

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE**

2005/CLE/gen/FP00232

BETWEEN

GOLD ROCK CORP., LTD

First Plaintiff

AND

DEL ZOTTO PRODUCTS OF FLORIDA, INC.

Second Plaintiff

AND

NYLUND HYLTON

Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr Hugh Small QC with Mr Dwayne Fernander for the plaintiffs
Mr Harvey O. Tynes QC with Mrs G. Ingrid Tynes and
Miss Ntshonda Tynes for the defendant

2010: 6, 7 and 8 December

2011: 16 May and 7 June

JUDGMENT

Gray Evans, J.

This is a case about infringement of copyright.

1. The plaintiffs commenced this action on 12 October 2005 by a specially indorsed writ of summons which was amended with leave on 7 December 2010.

2. The second plaintiff, Del Zotto Products of Florida, claims to be the author and owner, and Gold Rock Corp. Ltd, the first plaintiff, claims to be the exclusive licensee, of copyright and artistic work consisting of drawings and dimensions of 900 and 950 gallon 2-compartment septic tank specifications 3000-3500 PSI Concrete Reinforcing Schedule 6x6x10 Gauge Mesh #3 Reinforcing Rods #Lifting Loops, which drawings and dimensions expressly state: "this is proprietary information and remains the property of Gold Rock Corp., Ltd." The first plaintiff also claims to be the author and owner of copyright of an artistic work consisting of a 900-950 gallon septic tank form built from the specifications of the said drawings and dimensions.

3. The defendant, Nylund Hilton, is a former employee of the first plaintiff.

4. On or about 29 July 2005 officers from the Royal Bahamas Police Force executed a search warrant on premises occupied by the defendant in North Bahamia and seized therefrom several items including a set of drawings which the plaintiffs say bear a remarkable resemblance to their aforesaid drawings.

5. The plaintiffs, therefore, accuse the defendant of infringing their copyright in the following manner:

- (1) Preparing or instructing the preparation of copies of the said drawings and dimensions or of a substantial part of them for the purpose of erecting a septic tank.
- (2) Constructing a copy of the plaintiffs' septic tank form.
- (3) Selling, offering or exposing for sale septic tanks produced from the copied form.
- (4) Submission of and or preparing to submit the said drawings to the Port Authority Technical Department passing them off as his own.
- (5) Possessing in the course of business a copy of the said drawings and dimensions.
- (6) Possessing in the course of business a copy of the said concrete form.

6. Further, and in the alternative, the plaintiffs allege that it was an implied term of the defendant's contract of employment with the first plaintiff that the defendant would act with good faith towards the first plaintiff and not to misuse confidential information, but in breach of implied term the defendant:

- (1) Unlawfully entered the first plaintiff's premises with an unidentified Cuban welder to take notes and photographs of the first plaintiff's septic tank form.
- (2) Being in possession of notes believed to be taken by the defendant and/or the unidentified Cuban welder and photographs of the first plaintiff's septic tank form, these items were confiscated by the Royal Bahamas Police Force.
- (3) Preparing and instructing the preparation of a copy of the above mentioned confidential proprietary information, drawings and dimensions owned and copyrighted by the first plaintiff and passing them off as his own.

- (4) Constructing a septic tank form from the copied drawings and dimensions.
 - (5) Selling and/or offering for sale septic tanks which are a copy of the first plaintiff's specific copyrighted design without their consent.
 - (6) Stealing property belonging to the first plaintiff to build the copy of the said form including miscellaneous steel pieces used to build the form, reinforcing bars, hole makers, chains, cable, wire bar ties, grinding wheels, inner core stripping bolts, duct tape, 6011 welding rods, ½ inch round steel, c-clamps, conceal black bitu-mastic rope. These items were found on the premises of the defendant.
7. The plaintiffs say that as a result of the defendant's alleged conduct they have suffered loss and damage and the plaintiffs claim:
- (1) An injunction to restrain the defendant by himself or his servants or agents or otherwise from reproducing without the license of the second plaintiff any substantial part or any plans prepared by the first plaintiff for the purpose of building a septic tank form and from making or erecting any form or septic tank which reproduces the said plans, drawings and dimension or any substantial part thereof.
 - (2) Damages.
 - (3) An order for delivery up to the first and second plaintiffs of (i) all plans copied from the plaintiffs' plans; (ii) all forms used for the fabrication of septic tanks; and (iii) all copies of the said plans use for the manufacture of the septic tanks.
 - (4) Such further or other relief as to the court deems just and
 - (5) costs
8. The defendant denies that he has infringed the plaintiffs' copyright or that he has breached his contract of employment as alleged by the plaintiffs. The defendant also denies that the plaintiffs are entitled to the relief sought.
9. The parties agree that the issues to be determined are:
- (1) Whether or not the defendant has infringed the plaintiffs' copyright?
 - (2) Whether or not the defendant has breached the terms of his employment?
10. At the trial, the court heard from the following persons, all of whom, except for Inspector Cash, gave witnesses statements:
- (1) Officer Hilton Cash, an Inspector with the Royal Bahamas Police Force.
 - (2) Laura Ann Del Zotto, a businesswoman and president of each of the plaintiffs.
 - (3) Peter Corey Bowe, who has been employed with the first plaintiff since September 9, 2001 and presently holds the position of Operations, Construction & Maintenance Manager.
 - (4) Jamaal O'Dari Gomez, who has been employed by the first plaintiff since 2001 and has worked at both plaintiffs' plants. He presently holds the position of General Manager.
 - (5) James Durell Mercer, a welder employed by the second plaintiff since 2001 and whose responsibilities include the production of architectural and

mechanical drafting, welding, overseeing the installation structures like walls, barn walls and house walls.

(6) Donald Scott Miller, an employee of the second plaintiff since 1989. He currently holds the position of Operations Manager and Steel Fabrications Supervisor and he is responsible for overseeing the daily operations and specifically the steel fabrications at the second plaintiff's factory at Ocala, Florida.

(7) Nylund Hylton, the defendant.

(Note: Throughout the documents used during the course of the trial "Hilton" and "Hylton" are used interchangeably and I have maintained the spelling as it occurred in the various documents. Hence, the different spelling of the name in this judgment).

