

SW Hart & Co Pty Ltd v Edwards Hot Water Systems [1985] HCA 59

HIGH COURT OF AUSTRALIA

GIBBS CJ, MASON, WILSON, BRENNAN AND DEANE JJ

GIBBS CJ:

This is an appeal from a judgment of the Full Court of the Federal Court¹ which allowed an appeal from a judgment given by the Supreme Court of Western Australia (Brinsden J.) in favour of the plaintiff (the present appellant) in an action for infringement of copyright. The appellant company claimed that the respondent firm had infringed its copyright in three artistic works, viz. drawings of parts of the solar energy hot water systems which it manufactures on a large scale. Two of the drawings (which have the identifying numbers B310/29 and B310/30) together depict the absorber panels and header pipe connexion nuts which go to form one of the important parts of a solar energy hot water system, to which I shall refer as the absorber unit. The third drawing (B310/43) depicts another important part of the system, a storage tank. At all stages of the proceedings it was conceded that the drawings were artistic works within the definition contained in s. 10 of the *Copyright Act 1968 Cth*, as amended, ("the Act") which does not require that a drawing should be of artistic quality to bring it within the definition. The appellant's case was that the respondent reproduced the drawings, or a substantial part of the drawings, by producing a version of them in the form of articles which formed parts of the solar energy hot water systems manufactured and sold by the respondent. If that case is made out, then, subject to the effect of s. 71 of the Act which will be mentioned hereunder, the actions of the respondent will have amounted to an infringement: see ss. 14, 21(3), 31(1)(b)(i), 36 and 38 of the Act. It is convenient immediately to refer to s. 21(3), which provides as follows:

For the purposes of this Act, an artistic work shall be deemed to have been reproduced—

(a) in the case of a work in a two-dimensional form — if a version of the work is produced in a three-dimensional form; or

(b) in the case of a work in a three-dimensional form — if a version of the work is produced in a two-dimensional form,

¹ (1983) 81 F.L.R. 101; 49 A.L.R. 605.

and the version of the work so produced shall be deemed to be a reproduction of the work.

It was not contested that copyright subsisted in the drawings, that the appellant was the owner of the copyright or that the respondent had manufactured and sold the articles which were said to be infringing copies. It was, however, denied that any of the articles was a reproduction of anything in the drawings, and it was asserted by the respondent that the articles were objects which would not appear to persons who were not experts in relation to objects of that kind to be a reproduction of anything depicted in the drawings. Brinsden J. found that the copyright in all three drawings had been infringed. In the Federal Court all three judges (Fox, Woodward and Franki JJ.) found that the tanks manufactured by the respondent were not reproductions of the appellant's drawing B310/43. There is no appeal from that finding. The court further held, by a majority (Woodward and Franki JJ.; Fox J. dissenting) that the absorber units manufactured by the respondent were reproductions of drawings B310/29 and B310/30 but, by a different majority (Fox and Franki JJ.; Woodward J. dissenting) that those articles would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the drawings and that there was accordingly no infringement by reason of s. 71.

The two questions in issue before us are whether the absorber units manufactured by the respondent were reproductions of drawings B310/29 and B310/30 and whether those articles would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the two drawings of the appellant. Both of these questions are questions of fact.

The notion of reproduction, for the purposes of copyright law, involves two elements — resemblance to, and actual use of, the copyright work, or, to adopt the words which appear in the judgment of Willmer L.J. in *Francis Day & Hunter Ltd. v. Bron*², "a sufficient degree of objective similarity between the two works" and "some causal connection between the plaintiffs' and the defendants' work". Lord Reid said in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*³:

Broadly, reproduction means copying, and does not include cases where an author or

² [1963] Ch. 587, at p. 614.

³ [1964] 1 W.L.R. 273, at p. 276; [1964] 1 All E.R. 465, at p. 469.

compiler produces a substantially similar result by independent work without copying. And, if he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.

(See also [1964] 1 W.L.R., at pp. 283, 288 and 293; [1964] 1 All E.R., at pp. 473, 477 and 481.) In the same case, Lord Evershed said⁴, "that what amounts in any case to substantial reproduction cannot be defined in precise terms but must be a matter of fact and degree".

In the present case there are strong reasons to support the conclusion reached by Brinsden J. that the respondent had copied the drawings in making the absorber units. The evidence showed that one Davies, an employee of the appellant who had copies of the drawings, was discharged from his employment towards the end of 1976 and that when he left he did not return the drawings. It was clear that the respondent, who had a business association with Davies, then had access to the drawings. Whereas the appellant had spent a long period in research and testing, and had expended between \$1.5m. to \$2m. in producing the drawings, the respondent could point to no similar efforts or expenditure — indeed, the respondent could not even produce any drawings of its own, similar to B310/29 and B310/30, which were used in making its products. There were some features of the respondent's units whose presence could be explained only either by coincidence or by the fact that the respondent had copied the appellant's work. Brinsden J. did not believe the explanations given by the witnesses for the respondent. The inference that the respondent had in fact copied the appellant's drawings is plainly correct.

Brinsden J. further found that there was a substantial similarity between the respondent's products and the absorber unit depicted in the two drawings. He acknowledged that there were dissimilarities, but said that "the similarities greatly exceed the dissimilarities". It was submitted on behalf of the respondent that its product could not be held to be a reproduction of the appellant's drawings for a number of reasons. First, it was said that when a version of an artistic work is produced in a three-dimensional form the version must be a translation of the whole work into the new form — it is not enough that it be a translation of a substantial part of the artistic work. In other words, it was submitted that s. 14(1)(b) of the Act, which provides,

⁴ [1964] 1 W.L.R., at p. 283; [1964] 1 All E.R., at p. 473.

amongst other things, that in the Act, unless a contrary intention appears, a reference to a reproduction of a work shall be read as including a reference to a reproduction of a substantial part of the work, has no application to reproduction within s. 21(3) of the Act. This submission is contrary to the assumption made in a number of cases, including *L.B. (Plastics) Ltd. v. Swish Products Ltd.*⁵. In any case, it cannot be accepted. There is nothing in s. 21 that indicates that s. 14(1)(b) should not apply to the reference to reproduction in s. 21(3) — the word "version" carries no such implication — and it would permit a ready evasion of the Act if a reproduction of a substantial part of an artistic work made by converting it into a three-dimensional form could not be treated as an infringement.

Next it was submitted on behalf of the respondent that having regard to the dissimilarities, and notwithstanding the similarities, the respondent's products did not constitute a reproduction of the drawings or a substantial part of them. Brinsden J. identified sixteen points of similarity. On behalf of the respondent it was submitted that these similarities could be explained by the fact that both parties had relied on sources of information commonly available in earlier products or publications or by the fact that the function to be performed by the absorber units had determined their nature. In fact, Brinsden J. found that the information already available had not been of much assistance to the appellant in evolving its product. However, once it is accepted that the respondent did copy the appellant's drawings it is immaterial, even if it were true, that the respondent might have reached the same result if it had used the commonly available knowledge as the foundation of its own research and experiments. Counsel for the respondent further relied on the extent and nature of the dissimilarities between the respondent's products and the appellant's drawings. They submitted a schedule showing twenty-one dissimilarities. Some of those were discrepancies between the products of the appellant on the one hand and those of the respondent on the other and not between the appellant's drawings and the respondent's products and are accordingly irrelevant so far as the question of reproduction is concerned. Particular reliance was placed by Fox J. and in argument before us by counsel for the respondent on the differences in the dimensions of certain parts manufactured by the respondent and the dimensions of corresponding parts shown on the drawings, but I agree with Franki J. that it does not follow that the relevant similarity does not

⁵ [1979] R.P.C. 551.

exist merely because the dimensions of a part shown in a drawing and those of the corresponding three-dimensional part differ somewhat. Minor differences of that kind may be deliberately made for the very purpose of disguising the fact that copying has occurred. It is true that there were a good many differences in detail between the respondent's products and the appellant's drawings, although they seem to me to be comparatively minor. It would serve no useful purpose to set out and discuss these differences, or for that matter the similarities; lists of both were provided for us by counsel. The question is not whether there are dissimilarities but whether the respondent's products closely resembled the appellant's drawings or a substantial part of them. It was submitted that Brinsden J.'s statement that "the similarities greatly exceed the dissimilarities" indicated that he must have considered the number, rather than the quality, of the similarities and dissimilarities. However, Brinsden J. concluded by saying that "there is a substantial similarity between the [respondent's] absorber plate and the absorber plate depicted in [the two drawings]". Earlier in his judgment he had cited from *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*⁶, the words of Lord Pearce: "Did the defendants reproduce a substantial part of it? Whether a part is substantial must be decided by its quality rather than its quantity." There is no reason to assume that Brinsden J. approached the question before him other than correctly, and it has not been possible to point to anything in his judgment that indicates that he misapplied the principles. On the contrary, in the light of the fact that the respondent actually copied the appellant's drawings, obviously for the purpose of appropriating the benefit of the appellant's labour, and having regard not merely to the volume, but to the significance, of the similarities between the respondent's products and the drawings, I consider that Brinsden J. and the majority of the Federal Court were right in concluding that the respondent did reproduce a substantial part of the appellant's drawings.

The second question in the case arises under s. 71 of the Act. Section 21(3) has effect subject to s. 71: see s. 21(4). Section 71 is in the following terms:

For the purposes of this Act—

(a) the making of an object of any kind that is in three dimensions does not infringe the copyright in an artistic work that is in two dimensions; and

(b) the making of an object of any kind that is in two dimensions does not infringe the

⁶ [1964] 1 W.L.R., at p. 293; [1964] 1 All E.R., at p. 481.

copyright in an artistic work that is in three dimensions,

if the object would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work.

