

## *Breach of copyright – Where is the smoking gun?*

We had conduct of a breach of copyright case that involved what can be termed a fight between David and Goliath in every sense. The matter was in the fast track of the Federal Court of Australia between a relatively large building company (the Applicant) and another builder and his company (the Respondents).

The Applicant was represented by a major national law firm. We, many times smaller, represented the Respondents.

The Applicant alleged that in 2000 our clients breached copyright by engaging a prominent architect with 20 years experience, paid him reasonable fees, and then consciously or subconsciously gave instructions to the architect to design a home similar to one of the Applicant's display homes. Among other things, the Applicant applied for injunctive relief and claimed for damages in the millions of dollars.

After receiving advice from the writer, the Respondents instructed the writer to oppose the application. They affirmed their instructions after receiving advice from Counsel (Peter Cawthorn SC and Clive Madder).

Often, in breach of copyright cases there is at least one "smoking gun". That is, an architect, a draftsman, a manager, or a general employee of one organisation has "jumped ship" and took with them a design belonging to their former employer. There were no smoking guns in this case. The Applicant failed to show any connection between any of the Respondents' employees and the Applicant. The architect definitely did not work for the Applicant.

The law relating to a breach of copyright requires the Applicant to show that the Respondents, without the licence of the Applicant, reproduces, or authorises another person to reproduce, the work, or a substantial part of it, in a material form (see *Copyright Act 1968* (Cth) – ss 31 and 36). The judgment was handed down on 12 August 2010. The Applicant failed in its application. For the full judgment of Justice Jessup's decision, [click here](#).

The Applicant appealed to the Full Court of the Federal Court of Australia and on 17 February 2012 the Full Court (Jacobson, Nicholas & Yates JJ) dismissed the appeal with costs. For the Full Court's decision, [click here](#).

It was noted in both decisions that the Applicant significantly delayed in commencing proceedings against our clients. Although it was denied by the Applicant under cross examination, Counsel put it to the Applicant that the reason for it bringing an action was because it did not want our clients operating on "its turf."