11. As pleaded, the first plaintiff, Gold Rock Corp. Ltd ("Gold Rock") is a company incorporated under the laws of the Commonwealth of The Bahamas, doing business in Freeport, Grand Bahama, specializing in the manufacture of concrete septic tanks and forms for the manufacture of concrete septic tanks in addition to the sale of other concrete products and is the exclusive licensee of the second plaintiff pursuant to a License to Manufacture Septic Tanks Agreement executed on the 26th October 1999.

12. The second plaintiff, Del Zotto Products of Florida Inc. ("Del Zotto"), is a company incorporated in the State of Florida one of the United States of America which specializes in designing, manufacturing and selling pre-cast concrete products and forms for the manufacture of concrete products.

13. The plaintiffs' witnesses evidence as to the creation, ownership, copyright and license of the drawings and septic tanks, the subject of these proceedings, was not controverted.

14. That evidence is that Mrs Del Zotto created draft plans for a 900-gallon septic tank for and on behalf of the second plaintiff to be used exclusively by the first plaintiff. Those plans were used for the first series of 900-gallon septic tanks manufactured at the first plaintiff's plant in Grand Bahama and were dated and marked "DZ-2 by LDZ Date: 10-26-99" and "© 1999-Del-Zotto Products Incorporated, shall Protect all Patents, Patents Pending, Copyrights, and Proprietary Information" ("the DZ-2 plans").

15. Those plans were also used by one of the second plaintiff's employees, James Mercer, to produce drawings for a 950-gallon septic tank. The drawings produced by Mr Mercer were marked "© 2001 – Gold Rock Corp. Ltd. shall Protect all Patents, Patents Pending, copyrights and Proprietary Information." At the lower right corner of the drawings appear the words "GOLD ROCK CORP., LTD Precast Concrete Products & Forming Systems, #43 Fairfield Industrial Park Grand Bahama Highway, Freeport, Grand Bahama, Bahamas, S/3" (the "S/3 drawings").

16. The S/3 drawings were also referred to during the trial as LAD5.

17. According to Mrs Del Zotto, in addition to the distinguishing features of the DZ-2 plans and the S/3 drawings, being the modification of the interior dimensions of the tank, there were other "unique and unintentional distinctions" thereon including numerous spelling errors "inadvertently made by James Mercer during the drafting."

18. Mr Mercer, as did others of the plaintiffs' witnesses, Messrs. Gomez, Bowe and Miller, also confirmed that there were numerous "unintentional" spelling errors on LAD5, which they say was fortuitous as the errors made the drawings more "unique in a way".

19. In his witness statement, Mr Mercer sets out in paragraphs 6 through 11 what he says are the unique features, including spelling errors, in LAD5 and in paragraphs 15 through 32 he

points out the similarities (which I recite below) between the Hylton's Concrete drawings HC8 and the plaintiffs' LAD5.

20. The plaintiffs produce two sizes of septic tanks – 950 gallons and 1450 gallons – which they say have distinguishing features. Mr Bowe in his witness statement confirmed that the first plaintiff's pre-cast septic tanks are manufactured from forms designed by the second plaintiff. The plaintiffs' witnesses identified certain "special" features of the first plaintiff's septic tanks which they say distinguished them from other septic tanks, namely:

- (1) There are two different sets of mould used in the manufacture of the tanks. First, there is the mould that uses a ¼" – 11 gauge flat plating. The mould has several distinguishing features, which create the design uniqueness of the Del Zotto Tank.
- (2) Tanks are manufactured by pouring a concrete mixture of cement sand and rock into the mould. Before the cement mixture is poured into the mould a matting of 6x6x6 wire is set in the base of the form.
- (3) After the concrete is poured in, the #3 rods are placed vertically in the mould and are held in place by the ready mix concrete itself.
- (4) The tanks are built to specifications to withstand 4500 PSI – pounds per square inch. The 950-gallon Del Zotto tank is designed with two chambers. The design features of the Del Zotto tank can be used to create a tank of 570 gallons. The 570-gallon tank is a single chamber tank.
- (5) Several design features of the 950 gallon septic tank that make it unique include the following:
 - i. There are two plastic baffles that are secured with four tap corn screws. The baffles are on the shorter internal side of the tank where there is an inlet and outlet. This feature makes it unnecessary for the use of a PVC 't' and other piping when the tank is being connected to the waste line plumbing from the residence or building to the disposal well.
 - ii. The septic tank has several pickup hooks to facilitate it being lifted by a crane and lowered into the installation site where it is to be installed. The tank is manufactured with a separate reinforced concrete lid that is placed on top of the tank after it is installed. That lid has its own pick up hooks. There are also other features on the lid that make the design of the tank unique.
 - iii. There are three openings in the lid. The largest opening is to facilitate examination of the first chamber in the tank without the need for any excavation of the site at which the tank is installed. That opening accommodates a green circular plastic rising ring that can be accessed at ground level where the tank is installed. There is also a circular opening for inspection of the baffle wall. It is sealed with a fitted circular concrete cover that also has a pickup hook. The third opening is for the inspection of the disposal well. This opening is above the chamber that is at the side of the tank, which leads to the outlet side of the tank.
 - iv. A rubber gasket or o-ring is cast into the inlet and outlet openings during manufacture, which allows the insertion of the inlet or outlet pipe without need for further sealing.

- v. There are a total of 16 clamps on the mould, which are manufactured by Del Zotto Products. These clamps maintain the inner and outer core of the mould to the exact specifications of the design.
- vi. The tank mould comes with a special pick up bar.
- vii. The measurements on the 950-gallon tanks are bigger in size and length at the top of the tank and smaller at the base of the tanks.

21. In his witness statement, Mr Gomez said that he had seen the tanks manufactured by Hylton's Concrete Products on the premises of Pinder's Plumbing located on Logwood Road; that he had also seen Hylton's Concrete Products' tanks on the premises of several homeowners in various subdivisions; that the tanks manufactured and installed by Hylton's Concrete Products have distinct features identical to the Gold Rock septic tanks; that the tanks are shaped like the Gold Rock tanks, that is, wide at the top and tapered to a narrow base; that the "only minor difference" in the two tanks which he noted were the openings in the lid at the top: the Gold Rock tanks have a circular opening with the green access covers, whereas Hylton's Concrete Products' septic tanks have a squared opening.