The section is in substance similar to s. 9(8) of the *Copyright Act 1956 U.K.*, although that subsection does not include the words which appear in par. (b) of s. 71.

The provisions of s. 9(8) of the English Act were no doubt intended to give effect to the recommendation contained in the Report of the Copyright Committee (October 1952), p. 95, "that a limitation is desirable in the protection to be given to a drawing by reason of its reproduction as a building, machine or utilitarian article; otherwise the scope of the *Copyright Act* would again be extended into fields far beyond its main or original intent and properly to be covered by other forms of protection if at all". Although the object of the provisions is understandable, the form in which they are expressed, involving the use of a triple negative, is not altogether clear and their application proves difficult in practice. A particular difficulty is caused by the words "persons who are not experts in relation to objects of that kind". It will be observed that these words do not refer to persons who are not experts in any field, but to persons who are not expert only in relation to the objects which it is claimed infringe the copyright: see *L.B. (Plastics) Ltd. v. Swish Products Ltd.*⁷. That means, in the present case, that the persons referred to are those who are not expert in relation to absorber units, and perhaps solar energy hot water systems. There can be no doubt that such persons should be assumed to be of reasonable intelligence: *Merchant-Adventurers v. Grew & Co.*⁸; *Solar Thomson Engineering Co. Ltd. v. Barton*⁹; *Ogden Industries Pty. Ltd. v. Kis (Aust.) Pty. Ltd.*¹⁰; *Fire Nymph Products Pty. Ltd. v. Jalco Products (W.A.) Pty. Ltd.*¹¹ The section does not expressly make it relevant whether the notional non-experts should or should not be familiar with engineering and design drawings, and it seems right to attribute to the non-experts at least sufficient ability to interpret

⁷ [1979] R.P.C., at p. 622.

⁸ [1972] Ch. 242, at p. 255.

⁹ [1977] R.P.C. 537, at p. 559.

¹⁰ [1982] 2 N.S.W.L.R. 283, at p. 289; (1982) 62 F.L.R. 241, at p. 248.

¹¹ (1983) 74 F.L.R. 102, at pp. 126-127; 47 A.L.R. 355, at p. 381.

drawings to enable them to perform their notional function intelligently: cf. *Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.*¹²; *L.B. (Plastics) Ltd. v. Swish Products Ltd.*¹³

It was stated in *L.B. (Plastics) Ltd. v. Swish Products Ltd.*¹⁴ that the section "applies by way, and only by way of defence, i.e. after the issue of copying has been decided, and on the assumption that it has been decided in favour of the plaintiff": see also at pp. 630, 635. That is because, if there has been no reproduction by the defendant, the plaintiff's case must fail in any event, and because the section proceeds on the implied assumption that there has been a reproduction although persons who are not experts might not recognize it. Clearly the burden of proving the matters mentioned in the section is cast on the defendant: see *L.B. (Plastics) Ltd. v. Swish Products Ltd.*¹⁵; *Fire Nymph v. Jalco*¹⁶. The question whether non-expert evidence, or "expert evidence as to what might appear to a non-expert" (see *L.B. (Plastics) Ltd. v. Swish Products Ltd.*¹⁷), is admissible has never been authoritatively settled. However, that question does not arise in the present case. The test is one of appearance; the section contemplates that the judge will make a direct visual comparison between the object and the drawing: *L.B. (Plastics) Ltd. v. Swish Products Ltd.*¹⁸. The judge, in making this comparison, is entitled to have regard to any writing on the drawing which assists to explain what the drawing represents: *Merchant-Adventurers v. Grew & Co.*¹⁹; *Temple Instruments Ltd. v. Hollis Heels Ltd.*²⁰; *L.B. (Plastics) Ltd. v. Swish Products Ltd.*²¹. In *L.B. (Plastics) Ltd. v. Swish Products Ltd.*²², Lord Hailsham of St. Marylebone said:

Certainly I would regard it as a wrong approach in deciding a question under section 9(8) to enumerate dissimilarities which are really there and which a non-expert would have recognized as dissimilarities, or points of identity which are not really there which a non-expert would have mistakenly thought he saw as points of identity. The defence under section 9(8) is concerned with points of resemblance or identity which are really there, but which the non-expert would have failed to recognize as points of resemblance or identity in the three-dimensional form with the result that it would not

¹² [1973] R.P.C. 899, at p. 909.

¹³ [1979] R.P.C., at pp. 573, 622.

¹⁴ [1979] R.P.C., at p. 622.

¹⁵ [1979] R.P.C., at pp. 622, 630, 636.

¹⁶ (1983) 74 F.L.R., at p. 126; 47 A.L.R., at p. 380.

¹⁷ [1979] R.P.C., at p. 630.

¹⁸ [1979] R.P.C., at pp. 573-574, 622.

¹⁹ [1972] Ch., at p. 255.

²⁰ [1973] R.P.C. 15, at p. 19.

²¹ [1979] R.P.C., at p. 622.

²² [1979] R.P.C., at p. 631.

have appeared to him that there had been the reproduction of any substantial part of the original artistic work.

See also *Ogden Industries Pty. Ltd. v. Kis (Aust.) Pty. Ltd.*²³ and *Fire Nymph v. Jalco*²⁴. In deciding the question that arises under s. 71, the judge is not re-trying the question whether there has been a substantial reproduction. If the dissimilarities are such that they would have the effect that the object would not appear to a non-expert to be a reproduction, they will to that extent be relevant; otherwise, they are quite irrelevant in deciding a question under s. 71. In the end, in the present case, the judge had to ask himself the question whether it would not appear to a person who is not an expert in relation to absorber units or solar energy hot water systems that the objects manufactured by the respondent were reproductions of the drawings of the appellants. The question was one of fact.

In the present case, Brinsden J. found no difficulty in rejecting the defence raised under s. 71, and Woodward J., in the Federal Court, apparently had no difficulty in agreeing with him. Fox J., who took a different view, appeared to start with the assumption that a non-expert would have difficulty in understanding the drawings. He went on to say that the bulk of the respondent's product appeared "very similar" to that provided for on part of the drawings, and that closer examination would disclose other similarities, but that there were also dissimilarities, some of them obvious. He concluded²⁵:

In all, I think it likely that the non-expert, even were he able to understand fully the drawings, perhaps would not conclude that there was a reproduction. His first, and I think, insurmountable difficulty would be in understanding the drawings.

In effect his Honour made the necessary visual comparison, and found that there did appear to be a reproduction, but thought that a non-expert would "perhaps" take a different view. Franki J. said that he was of the view that Lord Wilberforce's statement (in *L.B. (Plastics) Ltd. v. Swish Products Ltd.*²⁶) that judges must be credited with some ability to interpret drawings in considering a defence under s. 9(8) should be read with the emphasis on the word "some". He went on to speak of the difficulty which a non-expert might experience in understanding the drawings, including that of determining the "quality" of some features of the drawings.

²³ [1982] 2 N.S.W.L.R., at pp. 289-290; (1982) 62 F.L.R., at pp. 247-248.

²⁴ (1983) 74 F.L.R., at p. 127; 47 A.L.R., at p. 381.

²⁵ (1983) 81 F.L.R. 101, at p. 112; 49 A.L.R. 605, at p. 617.

²⁶ [1979] R.P.C., at p. 622.

Questions of quality, which are critical in deciding whether there has been a substantial reproduction, do not arise in the application of the "lay recognition" test under s. 71. Franki J. then made the comparison for himself, and reached a conclusion different from that at which the trial judge arrived. However, with all respect, both Fox J. and Franki J. seem to have over-emphasized the difficulty of understanding the drawings (perhaps as a subconscious compensation for their own expertise in this regard) rather than concentrating attention on the result of a direct visual comparison between the respondent's product and the appellant's drawings. Further, their Honours fell into error in giving undue weight to the effect which a notional non-expert might give to the dissimilarities and to the question of the "quality" of the features in respect of which either similarities or dissimilarities existed.

The question whether a defence under s. 71 of the Act was made out was one of fact and the onus of proving it lay on the respondent. The nature of the issue, involving as it does matters of impression, is one in which particular respect and weight should be given to the decision of the trial judge unless some error in his judgment has been demonstrated. No such error was demonstrated in the judgment of Brinsden J. I, myself, see no reason to differ from his conclusion. In my opinion, his judgment should not have been disturbed.

The effect of s. 77 of the Act was considered both at first instance and in the Federal Court but before us counsel for the respondent abandoned any argument based on that section.

I would allow the appeal and restore the judgment of Brinsden J.

MASON J:

I would allow the appeal for the reasons given by the Chief Justice.

WILSON J:

The appellant claims that the respondent has infringed its copyright in certain engineering drawings relating to a solar hot water system. At the trial of the action before Brinsden J. in the Supreme Court of Western Australia attention was focused upon four drawings. Two of these drawings depicted the technical details relating to that part of the system described as the collector unit. This unit consisted in the main of two header pipes, a top header and a bottom header which were connected by a number of riser tubes covered by two metal absorber plates

each approximately two square metres in area and encased in an insulated metal box with a glass front. The remaining drawings were concerned with the second component of the system, the storage tank. The learned trial judge found for the appellant in respect of all four drawings. On appeal to the Federal Court, the Court by majority (Woodward and Franki JJ.; Fox J. dissenting) upheld the decision of the trial judge on the question of reproduction in fact but concluded, again by majority (Fox and Franki JJ.; Woodward J. dissenting), that the appellant's copyright in the two drawings relating to the collector unit had not been infringed because the respondent's hot water system "would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work": s. 71, *Copyright Act 1968 Cth*, as amended ("the Act"). The decision of the Federal Court has been reported²⁷. The Court was unanimous in finding that s. 71 of the Act applied so as to exonerate the respondent in relation to the drawings of the storage tank. The appellant does not challenge this last-mentioned conclusion. Its appeal is limited to its claim for infringement with respect to the drawings of the collector unit. Henceforth in this judgment when I refer to the drawings it will be these two drawings that I have in mind.

