since both the Copyright Act of the Commonwealth of the Bahamas and the US Copyright Act seek to give effect to the Berne Convention for the Protection of Literary and Artistic Works, and do so in substantially the same way, the American cases are at least persuasive authority on the meaning of section 2(3).

15. The proceedings before the Court of Appeal reveal that no authority was cited to the court; and none is mentioned in the brief extempore judgment. The Court of Appeal simply announced its conclusion that the plans did not fall within the definition of “artistic works” but fell within the definition of “design of a useful article”:

“... in as much as the plans would be a design of a useful article without any artistic features capable of existing independently of the utilitarian aspect of the article.”

16. In the Board’s view this conclusion fails to give effect to the distinction between the useful article itself and a technical drawing of the useful article. It reaches a conclusion that differs from the courts of the USA on almost identical language. The Board considers that the trial judge was right in holding that although the plaintiffs could not prevent copying the septic tank itself, they were entitled to prevent copying of the technical drawing. Accordingly the Board considers that the decision of the Court of Appeal on this issue was wrong.

17. The second issue, which the Court of Appeal did not need to resolve, was whether Mr Nylund Hylton (as opposed to anyone else) was liable for infringement. The pleaded case included an allegation that Mr Nylund Hylton had infringed copyright by:

“Preparing or instructing the preparation of copies of the said drawings and dimensions or of a substantial part of them ...”

18. Section 9 of the Copyright Act confers on the copyright owner the exclusive right “to reproduce the copyright work”. Section 40(1) provides that copyright is infringed if without the licence of the copyright owner:

“... [a] person ... does, or authorizes in relation to that work or any substantial part of that work, any of the acts which the copyright owner has the exclusive right to do pursuant to section 9.”

19. Thus the fact that HC8 may have been physically drawn by Mr Rolle does not absolve Mr Nylund Hylton of liability if he authorised the reproduction. On the judge's findings of fact he plainly did.
  
20. For these reasons the Board will humbly advise Her Majesty that the appeal should be allowed and the decision of the trial judge restored. The Board invites the parties to agree a form of order to include the issue of costs. In the absence of agreement the parties should make written submissions on the form of order and costs within 14 days of the judgment being delivered.