22. Mrs Del Zotto confirmed that she hired the defendant and that he worked for the first plaintiff until 2005 when it was discovered that he was stealing from Gold Rock and summarily dismissed. Her evidence is that he started as a helper and after some training at Del Zotto Products in Ocala, he was appointed Plant Manager at Gold Rock. He reported to her and his duties included overseeing the pouring of concrete and the delivery of finished products, checking all sales deposits and petty cash and the general management of the day to day business of the company.

23. The defendant's evidence is that he was hired by the first plaintiff on 1 April 2000. He never worked for the second plaintiff although he visited the second plaintiff's plant in Ocala, Florida, on several occasions for the "purpose of learning office procedure only." He left the first plaintiff's employ on 15 July 2005 because he could no longer tolerate the racial insults and verbal abuse from Mr William Del Zotto. During the time he worked for the first plaintiff, the company did not manufacture septic tank forms and other concrete products and although his former employers taught him how to manufacture septic tanks, they did not teach him how to build septic tank moulds; that during his tenure with the first plaintiff all of the first plaintiff's moulds were imported from the second plaintiff's plant.

24. The defendant said he has never asked for or obtained any information from either the owners or employees of the first or second plaintiff regarding the design of their septic tanks and he has not duplicated their products.

25. According to the defendant, the premises in North Bahamia belong to his father and the drawings confiscated by Officer Cash therefrom belong to Hylton's Concrete Products, a business owned by his brother, Ferris Hilton, and his current employer.

26. The defendant admitted that he has produced a septic tank mould, but said he did not use HC8 to do so.

27. As for the size or sizes of septic tanks produced by him, the defendant said that Hylton's Concrete Products started out with only one mould and two years later produced a second mould, which was built after the commencement of this action. In his view, "this trial has nothing to do with the second mould." The first mould he built was a 1200-gallon one which, he said, "looks different from the drawings for the first plaintiff's septic tank".

28. The defendant admitted that the photographs of the first plaintiff's plant confiscated by Inspector Cash from the premises in North Bahamia belonged to him and said that he took them "a year or two" before he left the first plaintiff's employ, for "security purposes", so that "in case the moulds were damaged, stolen or vandalized", he would "have proof of their original state". The defendant admitted that he did not provide the plaintiffs with copies of those photographs.

29. The defendant, while acknowledging that there are similarities, said there are also differences, between the plaintiffs' and the Hylton's Concrete Products' moulds and septic tanks, some of which, as I understood his evidence, are as follows:

- (1) Hylton's Concrete Products does not make a small inner core of the size used by the first plaintiff for any of its moulds.
- (2) Gold Rock's mould has an outer core and two inner cores, while Hylton's mould has one outer core and one inner core.
- (3) Gold Rock casts its middle/baffle wall at the same time it casts its tank. Hylton's casts its middle wall separately from the tank and puts in the middle wall after the tank has been cast.
- (4) The top of Gold Rock's inner core is open, which allows one to see into its centre. The top of Hylton's Concrete Products inner core is covered with a steel plate, welded to prevent water and dirt from dropping in, which prevents one from seeing into the centre of the core.
- (5) Gold Rock's mould is elevated. It is similar to a table with sidings. Hylton's Concrete Products' concrete septic tank mould is not elevated.
- (6) Gold Rock's mould has a removable vibrator. Hylton's Concrete Product's vibrator is bolted/stationary.
- (7) The holes in Gold Rock's septic tanks are round; the holes in Hylton's Concrete septic tanks are octagon shape.
- (8) Hylton's Concrete Products' tank has different dimensions from the Gold Rock. The plaintiffs' centre wall starts off narrow and goes wider whereas the Hylton's center wall goes "straight down".
- (9) The Hylton's septic tank is 6 or more inches higher than Gold Rock's.
- (10) The way one strips a Gold Rock tank is a little different from the way one strips (disassemble) a Hylton's Concrete septic tank.

30. The defendant identified the notepad, HC10, put in evidence by Inspector Cash as one of the first plaintiff's, which he said the first plaintiff gives to customers as complimentary gifts. He identified his handwriting and said that the drawings were rough sketches of septic tanks and septic tank moulds made by him when he was trying to decide on how to make a septic tank mould and the size thereof. However, he says, none of those sizes and dimensions match the Hylton's Concrete Products' mould "exactly". He also said that he did not rely on those sketches when building the Hylton's Concrete Products' mould.

31. Under cross examination, the defendant admitted to having "intimate association" with the first plaintiff's mould; that during the time he worked with the first plaintiff he gained some knowledge about making septic tanks which he carried with him, along with the photographs and sketches, when he left.

32. The defendant said he receives money from the sale of septic tanks, but he keeps no "books" on such sales. He admitted that he lived at his father's property in North Bahamia, No. 10 Wentworth Drive, Bahamia, Freeport, but he refused to answer questions regarding any properties owned by him, although he admitted that he owns property. He said that he is a director "from time to time" of Hylton's Concrete Products as well as its agent.

33. The defendant also said that prior to working with the first plaintiff he did construction work and welding with his father who had a construction business. He was educated at a local high school in Freeport where he took classes in technical drawing and passed class examinations. He took no external examinations in the subject. His brother Ferris, who, he said, is also a sub-contractor, has been involved in the construction business for most of his life and "off and on" his father and his brother worked together.

34. Notwithstanding Mr Tynes QC's intimation at the commencement of the trial that perhaps this action should have been brought under the provisions of the Industrial Property Act, chapter 324, Mr Small QC made it clear that the plaintiffs bring this action under the provisions of the Copyright Act, chapter 323 ("the Act"), the Long Title to which is as follows:

"An Act to make better provision in respect of copyright, to confer rights on performers and others in live performances and for matters connected therewith, and to repeal the Copyright Act, 1956 of the United Kingdom in so far as it applies to The Bahamas."

35. Section 6 of the Act provides:

"(1) Copyright is a property right which, subject to the provisions of this section, may subsist in the following categories of work of authorship —

(a)...(b)...(c)...

(d) artistic works;

(e), (f), (g)

and copyright may subsist in a work irrespective of its quality or the purpose for which it was created.

(2) Works of authorship shall not be eligible for copyright protection unless it is fixed in writing and any reference in this Act to the time which a work is created is a reference to the time at which it is so fixed.

36. Section 2(1) of the Act, defines "artistic works" as including 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; and section 2(3) of the Act provides that:

"The term "artistic works" as defined in subsection (1) shall include works of artistic craftsmanship insofar 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."