The respondent accepts that notwithstanding their functional and technical character the drawings are artistic works within the meaning of that expression in the Act. In s. 10, "artistic work" is defined to mean, inter alia, a drawing "whether of artistic quality or not" and "drawing" includes a diagram, map, chart or plan. The relevant operation of the Act in the circumstances of the present case may be described briefly. Section 31 provides that copyright is the exclusive right, in the case of an artistic work, to reproduce the work in a material form and to publish the work. A work is deemed to have been published if, but only if, reproductions of the work have been supplied (whether by sale or otherwise) to the public: s. 29(1)(a). A reference in the Act to the doing of an act in relation to a work shall be read as including a reference to the doing of that act in relation to a substantial part of the work; a reference to a reproduction of a work shall be read as including a reference to a reproduction of a substantial part of the work: s. 14(1). An artistic work in a two-dimensional form shall be deemed to have been reproduced if a version of the work is produced in a three-dimensional form and the version of the work so produced shall be deemed to be a reproduction of the work: s. 21(3). However, s. 71, to which

²⁷ (1983) 81 F.L.R. 101; 49 A.L.R. 605.

I have already referred, provides that the making of an object of any kind that is in three dimensions does not infringe the copyright in an artistic work that is in two dimensions if the object would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work. Subject to the Act, the copyright in an artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia any act comprised in the copyright: s. 36.

The parties are in agreement upon a number of matters. It is agreed that the drawings are the subject of copyright and that the appellant is the owner of that copyright. There is no question of any licence having been granted to the respondent. It is also clear that the respondent has manufactured and published a solar hot water system which includes among its components a collector unit broadly similar to the unit manufactured by the appellant from the drawings. These matters having been resolved, there remain two issues which have been agitated in the appeal to this Court: 1. Is the collector unit produced by the respondent a reproduction of the appellant's drawings or of a substantial part of them? 2. If yes, does the making and publication of that unit infringe the appellant's copyright in the drawings, having regard to the appearance test prescribed in s. 71 of the Act?

1. The Reproduction Issue.

In dealing with this issue the trial judge observed the guidance provided in *Copinger and Skone James on Copyright*, 12th ed. (1980), par. 458, where the law is stated as follows:

in any case of infringement the plaintiff has to establish, not only that the work in respect of which complaint is made in fact so nearly resembles his as to be capable of being an infringement, but also that it has in fact been produced by the use of those features of his work which, by reason of the knowledge, skill and labour employed in their production constitute it an original copyright work. The foregoing may be summarised by saying that there is no infringement unless it is established that the defendant has produced a work which both closely resembles the plaintiff's work and has been produced by a direct or indirect use of those features of the plaintiff's work in which copyright subsists.

His Honour then proceeded to look for similarities between the respondent's product and the drawings, recognizing that it is sufficient for a plaintiff to establish reproduction, not of the entire work in which copyright subsists, but of a substantial part of the work and that whether "a part is substantial must be decided by its quality rather than its quantity": per Lord Pearce in

*Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*²⁸ He made a detailed comparison of the respondent's product with the drawings and concluded that the similarities greatly exceeded the dissimilarities and that there was a sufficient resemblance to amount to a reproduction of a substantial part if the essential element of copying was established.

On the question of copying the trial judge was highly critical of the respondent's case. His Honour contrasted the long period of time and considerable amount of money (approximately \$1.5m. to \$2m.) spent by the appellant in researching and testing before the drawings were prepared with the six or seven months of intermittent work by the respondent on the project before the first of its units was produced and the complete absence of any drawings comparable to those of the appellant. The first unit produced by the respondent was tested for only two days before being sold. There was evidence, accepted by his Honour, of an association between the respondent and one Davies, a former employee of the appellant engaged on the solar hot water system project who on leaving that employment towards the end of 1976 had taken the drawings with him. They had never been returned. On questions of credibility his Honour preferred the evidence of witnesses called for the appellant. In the result, it was found that the respondent had access to the drawings and probably also to the appellant's model manufactured from those drawings and that the respondent's product was the result of deliberate copying.

It remains to say that neither in the Federal Court nor in the course of this appeal has the respondent challenged the finding that it had access to the drawings during the period when its product was being manufactured. The absence of any challenge at this point is no doubt understandable, having regard to the strength of his Honour's reasons and the extent to which they rested on his perception of the credibility of witnesses. Nevertheless, as I shall come to consider, the respondent's inability to controvert the findings with respect to copying may render more difficult its task of sustaining a challenge to the finding of similarity. However, before developing that aspect of the matter, I must examine the respondent's attack on the last-mentioned finding. That attack may be simply stated. It is that neither the trial judge, nor those members of the Federal Court who formed the majority on this aspect of the case, made a qualitative analysis of the significance of the similarities which were found to exist between

²⁸ [1964] 1 W.L.R., at p. 293; [1964] 1 All E.R., at p. 481.

the respondent's product and the drawings. It is said that despite the trial judge's acknowledgment of Lord Pearce's remark in *Ladbroke*, his assessment amounted to no more than a quantitative analysis, weighing up similarities against dissimilarities without regard to their significance. Counsel for the respondent argues that in the case of an alleged three-dimensional version of a technical or engineering drawing there is a distinction between substantial similarity on the one hand and reproduction of a substantial part on the other. Section 14 of the Act speaks of "a substantial part". As a matter of accurate expression, I think the point is well taken. The question is always whether there has been a reproduction of a substantial part of the copyright work. But that does not necessarily convict of error a judge who speaks of substantial or sufficient similarity.

Reproduction does not require a complete and accurate correspondence to a substantial part of the work. As Megarry J. pointed out in *British Northrop Ltd. v. Texteam Blackburn Ltd.*²⁹, when speaking of the concept of reproduction expressed in the *Copyright Act 1956 U.K.*:

section 48(1) [the English counterpart to s. 21 of the Act] necessarily indicates that "reproduction" is not confined to a copy of complete precision, from its use of the words "version", "converting" and "form", quite apart from the inevitable differences between two dimensions and three. Furthermore, I do not think that the word "reproduction", in its normal use, carries any necessary implication of exactitude of likeness between that which is reproduced and the reproduction itself. Not every reproduction is a perfect reproduction

In my opinion, the question whether there has been a reproduction is a question of fact and degree depending on the circumstances of each case. The emphasis upon quality rather than quantity directs attention to the significance of what is taken.

Counsel for the respondent argues that the drawings in the present case lack any real degree of originality because the ideas expressed had been portrayed in earlier literature on the subject, and furthermore the content of the drawings was dictated to an extent by the known function which the product was to perform. I am not persuaded that this submission is established by the evidence. The trial judge was justified in his conclusion that the existing literature could not have provided the information necessary to the construction of the respondent's product. His Honour found that the only explanation of the completed form of that product was the

²⁹ [1974] R.P.C. 57, at p. 72.

deliberate copying of the appellant's drawings. In any event, novelty or originality of the ideas expressed in an artistic work is not an essential prerequisite to copyright in the work. In *L.B. (Plastics) Ltd. v. Swish Products Ltd.*³⁰, Whitford J. said:

no originality of thought is needed to sustain a claim to copyright. Under copyright ideas are not protected, only the skill and labour needed to give any given idea some particular material form, for it is the form in which the work is presented that is protected by copyright. That need only be original in the sense that it is all the author's own work.

In my opinion, there is ample originality in the authorship of the drawings by the appellant. The proposition that the protection afforded by copyright is somehow greater where the artistic work embodies a novel or inventive idea than where it represents a commonplace object or theme was recently rejected by Buckley L.J. in the Court of Appeal in *Catnic Components Ltd. v. Hill and Smith Ltd.*³¹. His Lordship said³², in a passage cited by Franki J. in the Federal Court:

what is protected is the plaintiffs' "artistic work" as such, not any information which it may be designed to convey. If it is said that a substantial part of it has been reproduced, whether that part can properly be described as substantial may depend upon how important that part is to the recognition and appreciation of the "artistic work". If an "artistic work" is designed to convey information, the importance of some part of it may fall to be judged by how far it contributes to conveying that information, but not, in my opinion, by how important the information may be which it conveys or helps to convey. What is protected is the skill and labour devoted to making the "artistic work" itself, not the skill and labour devoted to developing some idea or invention communicated or depicted by the "artistic work".

Counsel appealed to the older authorities for support, beginning with the decision of the House of Lords in *Hanfstaengl v. Baines & Co. Ltd.*³³ where Lord Watson said:

But in cases where copyright is claimed for pictures or drawings which treat an old and common subject, such as love-making beside a stile, the privilege of the author must, in my opinion, be strictly confined to the particular design which he has chosen.

But this passage merely serves to emphasize the fundamental principle that copyright rests not in the idea, however romantic or important that idea may be, but in the particular form in which the idea finds expression in the work.

³⁰ [1979] R.P.C. 551, at p. 567.

³¹ [1982] R.P.C. 183.

³² [1982] R.P.C., at p. 223.

³³ [1895] A.C. 20, at p. 28.