37. Section 10 (1) of the Act provides:

"Subject to the provisions of this section, copyright in any work expires at the end of the period of seventy years from the end of the calendar year in which the author dies."

38. Section 11 of the Act provides, inter alia:

"(1) Subject to subsection (7) and to such exceptions as may be specified in or pursuant to any other provision of this Act, the author of...a literary, choreographic, musical, dramatic or artistic work that is a protected work has the right to be identified as the author of the work in the circumstances specified in this section.

(4) The author of an artistic work has the right to be identified as such whenever —

(a) the work is published or displayed publicly;

(b)...

(c) in the case of a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of the work are distributed to the public."

39. Section 18 of the Act:

"The rights conferred by sections 11 and 14 apply in relation to the whole or any substantial part of a work."

40. Section 40 (1) of the Act provides:

"The copyright in a work is infringed by any person who, without the licence of the copyright owner, 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."

41. Section 9 (1) of the Act provides:

"By virtue of and subject to the provisions of this Act, the owner of copyright shall have the exclusive right to do or to authorize any of the following —

(a) to reproduce the copyright work in copies or phonorecords;

(b) to distribute copies or phonorecords of the copyright work to the public by sale or other transfer of ownership, or by rental or loan;

(c) to prepare derivative works based upon the copyright work."

47. Mummery L.J., in the English Court of Appeal case of *Baigent & Anor v The Random House Group Ltd* [2007] EWCA Civ 247 (see also *Kitchin, J. in Paul Gregory Allen v Bloomsbury Publishing PLC and others* (2010)), opined that the following issues will usually need to be considered when determining whether there has been an infringement of copyright:

- (1) What are the similarities between the alleged infringing work and the original copyright work?
- (2) What access, direct or indirect did the author of the alleged infringing work have to the original copyright work?
- (3) Did the author of the alleged infringing work make some use in his work of material derived by him directly or indirectly from the original work?
- (4) If the defendant contends that no such use was made what is his explanation for the similarities between the alleged infringing work and the original copyright work?
- (5) If however, use was made of the original copyright work in producing the alleged infringing work did it amount, in all the circumstances, to "a substantial part" of the original work?
- (6) What are the circumstances or factors which justify evaluating the part copied in the alleged infringing work as "a substantial part" of the original work?

42. As indicated, the evidence of the plaintiffs' witnesses in support of the second plaintiff's claim to be the author and owner of the copyright and "artistic work" consisting of the drawings and dimensions LAD5 (S/3), is uncontroverted.

43. Likewise, their evidence in support of the first plaintiff's claim to be the exclusive licensee of the said drawings and dimensions as well as the author and owner of copyright of an artistic work consisting of a 900-950 gallon septic tank form built from the specifications of the said drawings and dimensions.

44. The question, however, is whether the items in which the plaintiffs claim copyright are copyrightable.

45. Section 6 of the Act provides that "copyright" is a property right which may subsist in certain categories of work of authorship, including artistic works, irrespective of its quality or the purpose for which it was created.

46. The Act defines "artistic works" as including two-dimensional and three-dimensional work of fine, graphic and applied art...and technical drawings; and also include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned". Further the design of such useful article is considered an artistic work only if, and only to the extent that it incorporates artistic features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article.

47. Relying, he says, "heavily", on the provisions of section 2(3) aforesaid, counsel for the defendant submits that it is necessary for the plaintiffs to show that the items in respect of which they claim copyright are works of "artistic craftsmanship" within the above-mentioned definition and, in his submission, they have failed to do so.

48. He submits further that there is no evidence that the maker or designer of those articles intended that they should have "artistic appeal", nor, he says, is there any evidence that either of the items came into existence as the product of an author who was consciously concerned to produce a work of art.

49. For those propositions, Mr Tynes QC also relied on the case of *George Hensher Limited v Restawile Limited* [1974] 2 All ER 420, a case in which, he pointed out, the plaintiff failed to prove breach of copyright even though evidence was given that the design in question had "eye appeal".

50. Mr Tynes QC also pointed out that copyright protection for an original work of authorship does not extend to an idea or concept of things of a similar nature regardless of the form in which it is illustrated or embodied in such work (see section 6(4) of the Act). He argued that the idea and the practice of creating pre-cast concrete septic tanks existed before the plaintiffs came to Grand Bahama. In that regard, counsel referred to the evidence of Laura Del Zotto given in cross examination in which she admitted that when the plaintiffs began their operation in Freeport there were already in existence several other producers of pre-cast concrete septic tanks operating in Grand Bahama.

51. Consequently, counsel for the defendant submits that the plaintiffs have failed to establish their claim to copyright within the meaning of the Copyright Act in respect of the drawings and dimensions, LAD5, and the 900-950 gallon septic tank form built from the specifications thereof.

52. In reply, Mr Small QC for the plaintiffs pointed out firstly, that this is not a case dealing with an article that is judged solely by the eye, as was the case in *George Hensher Limited v Restawile Limited* above-mentioned; secondly, the applicable legislation in Hensher's case was the English 1956 Copyright Act, which was repealed by the Act; and thirdly, the full definition of "artistic works" in the Act includes two-dimensional and three-dimensional work as well as technical drawings and in that regard, he submitted, it is beyond dispute that the artistic work about which this case is concerned is the technical drawings of the septic tank, which, he argued, are both two-dimensional and three-dimensional works.

53. It is clear from the authorities that copyright protection is available to an artistic work such as a drawing, although not to the ideas or concepts embodied in them. Per Morritt, LJ in the English Court of Appeal case of *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [Designers Guild 1998] EWHC Patents 349 "...copyright subsists, not in ideas but in the form in which those ideas are expressed."

54. It is also clear, in my judgment, that LAD5 (S/3) are clearly technical drawings and I find that they are "artistic works" within the meaning of section 2 of the Act and therefore capable of being copyrighted. Further that the ownership of, and copyright in, LAD5 (S/3) belong to the plaintiffs as they assert.

55. With respect to the septic tank form, as I understand the law and the authorities cited, in order for copyright to subsist in a functional article, which undisputedly the septic tank is, the claimant must show that it is a "work of artistic craftsmanship" as defined in section 2(3) of the Act; that is, that it possesses artistic features which can be identified separately from and are capable of existing independently of its utilitarian aspect. In that regard, I accept the submission of counsel for the defendant that the plaintiffs have led no evidence to show that their septic tank form is a "work of artistic craftsmanship" and, therefore, copyrightable. Indeed, Mr Small QC acknowledged that the septic tank nor its mould was intended to have "eye appeal".

56. I, therefore, find that the septic tank form in which the first plaintiff claims copyright, is not entitled to copyright protection, although, as I understand the authorities, the construction of the septic tank or its form by the defendant may nevertheless be an infringement of the plaintiffs' copyright in the drawings.

57. In that regard, although in *Hensher's* case a suite of chairs and a settee were held not to be a 'work of artistic craftsmanship' and therefore not entitled to copyright protection, in *British Leyland Motor Corp Ltd and another v Armstrong Patents Co Ltd and another* [1986] 1 All ER 850, Lord Templeman noting that the suite was manufactured from a prototype or mock-up and not from drawings, opined that if the suite had instead been manufactured from a drawing, it could have been argued that the copyright in the drawing had been infringed.

58. Having found that the copyright in the drawings LAD5 (S/3) are owned by the plaintiffs, the next question then is whether there has been an infringement of the plaintiffs' copyright in those drawings?

59. A summary of the applicable principles regarding infringement of copyright as derived from the cases cited before him, some of which were also cited before me, have been set out by Deputy Judge Lawrence Collins QC, in the case of *Designers Guild Limited v. Russell Williams (Textiles) Limited* [1998] EWHC Patents 349 (14th January, 1998) and which I set out below:

- (1) The protection given by the law of copyright is against copying, the basis of the protection being that one person must not be permitted to appropriate the result of another's labour and the plaintiff must establish and prove as a matter of fact that copying has taken place: *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551, 619 (H.L.), per Lord Wilberforce.
- (2) Proof of similarity between the alleged infringement and the copyright work, coupled with proof of access to the original, is prima facie evidence of copying for the defendant to answer: *Francis Day & Hunter v Bron* [1963] Ch 587 at 612; [1963] 2 All ER 16; [1963] 2 WLR 868 per Wilberforce.
- (3) There must be a sufficient resemblance between the copyright work and the alleged infringement, but there is no copyright in a mere idea: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 287 (H.L.), per Lord Hodson; *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551, 619 (H.L.), per Lord Wilberforce.
- (4) The degree of resemblance required must not be merely a similarity or resemblance in some leading feature or in certain of the details but, whether, keeping in view the idea and general effect created by the original, a degree of similarity as would lead one to conclude that the alleged infringement is a copy or reproduction of the original, having adopted "its essential features and substance": *Hanfstaengl v Baines* [1891-4] All ER Rep. 296, Lord Shand at page 301.
- (5) If part of the plaintiff's work has been copied, there will be an infringement if a "substantial part" has been taken, and for this purpose whether what has been copied is a substantial part depends much more on the quality than on the quantity of what has been taken, or more on its substantial significance rather than its physical quantity: *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, per Lords Reid, Evershed and Pearce.
- (6) Although copyright may not be granted in respect of a functional article, the copyright in a drawing of a functional article is infringed by a reproduction of the article. *British Leyland Motor Corp Ltd and another v Armstrong Patents Co Ltd and another* [1986] 1 All ER 850

60. Clearly, then, on the basis of those principles, a wholesale copying of the plaintiffs' drawings would be an infringement of their copyright therein.

61. It is obvious, even from a cursory comparison of the two sets of drawings, LAD5 (S/3) and HC8, that they are very similar, almost identical. In fact, as pointed out by the plaintiffs' witnesses, even the "unintentional" errors in LAD5 (S/3) have been replicated in HC8.

62. In that regard, Mr Mercer, at paragraphs 15 through 32 of his witness statement, provided the following comparison which was not challenged or controverted by the defendant:

15. On the bottom right hand corner of the S/3 drawing where the details of the disposal well are shown, under pipe casing it states, "Allow bottom 1' -0" section to "set up" before pumping in remaining depth of grout". There is a spelling mistake of the word "of" which has been misspelled "og". Exactly the same error is reproduced on the Hilton drawings for the same detail found at the lower right corner.
16. Further, under the caption "Baffle Detail" the word baffle is misspelled "baffel" on the S/3 drawing. In exactly the same manner the misspelled word is reproduced on the Hilton drawings. Also, baffle is found misspelled in the three - (3) dimensional view of the septic tank, top and manholes. See the three - (3) dimensional details above the "Baffle Detail".
17. It is further evident, at the lower left corner of the S/3 drawing I misspelled the word "it" with the word "if" in the sentence, "...Therefore, if must be filled with water..." Properly constructed this should have read, "Therefore, It must be filled with water..." At the bottom left corner of the Hilton drawings, the exact same mistake is reproduced.
18. Moreover, it is patently clear that the Hilton drawings has verbatim all of the descriptive words that I used in the S/3 drawing. An example is seen at the lower left corner of The Hilton drawings and the S/3 drawings. On the S/3 drawing, the following appear on the lower left corner: "950 Gallon 2-Compartment Septic Tank – Specification: 3000-3500 PSI Concrete. Reinforcing Schedule: 6x6x10 Gauge Mesh, # 3 Reinforcing Rods, #4 Lifting Loops – Note: This Septic Tank has been designed to hold liquid. Therefore, if must be filled with water immediately after installation, or this Septic tank will float." The exact language is reproduced on The Hilton drawings. It is telling that the word "if" which ought to have rightly been "it" also appears in The Hilton drawings.
19. Another example is mentioned in paragraph 9 above where I speak to the fact that I used three exclamation marks before and after "FILL TANK WITH WATER IMMEDIATELY".
20. Indeed, all of the phrasing on the S/3 drawing that follows after the words!!! "FILL TANK WITH WATER IMMEDIATELY" has been replicated wholesale onto the Hilton drawings. Indeed it is also telling that the words "1300 gallon Hole size..." taken from the Gold Rock Corp 1300-gallon septic tank drawings and which have absolutely nothing to do with the 950-gallon septic tank were also replicated on The Hilton drawings. I inadvertently inserted these words in my haste to produce the drawings. See the left bottom corner of Hilton's drawing for a comparison.
21. As for the Riser Detail, in the S/3 drawing, the words I used and the placement of the labeling I used are precisely duplicated on the Hilton drawings. It is so much so that the reproducer gave no thought to the words "© - 2001 Gold Rock Corp Ltd shall Protect all patents, Patents Pending, Copyrights and Proprietary Information" that appear at the bottom left hand corner of the S/3 drawings when he reproduced it.
22. It is also shockingly evident that practically every dimension in the drawings I produced is reproduced in the Hilton drawings. For example, at the top left hand corner of the S/3 drawing under the heading "Top View" every measurement, dimension and capacity illustrated on the drawing is replicated in the Hilton drawings. On the S/3 drawings 644.5 gallon in the large compartment, 314.5 gallon in the small compartment; on the reproduced drawings it shows the same thing, 644.5 gallons in the large compartment, 314.5 gallons in the small compartment. On the S/3 drawings 105" for the length and 57" for the width of the top. The Hilton drawings have the same measurement. Also see 10" concrete inspection hole plug on the S/3 drawing shown in the 644.5 gallons compartment, the same is noted on the Hilton drawing.
23. Turning to the "Side View" and reading clockwise from the left side outer markings of the diagram, there appears on the S/3 drawing 56.5", 4", 10", 28", 4' outlet, 4" lid