The question remains whether the trial judge's finding of reproduction is to be sustained. As I have shown, the trial judge dealt separately with the two factors which are involved in reproduction, namely similarity and copying. Although his findings on each of those factors, separately considered, may be sustained, I believe that to consider them in that fashion in the circumstances of this case is to introduce an artificiality into the process which overlooks the interdependence that naturally characterizes the two factors. There may be cases where this is not so. If a case is to succeed where there is no evidence of access to the copyright drawings, the similarity of the impugned product to the drawings will be required to be so strong as to itself sustain, without more, an inference of copying. On the other hand, in a case where there is strong evidence in support of an inference of copying such evidence as there is of similarity may take on added significance. It must, of course, still amount to a sufficient similarity of a substantial part of the copyright work. But such dissimilarities as are apparent may be seen as no more than a deliberate attempt to obscure what has actually taken place, namely, the appropriation of another person's labour. In *Ancher, Mortlock, Murray & Woolley Pty. Ltd. v. Hooker Homes Pty. Ltd.*³⁴ Street J. (as he then was) noted the fine line that may exist between the conduct of an architect who, having inspected an original plan or house, then proceeds to embody the architectural concept in an original plan prepared by him and that of an architect who merely proceeds by way of copying what he has seen. His Honour observed³⁵ that it may be that only after making a finding of copying, that is to say, of unfair or unconscientious use of the author's plan or building, that significance will attach to the degree of similarity. In finding an infringement in the case before him, his Honour acknowledged that his assessment had been coloured by the unmeritorious use made by the defendant of the plaintiff's plans and houses³⁶.

In the result, then, I have no doubt that the respondent's attack on the finding of reproduction should fail. I am unable to fault the reasoning and conclusion of the trial judge in this regard and therefore uphold the majority of the Federal Court. The drawings were the subject of copyright, the respondent's three-dimensional product exhibits a striking similarity, in a

³⁴ [1971] 2 N.S.W.L.R. 278.

³⁵ [1971] 2 N.S.W.L.R., at pp. 284.

³⁶ [1971] 2 N.S.W.L.R., at pp. 288, 289.

qualitative sense, to at least a substantial part of the copyright work and there is ample evidence of access and copying.

2. The "Non-Expert" Test: Section 71.

The section in the English statute that corresponds to s. 71 — i.e., s. 9(8) — has encountered a good deal of criticism from judges. In *Dorling v. Honnor Marine Ltd.*³⁷, Danckwerts L.J. described it as an "extraordinary provision" which "presents the court with a very difficult, if not impossible, task".

In *L.B. (Plastics)*³⁸, Lord Salmon was even more critical. His Lordship said:

This is clearly a long stop defence. Unless the plaintiffs established that a substantial part of the two-dimensional drawing 479A had been copied by the defendants to produce their Swish drawer, the plaintiffs' claim for infringement of their copyright in 479A would have failed — and no question under section 9(8) could have arisen. It is indeed a curious subsection. I find it impossible to discover any sensible reason why, in circumstances such as these, defendants who copy a plaintiffs' two-dimensional drawings (in which the plaintiff owns the copyright) and constructs a three-dimensional drawer from it and thereby infringes that copyright, should be taken not to have done so merely because persons who are not experts in "knock-down" drawers would fail to recognize that the plaintiffs' copyright had been infringed. If and when the law of copyright is again considered by Parliament, it may think that a long, cold look should be taken at this strange subsection.

(Cf. also, *I.M.I. Developments Ltd. v. F.C. Harrison Ltd.*³⁹; *Merchant-Adventurers Ltd. v. M. Grew & Co. Ltd.*⁴⁰; *Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.*⁴¹; *Temple Instruments Ltd. v. Hollis Heels Ltd.*⁴²; *British Northrop Ltd. v. Texteam Blackburn Ltd.*⁴³.)

The section was considered by the House of Lords in *L.B. (Plastics)*⁴⁴. In the course of argument in the House, Mr. Aldous Q.C. was asked how s. 9(8) came to be in the 1956 Act. His reply⁴⁵:

It is generally believed to have been intended to apply to certain technical drawings such as circuit diagrams — drawings which an expert can understand but which a non-expert cannot. For example, a non-expert would not recognise a television circuit from

³⁷ [1965] Ch. 1, at p. 21.

³⁸ [1979] R.P.C., at pp. 635-636.

³⁹ [1970] R.P.C. 299, at pp. 301-302.

⁴⁰ [1972] Ch. 242, at p. 255.

⁴¹ [1971] 2 All E.R. 1074, at pp. 1076-1077.

⁴² [1973] R.P.C. 15, at p. 17.

⁴³ [1974] R.P.C. 57, at p. 72.

⁴⁴ [1979] R.P.C., at pp. 622, 630-631, 635-636.

⁴⁵ [1979] R.P.C., at p. 611.

the circuit diagram. It is not clear how far section 9(8) goes.

Mr. Aldous could have gone on to trace the origin of s. 9(8) to a recommendation of the Gregory Committee in 1952 (Report of the Copyright Committee (Cmnd. 8662)). In par. 258 the Committee discusses the problem of the reproduction of drawings or designs in the form of three-dimensional objects. It expressed the view that such a reproduction, to infringe, "must at least be a visible copy of the original work, obvious to the layman". The Report then continues:

For example, plans and other drawings referring to articles or machines frequently contain no sketch or view of what would be the outward appearance of the article and, in such cases at least, copyright in such drawings need not be infringed by constructing the article. In one case (*Chabot v. Davies*⁴⁶) it was held that the copyright in an architect's elevation representing a shop front was infringed by the erection of the shop since this was regarded as a reproduction of the elevation "in a material form". We do not dissent from such an application of copyright protection, provided the test is whether the building or other reproduction can be recognised visually by an ordinary man as being, in fact, a reproduction, even if in another material or on a different scale to what has been drawn. It should not be an infringement of the copyright in the drawing to erect a building or to construct an article based thereon if the result has no clearly visual resemblance to the drawing.

This passage would suggest that the Committee considered that there could be no "visual resemblance" between a drawing and the finished product unless the drawing itself contained a pictorial representation or sketch of the finished product. The "ordinary man" could then make a simple and direct comparison of the one with the other. If this were so, the suggestion may have proved both understandable and capable of implementation in practice. However, difficulties are obviously engendered by the lack of clarity in the statutory provision designed to implement the Committee's recommendation. What capacity is to be credited to those "who are not experts in relation to objects of that description"? Is it a matter for evidence? Is it for the judge to place himself in the position of a non-expert in relation to (in this case) solar hot water systems and, if so, is he to be credited with some ability to interpret design drawings? Where does the onus lie? Whatever may have been the precise legislative intent in enacting the provision, its operation in practice led the Copyright Committee chaired by Whitford J. in 1976 to recommend its repeal: Report of the Committee to consider the Law on Copyright and Designs 1977 (Cmnd. 6732) (1977), par. 202(vii).

⁴⁶ (1936) 155 L.T. 525.

Nevertheless, while its implementation remains difficult, many of these questions were answered in *L.B. (Plastics)* when the House of Lords placed an authoritative seal on the developing case law in relation to s. 9(8). The decision yields a number of propositions contained primarily in the speech of Lord Wilberforce⁴⁷ in which the other members of the House concurred. The sub-section applies only by way of defence, after the issue of copying has been decided in favour of the plaintiff. The onus is therefore on the defendant. It is a question of fact. The judge must place himself in the position of a non-expert in relation to the infringing article in order to decide whether the article does not appear to be a reproduction of the copyright work. To perform this task he must compare the article with the drawing, taking account of any written matter on the drawing. Furthermore, the judge must be credited with some ability to interpret design drawings; the sub-section does not say the contrary and without such ability the comparison could not be made. The comparison to be made is a visual comparison; the judge should not repeat the process (which he has already gone through) of determining whether there has been a reproduction by copying. In applying the s. 9(8) test, one should not look for dissimilarities between the article and the drawing, nor for points of identity mistakenly supposed by a layman to exist; one looks for points of resemblance which are really there but which the layman would have failed to recognize as points of resemblance in the article with the result that it would not have appeared to him that there had been a reproduction of any substantial part of the original copyright work: see per Lord Hailsham of St. Marylebone⁴⁸.

The question then arises whether these propositions express the way in which s. 71 of the Act should be applied in Australia. In my opinion they do. They are consistent with the limited case law which the section has attracted since its enactment in 1968: cf. *Lend Lease Homes Pty. Ltd. v. Warrigal Homes Pty. Ltd.*⁴⁹; *Ogden Industries Pty. Ltd. v. Kis (Aust.) Pty. Ltd.*⁵⁰; *Fire Nymph Products Ltd. v. Jalco Products (W.A.) Pty. Ltd.*⁵¹. With all respect they provide a sensible approach to a difficult problem.

⁴⁷ [1979] R.P.C., at p. 622.

⁴⁸ [1979] R.P.C., at p. 631.

⁴⁹ [1970] 3 N.S.W.R. 265.

⁵⁰ [1982] 2 N.S.W.L.R. 283; (1982) 62 F.L.R. 241.

⁵¹ (1983) 74 F.L.R. 102; 47 A.L.R. 355.

It remains to consider the operation of s. 71 in the present case. The trial judge expressed the view that it was not difficult for a non-expert when studying the drawings to visualize the collector unit in three-dimensional form. He rejected the defence. In the Federal Court, Franki J. took a different view and Fox J. agreed with his Honour. Woodward J. agreed with the trial judge. With all respect to the majority, I have some difficulty with the approach taken by Franki J. I accept the emphasis his Honour placed on the word "some" in applying Lord Wilberforce's proposition in *L.B. (Plastics)* that the trial judge was to be credited with "some" ability to interpret design drawings, by which I take him to mean that the non-expert is not of above average ability in interpreting drawings. But in making the necessary comparison as a non-expert, Franki J. saw himself as having to weigh up questions such as "the quantity and quality" and "the significance of what is taken" before he could decide whether the three-dimensional article is a reproduction of the artistic work. It seems to me that this is to misunderstand the nature of the test required by s. 71. The test is to be a visual comparison. As Lord Wilberforce said in *L.B. (Plastics)*⁵²:

The (non-expert) judge should not repeat the process which, as judge with the assistance of expert and other witnesses, he has gone through in deciding whether there has been copying or not.