Thickness or 8" Thick, 67". The identical dimensions are replicated on the Hilton Drawings. Further, the inner dimensions are also identical except that in the Hilton drawings, the liquid level is arithmetically incorrect. That however does not affect the dimensions and the capacity of the tank.

24. At the top right corner of the S/3 drawings, there are three (3) drawings labeled "Top View", "Lid Side View", "Side View" and "End View". The dimensions on the "Top View" are: outer width 60", inner width 55": total exterior length of lid 102"; interior lengths of 64", 2" and 31' respectively with #4 rebar. Hilton's drawing for the "Top View" has outer width 60", inner width 55": total exterior length of lid 102"; interior lengths of 64", 2" and 31' respectively with #4 rebar. These are identical to mine. These are glaring examples of reproductions found in Hiltons' drawings of dimensions taken from the S/3 drawings.
 25. Further, the Lid Side View on the S/3 drawing shows the 8" thick lid, the Hilton drawings shows the same. The Hilton drawings also reflect the reinforcing in the center exactly the same as mine.
 26. In respect of the "Side View", I can say without a doubt that the dimensions in the Hilton drawings are identical to mine. The wiring measure is 6x6x8 gauge wire mesh 12" high up the side of the wall in the drawing I produced. The Hilton drawings contain the same specifications for the gauge wire mesh going up the sidewall. In the drawing I produced the rebar is #3 rebar. The same rebar is showing on the Hilton drawings. The pick up bar I used is 1/2" bar; the Hilton drawings reflect the same 1/2" size pick-up bar.
 27. Further, the water line marking indicated on the S/3 drawing is 42". The Hilton drawings are showing 4'2". However, clearly his 4'2" is incorrect and no doubt a typographical error. If you take the dimension from the bottom of the tank to the bottom of the outlet on Hilton's drawing it is 45" to the outside; subtract the floor height, which is 3" and you get the 42" liquid level on the inside. The same level that I am showing on the S/3 drawings.
 28. Additionally, I calculated the airspace on the S/3 drawing at 7". The Hilton drawings also show 7".
 29. Further, the drawing I produced shows a 2" drop from the bottom of the inlet to the waterline; the Hilton drawings are also shows a 2" drop.
 30. In the S/3 drawing, I indicated a measurement of 47" from the bottom of the tank to the bottom of the inlet. The Hilton drawings also show a measurement of 47" from the bottom of the tank to the bottom of the inlet. The S/3 drawing shows a 60" overall height including the lid. The Hylton drawing shows a 60" height including the lid. The drawing I produced shows measurements at the bottom of S/3 of 61", 4" and 28"; the Hilton drawings also reflect the identical 61", 4" and 28".
 31. In the S/3 drawing under End View I have one (1) horizontal #3 bar, two (2) vertical #3 bars. The Hilton drawings has one (1) horizontal #3 bar and two 2 vertical #3 bars in exactly the same position as on the S/3 drawing, 12" from the top of the wall.
 32. The polyethylene baffle appearing in the S/3 drawing and used in the manufacture of the septic tanks at the Gold Rock plant is only manufactured by Del Zotto Products and is not available on the commercial market. It is installed with stainless steel tap-it fasteners to keep it in place. The Hilton drawings of the tank contain a baffle wall that is a copy of the one manufactured by Del Zotto Products.
63. Mr Mercer concluded that the only difference between the S/3 drawings (LAD5) and HC8 is that the first plaintiff is named on LAD5 as the copyright owner whereas no copyright owner is named on HC8.
64. I agree.

65. I am satisfied on the evidence of the plaintiff's witnesses and on an examination of both sets of drawings, that the degree of similarity between HC8 and LAD5 (S/3) leads me to conclude that a substantial part of the plaintiffs' drawings LAD5 were used to produce HC8. I, therefore, find that HC8 is a copy or reproduction of LAD5, and as such, is an infringement of the plaintiffs' copyright therein.

66. The question then is who was responsible for the infringement?

67. It is not disputed that on its face, HC8 was drawn by Brian Rolle for Hylton's Concrete Products. In fact, the defendant's evidence is that HC8 is the property of Hylton's Concrete Products, a "trade-as" business owned by his brother, Ferris Hylton; that HC8 was produced by Brian Rolle "as an example of what Hylton's Concrete Products could manufacture" in order to obtain a business license from the Grand Bahama Port Authority, Limited.

68. Neither Brian Rolle nor Ferris Hylton was called as a witness and there is no evidence that either of them had direct access to the plaintiffs' drawings LAD5.

69. On the other hand, it is common ground that the defendant was employed by the first plaintiff for approximately five years until sometime in July 2005; that during that time he was not only an employee, managing the first plaintiff's plant in Grand Bahama, but he was also treated by the Del Zottos as a member of the family, living in their home in Grand Bahama and spending time at their plant and property in Florida, at the plaintiffs' expense.