Ordinarily a drawing will convey to the mind of a viewer a picture of what a three-dimensional version of that drawing would look like. But some drawings may be so complex or technical in their expression as not to yield any immediate visual impression of a three-dimensional object capable of being compared with the alleged infringing articles. In such a case there will be no infringement notwithstanding that in truth the article is a reproduction of the drawing. I appreciate that his Honour could properly be influenced by the view he took of the complexity of the drawings and the number of parts in the objects under consideration. The trial judge apparently took a different view when it came to visualizing the collector unit as it appears in the drawings. He saw no difficulty. For his part, Fox J. agrees that the bulk of the apparatus comprised in the product "appears very similar" to that which is provided for on part of the drawings, but his Honour then focuses on differences in detail which would lead a non-expert not to conclude that there was a reproduction. It may be that in coming to that conclusion his

⁵² [1979] R.P.C., at p. 622.

Honour was influenced by the view to which he had already come that in any event the collector unit was not a reproduction of the drawings. In my opinion, when it is said that the comparison to be made is a visual comparison, the test is a broad one. It must already have been decided that there is the requisite similarity of a substantial part and that the similarity has been achieved by an unauthorized copying of the artistic work which is the subject of copyright. Notwithstanding those findings, there will be no infringement if there is no visual resemblance, that is, if the object does not look like a reproduction of the artistic work or of a substantial part of it.

In the last resort it is a question of fact upon which minds may differ. For my part, having examined the drawings and compared them with the respondent's product, I agree with the trial judge and Woodward J. that the s. 71 defence is not made out.

I would allow the appeal.

BRENNAN J:

The *Copyright Act 1968 Cth* ("the Act") defines "artistic work" to mean, inter alia, "a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not": s. 10(1). "Drawing" includes a diagram or plan. "Literary work" is not defined to include artistic work and the Act distinguishes between the two categories of work in its substantive provisions. The Act deems the production in a three-dimensional form of a version of an artistic work in a two-dimensional form to be a reproduction of the artistic work: s. 21(3)(a). Therefore the production of a three-dimensional object in accordance with a drawing is deemed to be a reproduction of the drawing. If copyright subsists in a drawing, the owner of the copyright has the exclusive right to make material objects in accordance with it: s. 31(1)(b)(i). The making of a material object in accordance with the drawing without the licence of the owner of the copyright in it is an infringement of the copyright, except where the making of the material object is protected by s. 71.

The effect of s. 71 is to restrict the wide scope of copyright in drawings, as defined by s. 31(1)(b)(i), so that the copyright owner's exclusive right to make three-dimensional objects in accordance with a drawing does not prevent the making of such objects without licence if, to a non-expert eye, they would not appear to be a version of the drawing. The non-expert eye is

the eye of a person who is not an expert in relation to the kind of objects which are said to infringe copyright in the drawing, but the Act is silent as to the notional observer's expertise in the reading and comprehension of drawings.

When copyright legislation included plans within the description of "literary work" and defined "copyright" to mean the sole right to reproduce a work or any substantial part thereof in any material form (*Copyright Act 1911 Imp.*, ss. 1(2), 35(1), adopted by the *Copyright Act 1912 Cth*) it was held that unauthorized reproduction in a three-dimensional form of a drawing in which copyright subsisted might infringe the copyright. The test was one of visual similarity: see *King Features Syndicate, Inc. v. O. & M. Kleeman Ltd.*⁵³; *Chabot v. Davies*⁵⁴. In *Lend Lease Homes v. Warrigal Homes*⁵⁵, a case to which the 1912 Act applied, Helsham J. in considering the issue of reproduction in three-dimensional form of a plan referred to the written as well as the graphic contents of the "literary work" in question. However, in the 1912 Act there was no statutory restriction on the scope of copyright in drawings such as s. 71 now provides.

Section 71, which follows the introduction of a corresponding provision in the United Kingdom (*Copyright Act 1956 U.K.*, s. 9(8)), preserves the test of visual recognition. The Act does not deem the making of a three-dimensional object in accordance with a written specification — a "literary work" that is not a drawing — to be a reproduction of the specification, but s. 9(8) of the United Kingdom Act has been held to require a judge, stepping into the shoes of the notional non-expert, to take account of written matter on the drawing: *L.B. (Plastics) Ltd. v. Swish Products Ltd.*⁵⁶; *Temple Instruments Ltd. v. Hollis Heels Ltd.*⁵⁷; *Merchant-Adventurers v. Grew & Co*⁵⁸. It was conceded by the respondent in the present case that that was the correct approach. If the concession was rightly made, the test of visual similarity cannot be applied as a mere matter of impression. As Graham J. pointed out in *Merchant-Adventurers* it is necessary for the notional non-expert, endowed with "reasonable and average intelligence" for the

⁵³ [1941] A.C. 417, at pp. 424, 435.

⁵⁴ [1941] A.C. 417, at pp. 424, 435.

⁵⁵ [1970] 3 N.S.W.R., at pp. 272, 273.

⁵⁶ [1979] R.P.C. 551, at pp. 574, 622, 636.

⁵⁷ [1973] R.P.C. 15, at pp. 17-18, 19.

⁵⁸ [1972] Ch. 242, at p. 255.

purpose, "to visualize in his mind" what a three-dimensional object made in accordance with the drawing and the writing on it would look like, and then to compare that mental picture with the material object the making of which is said to infringe the copyright. Such an approach places a minimal restriction on the scope of copyright in trade drawings for it would require a comparison between the material object and the mental picture derived from the drawing and the writing on it, and it would permit the court to consider whether particular features of the object which is said to infringe the copyright corresponded with information contained in writing on the drawing. The last reference to the artistic work in s. 71 would have to be read as a reference to the mental picture, and the notional observer would have to be invested with a capacity to glean the true meaning of drawings and the writings which appear on them. He would have to be invested also with a capacity to take measurements and to ascertain the material of which an object is made if those matters are specified in the writing on the drawing.

The operation of s. 71 in the context of s. 21(3)(a) and s. 31(1)(b)(i) depends, in my opinion, on whether that be the right approach, but I forbear from considering that question in the light of the concession made. However, by adopting that approach, the task of applying s. 71 is made more complex. A drawing and the writing on it must be interpreted to get the required mental picture and consideration may need to be given to similarities and dissimilarities between the materials, measurements and other features of the object and the materials, measurements and other features written on the drawing. It is not surprising that the mental picture which one non-expert develops is different from the mental picture developed by another, nor that the emphasis which one non-expert gives to a particular similarity or dissimilarity in materials, measurements or other features written on the drawing will differ from the emphasis given by another. The finding by the trial judge as to the opinion of the notional non-expert is critical in such an exercise, for there is no legal touchstone by reference to which his finding as to the non-expert's opinion can be set aside if that finding is reasonably open on the facts of the case. Brinsden J. thought that it was not difficult for a non-expert to visualize in three-dimensional form the absorber plates and connecting links shown in the drawings. He was not satisfied that the manufactured components of the respondent's absorber plate would not appear to a non-expert to be reproductions of the defendant's drawings. Those findings were reasonably open. An appellate court is not justified in setting those findings aside merely because that court differs from the trial judge on the question of opinion as to what a non-expert who had examined the drawings would or would not visualize in his mind. Given the concession made

by the respondent, I do not think that the majority of the Federal Court were entitled to depart from the findings made by Brinsden J. on the issues arising under s. 71.

I agree with the Chief Justice for the reasons which he gives that Brinsden J. and the majority of the Federal Court were right in concluding that the respondent did reproduce a substantial part of the appellant's drawings. I would therefore allow the appeal and restore the judgment of Brinsden J.

DEANE J:

The relevant facts are set out in the judgment of Franki J. in the Full Court of the Federal Court⁵⁹ and in the judgment of Wilson J. in this Court. Except to the extent necessary for discussion, I shall refrain from repeating them. There remains in issue on the appeal the alleged infringement by the respondent Edwards Hot Water Systems ("Edwards") of the copyright of the appellant S.W. Hart & Co. Pty. Ltd. ("Hart") in two engineering drawings (Nos. B310/29 and B310/30) of the absorber panels (and associated and incorporated parts including connexion nuts) of a solar hot water system. Hart claims that Edwards infringed its copyright by the production of a solar hot water system which included, among its components, absorber panels (and associated and incorporated parts including connexion nuts) which allegedly constituted a reproduction of its two drawings or of a substantial part of them. For its part, Edwards concedes that each of the two drawings is, for the purposes of the *Copyright Act 1968 Cth* ("the Act"), an "artistic work" (defined by s. 10 to include a "drawing whether of artistic quality or not") in which Hart was the owner of the copyright. It disputes that the fabrication of the relevant components of its solar hot water system involved a reproduction of a substantial part of both or either of the drawings and claims that, in any event, any finding of infringement is precluded by the provisions of s. 71 of the Act. Defences based on s. 77 of the Act and on an alleged absence of any reason to suspect breach of copyright which were unsuccessfully raised by Edwards in one or both of the courts below are no longer relied upon and can be disregarded.

⁵⁹ (1983) 81 F.L.R. 101; (1983) 49 A.L.R. 605.

In the Supreme Court of Western Australia, the learned trial judge (Brinsden J.) found in Hart's favour both on the question of reproduction in fact and on the question whether s. 71 of the Act precluded a finding of infringement. The members of the Full Court of the Federal Court were divided on each question. A majority (Woodward and Franki JJ.; Fox J. dissenting) agreed with the finding of the learned trial judge that there had in fact been a reproduction of the two drawings. A differently constituted majority (Fox and Franki JJ.; Woodward J. dissenting) held that Edwards had made good its defence based on s. 71 of the Act and that a finding of infringement of copyright was therefore precluded. In the result, Edwards succeeded on its s. 71 defence and the decision of the full Federal Court (Fox and Franki JJ.; Woodward J. dissenting) was that Brinsden J.'s finding that Edwards had infringed Hart's copyright in the two drawings should be set aside. It can be said at once that I agree with Fox J. and Franki J. that the provisions of s. 71 precluded a finding of infringement of Hart's copyright in either of the two drawings and that I am in general agreement with the reasoning of each of their Honours which leads to that conclusion.

Section 71 provides:

For the purposes of this Act—

(a) the making of an object of any kind that is in three dimensions does not infringe the copyright in an artistic work that is in two dimensions; and

(b) the making of an object of any kind that is in two dimensions does not infringe the copyright in an artistic work that is in three dimensions,

if the object would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work.

The section is based upon s. 9(8) of the *Copyright Act 1956 U.K.* ("the English Act") which contains provisions which, apart from insignificant variations, correspond to s. 71(a). Those provisions were introduced in the English Act and subsequently adopted in the Act in pursuance of the respective recommendations of United Kingdom and Australian expert committees. The main reason for their introduction in the English Act and for their adoption in this country was, in the words of the Report of the United Kingdom Copyright Committee (the Gregory Committee) (1952) U.K. Cmnd. 8662, par. 258, to prevent the scope of the *Copyright Act* from being extended "into fields far beyond its main or original intent and properly to be covered by other forms of protection if at all". The section must be read in the context of s. 31(1)(b)(i) which provides that copyright in an artistic work includes the exclusive right "to reproduce the work in a material form" and of s. 21(3) which provides that, for the purposes of

the Act, "an artistic work shall be deemed to have been reproduced" if a three-dimensional "version" is produced of a two-dimensional artistic work or if a two-dimensional "version" is produced of a three-dimensional artistic work.

The test which s. 71 propounds — sometimes referred to as the "lay recognition" test — has attracted much criticism from informed sources in England. The 1977 report of the expert committee chaired by Whitford J. recommended its repeal (Report of the Committee to consider the Law on Copyright and Designs (1977) U.K. Cmnd. 6732, par. 202(vii)). In the leading case on s. 9(8) of the English Act (*L.B. (Plastics) Ltd. v. Swish Products Ltd.*⁶⁰), it was described by Whitford J.⁶¹, at first instance, as "that most difficult of provisions" and was referred to with varying degrees of disaffection in the speeches of each of the three members of the House of Lords who delivered separate reasons. Lord Wilberforce⁶² remarked that the s. 9(8) test "inevitably gives rise to difficulties as to the nature of the evidence which may be received, and as to the degree of non-expertise to be attributed to the judge". Lord Hailsham of St. Marylebone⁶³ commented that he was "as puzzled as other judges have been by the concept of the notional non-expert and by the policy underlying the subsection". Lord Salmon⁶⁴, having described the s. 9(8) test as a "long stop defence", suggested that "[i]f and when the law of copyright is again considered by Parliament, it may think that a long, cold look should be taken at this strange subsection". In the context of such criticism from those and other eminent sources, one can but be diffident in discerning merit in the provisions of s. 71. For the reasons which follow however, it seems to me that those provisions are well adjusted to the law of copyright and represent a reasonably clear expression of an informed and defensible legislative policy with respect to the appropriate compromise to be made, in the public interest, between the prolonged protection by copyright law of private rights in original work and the free access of the public to the use of published material.

⁶⁰ [1979] R.P.C. 551.

⁶¹ [1979] R.P.C., at p. 573.

⁶² [1979] R.P.C., at p. 622.

⁶³ [1979] R.P.C., at p. 630.

⁶⁴ [1979] R.P.C., at pp. 635-636.

The provisions of s. 71 are preclusive and not inclusive. A three-dimensional fabrication does *not* infringe copyright in a two-dimensional artistic work if the fabrication would not appear to lay persons to be a reproduction of the whole or of "a substantial part" (see the Act, s. 14) of the artistic work. That test is well attuned to established notions of copyright law whose essential concern had traditionally been with the copying by reproduction of the visual expression of a subject or idea: "[w]hat is protected is the skill and labour devoted to making the "artistic work" itself, not the skill and labour devoted to developing some idea or invention communicated or depicted by the "artistic work" ": per Buckley L.J., *Catnic Components Ltd. v. Hill and Smith Ltd.*⁶⁵. It is in close accord with what has been recognized in the United States as a normal ingredient of the ordinary concept of reproduction by copying (see, e.g., *King Features Syndicate v. Fleischer*⁶⁶; Corpus Juris Secundum, vol. 18, "Copyright and Literary Property", s. 94a, p. 216) and with what had already been evolved by judicial decision in England and in this country: cf. *Burke and Margot Burke Ltd. v. Spicers Dress Designs*⁶⁷; *Cuisenaire v. Reed*⁶⁸; *Lend Lease Homes Pty. Ltd. v. Warrigal Homes Pty. Ltd.*⁶⁹. Indeed the view was expressed, in the period between the enactment of s. 9(8) of the English Act and the introduction of its provisions in this country, that those provisions represented "statutory confirmation" of what "would seem to follow" from the decision in *Burke and Margot Burke Ltd.*, namely, that *Chabot v. Davies*⁷⁰ was "confined to cases in which the appearance of the complete building appeals to the eye as being a reproduction of what appears on the architect's plan or elevation": Copinger and Skone James on Copyright, 9th ed. (1958), p. 258; 12th ed. (1980), par. 269; *Cuisenaire v. Reed*⁷¹. The s. 71 test also has the advantage of being, at least in the context of copyright law, comparatively uncomplicated in concept and elementary in application. It is true that the section dutifully adopts that cause of much dispute in copyright cases, the notion of "reproduction". For the purposes of s. 71 however, that notion is confined by the controlling reference to what would "appear" to non-experts: so confined, it does not embrace the hidden similarities or differences which none but the expert could discern or

⁶⁵ [1982] R.P.C. 183, at p. 223.

⁶⁶ (1924) 299 Fed. 533, at p. 535.

⁶⁷ [1936] Ch. 400, at p. 406.

⁶⁸ [1963] V.R. 719, at pp. 733-736.

⁶⁹ [1970] 3 N.S.W.R., at p. 273.

⁷⁰ [1936] 3 All E.R. 221.

⁷¹ [1963] V.R., at p. 735.

evaluate but is limited to what would appear to the observation of ordinary persons who are not experts in the relevant field. In effect, all that the s. 71 test does is to impose the requirement that ordinary people would observe that the allegedly infringing object appeared to reproduce the artistic work in a different dimension.

As Fox J. pointed out in the Full Court of the Federal Court⁷², the present case falls in an area in which one should be conscious of the distinct functions performed by the law of copyright and the law of patents and industrial designs and of the desirability of maintaining at least the semblance of a boundary between their respective fields of operation. The convoluted path by which a three-dimensional object has been held to be an infringement of the copyright in a technical drawing which has been neither factually copied nor even seen illustrates the incursions which copyright — with its extended life but more limited protection, its lack of any requirement of novelty or true inventiveness and its minimal standards of originality — is capable of making into what would ordinarily be seen as the proper domains of the law of patents and the law of industrial designs. Section 71 represents a deliberately imposed legislative restraint of that expansion of the law of copyright in cases such as the present where what is involved is the reproduction of a "drawing as a building, machine or utilitarian article" (Gregory Report, par. 258). In the simple and non-technical case where both artistic work and alleged infringing copy were made to be viewed rather than used, expert evidence is likely to be unnecessary to expose the similarities and dissimilarities between the two. In such a case, particularly where there is no direct evidence about actual copying, the question of reproduction in fact may largely turn upon whether the object appears to the judge, upon visual examination, to be a reproduction of the artistic work in a different dimension. When that is so, the question which the s. 71 test raises will closely correspond to what is involved in the issue of reproduction in fact. Conversely, the s. 71 test is likely to be of greatest independent significance in a case where complicated expert evidence is necessary to identify and explain technical points of similarity and dissimilarity, which are not apparent to a non-expert, between an artistic work made to visually convey technical information and an allegedly infringing object made to function or be used. Such cases fall within an area in which the copyright law's concern with distinctions between concepts such as form, expression and arrangement on the

⁷² (1983) 81 F.L.R., at pp. 103ff.; 49 A.L.R., at pp. 607ff.

one hand and concepts such as subject, function and information on the other become increasingly more difficult to draw as the technical similarities and dissimilarities become further removed from what can be seen by the ordinary visual observation of ordinary people and as visual appearance becomes increasingly a reflection of function. In such cases, the s. 71 test, if left uncomplicated by unnecessary legal sophistry, provides a reasonably straightforward means of restricting the protection of the law of copyright to the category of case which it was designed and is best equipped to regulate. It is true that the effect of s. 71 is to extend the protection of a largely unmeritorious defence to some copyists of another's original artistic work. No doubt there have been and will be circumstances in which the availability of such a defence will appear unjust as between the parties. It is, however, no part of the function of the courts to allow distaste for the activities of the copyist in the particular case to lead either to further judicial blurring of a boundary which the legislature has sought to maintain or to the grant of curial protection in circumstances in which the legislature has determined that the overriding requirements of public interest should preclude it.