70. The evidence of the plaintiffs' witnesses is that the first plaintiff kept several sets of its technical drawings in its conference room which also doubled for other administrative purposes and although in his witness statement the defendant said he had never seen any drawings of a septic tank form at the work place of the first or second plaintiff, under cross examination, he admitted that while in the first plaintiff's employ he had seen drawings of "almost every concrete product that was produced." Further, when shown a copy of LAD5 and asked: "Have you ever seen a drawing like that of the first plaintiff? The defendant responded: "I have seen a similar drawing"; and on another occasion when he was asked: "Have you ever seen the drawing LAD5 while you were employed to the first plaintiff?" The defendant responded in the affirmative.

71. Notwithstanding the obvious similarities between HC8 and LAD5, coupled with evidence, in my view, of the defendant having direct access to LAD5, the defendant denied that he infringed the plaintiffs' copyright in LAD5 and blamed his brother, Ferris, who, the defendant says, commissioned the drawings for his business, Hylton's Concrete Products and with whom the defendant claimed to be currently employed.

72. According to the defendant, he had been working with Hylton's Concrete Products on a part-time basis prior to 15 July 2005 and on a full-time basis since that date. He did not say when, prior to 15 July 2005, he began working part-time with Hylton's Concrete Products.

73. HC8 is dated 13 May 2005 and the license to Ferris Hilton, Jr. trading as "Hylton's Concrete Products" was issued on 1 August 2005, and although I note, as Mr Tynes QC pointed out, that the receipt for the license fees is dated 8 July 2005, it is clear from the defendant's evidence that he began building his first septic tank long before Hylton's Concrete Products was established.

74. Further, the defendant admitted to having taken photographs of the first plaintiff's plant and equipment, including the mould. He also admitted to having made the sketches exhibited at HC10 and HC11 which were identified as sketches and dimensions of septic tanks with dimensions identical to the plaintiffs' and although he said he did not recall when the photographs were taken or the sketches done, it is obvious that they must have been done prior

to his employment with Hylton's Concrete Products, and certainly during his employment with the first plaintiff.

75. In the circumstances, I find that the defendant, as an employee of the first plaintiff, had direct access to the plaintiffs' technical drawings, including LAD5, and that even if, as the defendant contends, HC8 was prepared by Brian Rolle at the request of the defendant's brother, Ferris Hylton, then, as the defendant appears to be the only link between the plaintiffs and Ferris Hylton and Brian Rolle, they too would have had access, albeit indirectly through the defendant, to the said drawings, LAD5.

76. Moreover, notwithstanding the license having been issued to "Ferris Hilton trading as Hylton's Concrete Products", I am inclined to the view posited by counsel for the plaintiffs that the defendant is really the directing mind behind the business of Hylton's Concrete Products. I am persuaded, as contended by counsel for the plaintiffs, that because of his employment with the first plaintiff, the defendant, more likely than not, requested his brother, Ferris, to make application for the business license in an attempt to avoid detection by his employer, the first plaintiff.

77. This view, in my judgment, is fortified by the defendant's own evidence which suggested ownership, or at the very least, control of the business of Hylton's Concrete Products. For example, when asked by counsel for the plaintiffs why he had not produced his blueprint drawings in evidence, the defendant replied: "because I don't want to hand out all my information on manufacturing a septic tank." On another occasion, the defendant referred to "my drawings" and then quickly followed that with "Hylton's Concrete Products' drawings".

78. Further, the defendant admitted that he is Hylton's Concrete Products' only employee. He said that he is a director and an agent of Hylton's Concrete Products and on one occasion, under cross examination when asked by counsel for the plaintiffs where his brother's business was, the defendant responded "I can't remember" and then as if realizing his "slip" asked: "Which business you talking about now"?

79. Again, under cross examination, the defendant admitted that whenever he sold septic tanks, he received payment in cash or by cheque made payable to him personally – not to his brother, Ferris, nor to Hylton's Concrete Products – and that he cashed those cheques at the respective purchaser's bank; not that he deposited them to the account of his brother, Ferris, or to Hylton's Concrete Products' account. Additionally, included in the defendant's bundle of documents were copies of receipts in the defendant's, rather than Hylton's Concrete Products', name, for material presumably used in the construction of the septic tanks and I note here that those receipts were dated in April and May 2005, while the defendant was still employed by the first plaintiff.

80. Further, although the Court did not visit the premises in North Bahamia or had sight of the alleged offending mould or septic tanks, the evidence of Inspector Cash, which was not controverted by the defendant, is that he was told by the defendant on 29 July 2005 that the premises were used by him for constructing septic tanks. Moreover, although the defendant said that the premises belonged to his father, he admitted that he resided there and although he said that the drawings belonged to Hylton's Concrete Products, they were found at his residence with other items: photographs of the first plaintiff's plant and equipment as well as sketches of septic tanks, with dimensions identical to the plaintiffs' drawings, which he admitted belonged to him.

81. Additionally, Mrs Del Zotto's evidence is that when she confronted the defendant sometime in July 2005 at the premises of Pinder's Plumbing, he admitted that he had gone into

business for himself and his evidence is that he began building a septic tank mould in late 2004 and completed his first septic tank some seven months later, in June 2005.

82. In the circumstances, I accept the submission of counsel for the plaintiffs that the only rational and reasonable conclusion is that the defendant was the person who breached the copyright of the plaintiffs in the aforesaid drawings.

83. I, therefore, find on a balance of probabilities, that the defendant who had access to the plaintiffs' drawings, is the one responsible for infringement of the plaintiffs' copyright in the drawings LAD5 by the reproduction thereof in HC8 either by preparing or instructing the preparation of copies, or of a substantial part, thereof and that he submitted the infringing copy HC8 to the Port Authority Technical Department passing them off as his own or that of Hylton's Concrete Products, as well as having in his possession during the course of his business a copy thereof.

84. And I find that the defendant by preparing or instructing the preparation of a copy of the said drawings and dimensions and passing them off as his own breached his contract of employment with the first plaintiff.

85. The plaintiffs also allege that the defendant had HC8 prepared for the purpose of erecting a septic tank form and that he infringed their copyright and/or breached his contract of employment with the first plaintiff, by, inter alia, constructing a copy of their septic tank form and selling and/or offering for sale septic tanks which are a copy of the first plaintiff's specific copyrighted design without their consent.