In form, the s. 71 test is a negative one: the object would *not* appear to non-experts to be a reproduction of the artistic work. A defence based upon the section will succeed only if a positive finding can be made that that negative test is satisfied: cf. *British Northrop Ltd. v. Texteam Blackburn Ltd.*⁷³. That being so, the overall onus of satisfying the test rests upon the defendant: cf. *L.B. (Plastics) Ltd.*⁷⁴. The fact that the test is cast in negative form should not however be permitted to obscure the fact that the substance of the test is positive: the test is not that it would appear that the object was *not* a reproduction; it is that it would not appear that it *was*. If the conclusion is reached that non-experts would be unable to form a view about whether the object was or was not a reproduction, the s. 71 test will be answered affirmatively (i.e. it would *not* appear to non-experts that the object *was* a reproduction) and a finding of infringement would be precluded. In these circumstances, the defendant's overall onus of satisfying the court that the test has been satisfied is, apart from the improbable case of judicial atrophy, likely to prove of less significance in practice than the fact that the substance of the

⁷³ [1974] R.P.C. 57, at p. 72.

⁷⁴ [1979] R.P.C., at pp. 622, 636.

test requires no more than the negating of a positive appearance (to non-experts) of reproduction.

The non-experts to whom s. 71 refers are not to be discounted as rash, illogical or foolish. Like some other notional inhabitants of the law, they are to be presumed to be reasonably observant, rational and careful persons of average intelligence: cf. *Merchant-Adventurers Ltd. v. M. Grew & Co. Ltd.*⁷⁵; *Ogden Industries Pty. Ltd. v. Kis (Aust.) Pty. Ltd.*⁷⁶. The test which the section propounds involves a notional direct visual comparison of the artistic work and the alleged infringing object, viewing them together: cf. *Solar Thomson Engineering Co. Ltd. v. Barton*⁷⁷; *L.B. (Plastics) Ltd.*⁷⁸; *Ogden Industries Pty. Ltd.*⁷⁹. In making that comparison, the notional non-experts are to be presumed to have access to any material written upon a two-dimensional drawing which may explain it: cf. *L.B. (Plastics) Ltd.*⁸⁰; *Ogden Industries Pty. Ltd.*⁸¹. In that regard however, it is important to note that, since the notional comparison by non-experts is a visual one between the two-dimensional drawing and the three-dimensional object, the assistance to be derived from what is written on or around the drawing must be limited to what non-experts would understand as explanatory of the actual visual representation which is the drawing as distinct from the underlying idea, substance or working of what is depicted. The non-experts are to be credited with such ability to observe and comprehend what the two-dimensional drawing visually represents as would be possessed by a person of reasonable and average intelligence, knowledge and education, with ordinary ability but without expert knowledge with relation to the kind of object which the drawing visually represents. There is authority to support the view that, where the two-dimensional drawing depicts the face of a sectioned part of a three-dimensional object, the non-experts are also to be presumed to have available for the purposes of visual comparison the corresponding face of the relevant sectioned part of the allegedly infringing object: cf. per Buckley L.J., *Solar Thomson Engineering Co.*

⁷⁵ [1972] Ch. 242, at p. 255.

⁷⁶ [1982] 2 N.S.W.L.R. 283, at pp. 289-290; (1982) 62 F.L.R. 241, at pp. 247-248.

⁷⁷ [1977] R.P.C. 537, at p. 559.

⁷⁸ [1979] R.P.C., at pp. 573, 622.

⁷⁹ [1982] 2 N.S.W.L.R., at p. 289; (1982) 62 F.L.R., at p. 248.

⁸⁰ [1979] R.P.C., at pp. 574, 622, 636.

⁸¹ [1982] 2 N.S.W.L.R., at p. 289; (1982) 62 F.L.R., at p. 248.

*Ltd. v. Barton*⁸². Where, as in the present case, there is an obvious inter-relationship between two distinct drawings, they can be viewed together: cf. *Merchant-Adventurers Ltd. v. Grew*⁸³.

It should perhaps be mentioned that, in the course of his speech in *L.B. (Plastics) Ltd.*⁸⁴, Lord Wilberforce commented that, for the purposes of s. 9(8) of the English Act, "the judge must be credited with some ability to interpret design drawings: the subsection does not say the contrary, and without it the comparison could not be made". I do not read that comment of his Lordship's as intended to indicate a view that the notional non-experts should be credited with any special expertise in reading or understanding technical or design drawings. It would, in my view, be contrary both to the plain import of the provisions of s. 71, to the legislative policy which underlies them and to what has been said in the cases about "persons who are not experts" (see above) to attribute to the notional non-experts in relation to objects of the relevant kind any such special expertise. In that regard, I would respectfully adopt the following comments made by Franki J. in the course of his judgment in the Federal Court⁸⁵:

It is appropriate to note that, in the field of patents, judges have been said by the House of Lords not to be experts in the reading or interpretation of photographs and also presumably of drawings (see generally *Van Der Lely (C.) N.V. v. Bamfords Ltd.*⁸⁶ and Terrell on the Law of Patents, 12th ed. (1971), par. 926). I am of the view that Lord Wilberforce's statement that judges must be credited with some ability to interpret drawings in considering a defence under s. 9(8) should be read with the emphasis on the word "some".

The notional non-expert is to be credited with no more than the modest ability which a person of reasonable and average intelligence is likely to have to read and understand technical drawings.

One of the difficulties about s. 71 (and s. 9(8) of the English Act) to which Lord Wilberforce referred in *L.B. (Plastics) Ltd.*⁸⁷ is that concerning the nature of the evidence which may be received in relation to the question whether the test which the section propounds has been satisfied. As at present advised, it appears to me that direct expert evidence would not be

⁸² [1977] R.P.C., at p. 559.

⁸³ [1972] Ch., at p. 255.

⁸⁴ [1979] R.P.C., at p. 622.

⁸⁵ (1983) 81 F.L.R., at p. 124; 49 A.L.R., at p. 628.

⁸⁶ [1963] R.P.C. 61, at p. 71.

⁸⁷ [1979] R.P.C., at p. 622.

admissible to the effect that it would or would not appear to notional non-experts that there had been reproduction. That is an ultimate question of fact which it is for the court to determine. Nor, as I presently see the matter, would non-expert evidence be admissible of what did or did not appear or had or had not appeared to the particular non-expert witness: cf. per Lord Salmon, *L.B. (Plastics) Ltd.*⁸⁸. Where the original or a copy of both the artistic work and the alleged infringing copy are before the judge and can be fully observed by the unaided eye, there is plainly much to be said for the view that evidence will ordinarily be only of assistance or admissible to establish the objective context within and by reference to which that ultimate question of fact falls to be determined. It is, however, unnecessary to express any concluded view on those matters for the purposes of the present case since, subject to the qualification mentioned in the next paragraph, there has been no effort on either side to rely upon extrinsic evidence on the question whether it would appear to non-experts that the relevant parts of the Edwards system were a reproduction of the whole or of a substantial part of one or both of Hart's drawings and it is plain that the non-expert judge may determine the question merely on the evidence of the drawings themselves and the allegedly infringing object: cf. *L.B. (Plastics) Ltd.*; *I.M.I. Developments Ltd. v. F.C. Harrison Ltd.*⁸⁹; *Lerose Ltd. v. Hawick Jersey International Ltd*⁹⁰; *Ogden Industries Pty. Ltd.*⁹¹

The qualification is that Hart relied upon an actual example of the absorber panels (including associated and incorporated parts) of its own solar heating system which was in evidence (Ex. 6) and which was said to demonstrate an actual reproduction in three-dimensional form of the two engineering drawings. In some respects, this exhibit is liable to be misleading in that it incorporates some details which are not shown by the drawings. Its relevance and significance in relation to the s. 71 defence is plainly debatable. It was not however suggested that the exhibit represented more than indirect assistance as an illustrative aid to argument on the question whether it would appear to non-experts that there had been a reproduction. Even assuming that this exhibit accurately illustrated what the result would be of an expert fabrication of what was depicted by Hart's drawings however, it is, for reasons which will

⁸⁸ [1979] R.P.C., at p. 636.

⁸⁹ [1970] R.P.C. 299, at p. 302.

⁹⁰ [1974] R.P.C. 42, at pp. 50-51.

⁹¹ [1982] 2 N.S.W.L.R., at p. 289; (1982) 62 F.L.R., at p. 248.

appear, of negligible relevance or assistance on the question whether it would appear to non-experts that the Edwards absorber panels — or for that matter the Hart absorber panels — constituted a visual reproduction of those actual drawings.

There are two further matters in relation to the operation of s. 71 to which it would seem desirable to make particular reference at this stage. They are related. The first arises from some comments of Lord Wilberforce and Lord Hailsham of St. Marylebone in *L.B. (Plastics) Ltd.* about the stage at which the defence under s. 9(8) of the English Act becomes relevant and the assumptions on the basis of which it should be applied. The second arises from the views expressed by Lord Hailsham in the same case about what that defence is "concerned with". I shall consider these matters in the order in which I have mentioned them.

In the course of his speech in *L.B. (Plastics) Ltd.*⁹², Lord Wilberforce said that s. 9(8) of the English Act "applies by way, and only by way of defence, i.e. after the issue of copying has been decided, and on the assumption that it has been decided in favour of the plaintiff". To the same effect was the comment of Lord Hailsham⁹³ that the defence under s. 9(8) "only arises if there is a reproduction of a part of the copyright work sufficiently substantial to be otherwise an infringement of copyright". It seems to me, with respect, that those comments must be read in the context of the reasons for their Lordships' rejection of the conclusion reached by the Court of Appeal that it would not appear to non-experts that there had been a reproduction. Their Lordships were concerned to stress that the members of the Court of Appeal had mistakenly approached that question on the basis of their finding that there had in fact been no substantial reproduction: per Lord Hailsham⁹⁴. As Lord Salmon pointed out⁹⁵, on that basis no question could arise under s. 9(8) of the English Act. So read, the above comments were directed more to disapproving the view that s. 71 might properly be approached on the basis that there had been no reproduction in fact than to asserting the view that the section should properly be approached on the basis or assumption that there has been a positive finding that

⁹² [1979] R.P.C., at p. 622.