86. The defendant admits that he has built a septic tank mould as well as septic tanks. However, his evidence is that he did not use the plaintiffs' drawings, LAD5, or the Hylton's Concrete Products drawings, HC8, to build the mould or septic tank. Indeed, his evidence as well as the evidence of the plaintiffs' witnesses, is that the drawings LAD5 and consequently HC8 are insufficient by themselves to build a septic tank or its mould. In fact, Mr Miller indentified LAD5 as the drawing of a septic tank that "goes to the permitting or approving department whenever a septic tank is being installed". Mr Miller, who has responsibility for building the plaintiffs' mould also said that the drawings would not normally be a part of his process for building a mould.

87. Moreover, Mrs Del Zotto under cross examination, confirmed that LAD5 (S/3) was not a blueprint for the production of a mould. She said that the plaintiffs' blueprint showing how a mould is to be drawn or prepared is a matter of top secret in the second plaintiff's plant in Florida.

88. Further, the evidence is that the plaintiffs produce a 950-gallon and a 1450-gallon septic tank, whereas the defendant's evidence is that prior to the commencement of this action he produced a 1200-gallon tank. This evidence was not controverted. The defendant also pointed to other differences between the mould and tank he produces and those produced by the plaintiffs. This evidence was also uncontroverted and although Mr Gomez for the plaintiffs said that the Hylton's Concrete Products' tanks "have distinct features identical to the Gold Rock septic tanks", except, for also saying that the tanks are shaped like the Gold Rock tanks, "wide at the top and tapered to a narrow base", he does not say what those distinct features are and no evidence, other than the defendant's, was led as to the size or dimensions of the defendant's tanks. Clearly a 950 gallon tank is different from a 1200 gallon tank, in addition to which, the defendant pointed out several other differences between the two moulds and tanks.

89. Further, as counsel for the defendant pointed out, Mrs Del Zotto not only admitted that there were several companies engaged in the business of selling pre-cast septic tanks at the time the first plaintiff commenced its operations in Freeport, but she also agreed with counsel for

the defendant's suggestion on several occasions during cross examination that certain features of septic tanks are standard. For example, the rectangular shape; lifting loops; gauge mesh or wire mesh placed in the floor of the tank; the fact that they are designed to serve the same basic purpose, breakdown of solid waste into liquid form and that they are required by the Technical Department of The Grand Bahama Port Authority, Limited to have two compartments.

90. Additionally, the plaintiffs say that in order to build a septic tank mould, a "cut sheet list" is required. This list, which details the dimensions that each piece of form material needs to be cut, is prepared by Don Scott Miller, the second plaintiff's plant manager, whose evidence is that in 1999 he was requested to create drawings for the cut sheet list for the fabrication of a mould to build a 900-gallon septic tank. He said that the cut sheet list contained specifications for the base jacket and core of the mould and was completed and dated November 15, 1999. According to the plaintiffs' witnesses, the cut sheet list is confidential information and a "critically sensitive part of the second plaintiff's intellectual property". Mr Miller said that in order to use the cut sheet list to fabricate a mould for a concrete septic tank, one would have to have knowledge of how the different parts on the list were assembled.

91. The defendant says he had never seen the cut sheet list prior to being shown it by his attorney in preparation for this trial. In any event, he, too, said that the cut sheet cannot be used by itself to produce a septic tank mould. Moreover, the defendant's evidence is that no one from either of the plaintiffs' plants ever showed him how to create a septic tank mould; that in fact, while he was employed by the first plaintiff, the first plaintiff did not manufacture a mould as all of the first plaintiff's moulds were imported from the second plaintiff's plant in Florida.

92. Under cross examination, Mrs Del Zotto confirmed that although the cut sheet shows the craftsman how to cut all flat pieces of steel to create a mould, it does not show all of the steel that would be required to manufacture a septic tank mould.

93. So, it would seem from the evidence that although, as I have found, the defendant had the drawings in LAD5 reproduced, they are not sufficient to enable him to manufacture a septic tank or its mould.

94. The defendant's evidence is that he relied on certain other material as well as blueprints to produce the 1200 gallon septic tank mould, but that he had not used the plaintiffs' drawings or the infringing copy thereof to create the mould. Further, as pointed out by his counsel, the defendant did not have access to the plaintiffs' blueprints and since this court did not have the opportunity to inspect either party's blueprints, or their respective moulds/forms and/or tanks, there was not sufficient evidence on which this court could make a determination that the defendant's mould or tanks infringed the plaintiffs' copyright in the drawings LAD5.

95. Consequently, in my judgment, the plaintiffs have failed to prove that the defendant infringed their copyright or breach his contract of employment by:

- (1) Constructing a copy of the septic tank form;
- (2) Selling, offering or exposing for sale septic tanks produced therefrom; and
- (3) Possessing in the course of business a copy of the said concrete form.

96. Further, I accept the submissions of counsel for the defendant that the plaintiffs led no evidence and therefore failed to prove the other allegations set out in their statement of claim, namely that the defendant in breach of his contract of employment:

- (1) Unlawfully entered the first plaintiff's premises with an unidentified Cuban welder to take notes and photographs of the first plaintiff's septic tank form.

(2) Stealing property belonging to the first plaintiff to build the copy of the said form including miscellaneous steel pieces used to build the form, reinforcing bars, hole makers, chains, cable, wire bar ties, grinding wheels, inner core stripping bolts, duct tape, 6011 welding rods, ½ inch round steel, c-clamps, conceal black bitu-mastic rope. These items were found on the premises of the defendant.

97. In the result I find that the plaintiffs' copyright was infringed in the copying of the drawings alone and I would order damages accordingly.

98. I would also order that the defendant by himself his servants or agents or otherwise be and is hereby restrained from reproducing without the license of the plaintiffs any substantial part of, or any plans prepared by the plaintiffs for the purpose of building a septic tank form and from making or erecting any form or septic tank which reproduces the said plans, drawings and dimensions or any substantial part thereof.

99. Further, I would direct the Registrar to conduct an assessment into any damages which the plaintiffs may have suffered as a result of the aforesaid copying of LAD5 in HC8 and the use of HC8 subsequent thereto.

100. I also direct the defendant to deliver up to the plaintiffs all copies of HC8 and/or LAD5 in his possession or the possession of his servants or agents.

101. I will hear the parties as to costs.

Delivered this 20th day of January 2012

Estelle G. Gray Evans
Justice

Having heard counsel on the issue of costs, it is hereby ordered that the defendant pays 50% of the plaintiff's costs, fit for two counsel and that such costs be taxed if not agreed.

Gray Evans, J.
20 January 2012