⁹³ [1979] R.P.C., at p. 630.

⁹⁴ [1979] R.P.C., at pp. 630-631.

13. ⁹⁵ [1979] R.P.C., at pp. 630-631.
[1979] R.P.C., at p. 636.

there was in fact such reproduction. On the other hand, their Lordships' remarks are framed in words which are appropriate to lay down the proposition that the issue raised by a defence under s. 9(8) of the English Act cannot properly be dealt with unless an actual finding or assumption of actual reproduction of the whole or a substantial part of the two-dimensional artistic work is made. To the extent that their comments are properly to be construed as laying down that proposition, I respectfully consider that they should not be followed by Australian courts in relation to s. 71 of the Act.

The provisions of s. 71 are not framed upon an assumption that there has been a finding of actual reproduction. They operate to preclude any finding of infringement if the negative test which they propound is satisfied. The only assumption that needs to be made for the purposes of the section is the obvious one that the alleged infringing copy was produced after the relevant artistic work. Otherwise, the test which s. 71 propounds is an independent one. If, on the assumption that the object was subsequently made, it would not appear to non-experts that the three-dimensional object was a reproduction of the two-dimensional artistic work, there is no infringement regardless of whether there was or was not actual reproduction. In the context of the sophistry of the ideas and the length and expense of the curial processes involved in the ascertainment and enforcement of rights under copyright law, it will, in some cases, be sensible and convenient that the comparatively uncomplicated s. 71 test be considered and determined as a preliminary point. In other cases where both the issue of actual reproduction and a defence under s. 71 have been litigated, a court — particularly an appellate court on an appeal from a decision upholding a s. 71 defence — may consider that the appropriate course is to deal first with the s. 71 defence for the reason that, if it be established, the issue of actual reproduction will be irrelevant since a finding of infringement will be precluded in any event.

The other matter relating to s. 71 to which reference should be made at this stage arises from the following comments of Lord Hailsham in his speech in *L.B. (Plastics) Ltd.*⁹⁶:

Certainly I would regard it as a wrong approach in deciding a question under section 9(8) to enumerate dissimilarities which are really there and which a non-expert would have recognized as dissimilarities, or points of identity which are not really there which a non-expert would have mistakenly thought he saw as points of identity. The defence under section 9(8) is concerned with points of resemblance or identity which are really there, but which the non-expert would have failed to recognize as points of

⁹⁶ [1979] R.P.C., at p. 631.

resemblance or identity in the three-dimensional form with the result that it would not have appeared to him that there had been the reproduction of any substantial part of the original artistic work.

Those comments, which effectively adopted the submissions of counsel for the appellant in the case⁹⁷, are related to, and develop, his Lordship's comments to the effect that s. 9(8) only arises if the court has decided that there has in fact been reproduction. As I read them, they assert that s. 71 can only operate upon the fact of actual reproduction in the sense that the section is not directed to the simple question whether it would not appear to non-experts that there was a reproduction but to the question whether, starting with the fact that there has been a reproduction, the non-expert is unable to perceive points of resemblance upon which the expert would rely to perceive that fact. In my respectful view, there is no justification for giving to the provisions of s. 71 of the Act such an artificial and restricted operation. As has been said, s. 71 operates to preclude a finding of infringement regardless of whether there has or has not been actual reproduction. The question which the section propounds is whether it would not appear to non-experts, on a visual comparison of the allegedly infringing object and the artistic work, that the object was a reproduction of the artistic work. It requires no assumption that there was actual reproduction any more than it requires an assumption that there was not. In making that visual comparison, regard must be paid both to similarities and dissimilarities between object and artistic work to the extent that they would be apparent to the eye of the non-expert. In particular, "dissimilarities which are really there and which a non-expert would have recognized as dissimilarities" are, in my respectful view, not only relevant to be noted or enumerated but may well prove decisive.

It follows that the test prescribed by s. 71 of the Act involves no more than the notional visual comparison of object and artistic work by non-experts on the assumption that the object had been produced after the artistic work. If the conclusion is that it would not, as a result of such visual comparison, appear to non-experts that the object was a reproduction of the artistic work, there will be no infringement of copyright and, at least in an appellate court, it will ordinarily be unnecessary to resolve the question whether there had in fact been reproduction. The requirement of an appearance to non-experts of "reproduction" does not necessitate an

⁹⁷ [1979] R.P.C., at pp. 613-614, 616.

appearance of exact correspondence between the allegedly infringing copy and the original work. It will suffice that it would appear to non-experts that there has been reproduction of "a substantial part" (s. 14) in the sense of qualitative significance: cf. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*⁹⁸; *L.B. (Plastics) Ltd.*⁹⁹. The absence of any need for an appearance of exact correspondence between object and artistic work is, at least arguably, underlined by the references to "version" of the artistic work in s. 21(3) (see above).

I turn to consider the question whether, in the present case, the Edwards absorber panels would not appear to non-experts to be a reproduction of the whole or a substantial part of either of Hart's two engineering drawings. If one starts with the drawings alone, it is plain that, ignoring what is written upon them, there would be no likelihood that non-experts would even identify what it was that they depicted. They are not drawn to create a visual impression of the relevant parts of the Hart system. They are drawn to convey information about the engineering details of those parts or instructions and guidance about how to fabricate them. Examination of what is written upon and around the actual drawings provides some clues to the non-expert about the identity of their subject-matter. There is reference to "Reflective Foil", "Riser Pipe", "Absorber Plate", "Backing Insulation", "FLOW CONNECTION ABSORBER TO CYLINDER" and "RETURN CONNECTION ABSORBER TO CYLINDER". More directly informative are the descriptions which the drawings bear: drawing No. B310/29 bears the description "20 SQU FT — 300 LITRE STANDARD SOLAR PANEL" while drawing No. B310/30 bears the description "S W HART STANDARD 20 SQU FT ABSORBER". I am prepared to assume that the reasonably intelligent non-expert would identify the subject of the drawings as the absorber panels (and associated and incorporated parts) of a solar hot water system.

Even after general identification of the subject-matter however, the drawings are, of themselves, inadequate to convey any real visual picture of an absorber panel fabricated to accord with the written and illustrated specifications. They lack colour, perspective and real substance. Common lay knowledge and some familiarity with technical drawings may suffice

⁹⁸ [1964] 1 W.L.R., at pp. 276-277, 283, 288, 293; [1964] 1 All E.R., at pp. 469, 473, 477, 481.

⁹⁹ [1979] R.P.C., at p. 622.

to enable the non-expert to clothe the pipe-like skeleton of the engineering drawing with the appearance of the customary regular-shaped black panel with parallel vertical ridges which is a not unusual sight on roofs of dwelling-houses in this country. Neither of the engineering drawings would enable him or her to do much more. Nor do the illustrations of particular sections or connexions constitute or convey any clear visual representation of the object or objects depicted. One can point to arguable support for the view that the failure of the engineering drawings to convey to the ordinary person a clear picture of what a three-dimensional fabrication would look like is itself sufficient to make good the defence based on s. 71: cf. *Merchant-Adventurers Ltd. v. Grew*¹⁰⁰. As has been mentioned however, the notional non-experts are to be presumed to have the opportunity of direct visual comparison of the artistic work with the allegedly infringing object. It is conceivable that such direct comparison might disclose apparent reproduction even though the artistic work was, of itself, inadequate to convey a clear picture of a three-dimensional fabrication. That being so, one must consider the likely effect of a reasonably careful visual comparison by non-experts of the two Edwards absorber panels (with associated parts) and the two engineering drawings.

The conclusion to which I have come is that, if non-experts were furnished with the drawings and the Edwards absorber panels and, having been told that the drawings pre-dated the panels, were asked whether or not it appeared to them that the panels or any particular part or parts of them were a reproduction of the whole or of a substantial part of the drawings or either of them, the overwhelming likelihood is that they would point out that they were not experts in technical drawings or solar heating systems and answer that they were unable to form a view about what, if any, was the relationship between the panels and what was depicted by the drawings let alone whether the one was a reproduction of the other. That conclusion is sufficient to make good the defence under s. 71. It means that it would not appear to non-experts that the panels were a substantial reproduction of the drawings or either of them. If the notional non-experts were initiated into the mysteries of the copyright lawyer's distinction between an object or idea and the visual representation or expression of it by an artistic work, they would be but more emphatic in their rejection of any appearance to them of reproduction. They might even point out that the Edwards absorber panels did not look anything like the pipe-like skeleton in the

¹⁰⁰ [1972] Ch., at p. 255.

drawings and that, if the Edwards panels had in fact been fabricated by reference to the drawings, the drawings and written material could be equated with the specifications and illustrations of an engineer's instruction sheet which had been followed as distinct from reproduced: cf. *Cuisenaire v. Reed*¹⁰¹; *Merlet v. Mothercare P.L.C.*¹⁰². Either way, the point would be made that, for the purposes of s. 71, the absorber panels would not appear to non-experts to be a reproduction of the artistic work (i.e. the actual engineering drawings) in which copyright subsisted.

Much of the argument (on the s. 71 defence) on the hearing of the appeal was concerned with the effect of comparison between actual (Ex. 6) or hypothetical Hart absorber panels manufactured to accord with the illustrations and specifications of the two engineering drawings and the Edwards panels. In the circumstances of the present case, such comparisons are, in my view, likely to confuse rather than assist. The copyright which is alleged to be infringed is the copyright in the engineering drawings themselves and not some asserted copyright in the objects which experts might envisage or manufacture from a careful study of them. In deference to the careful argument of counsel however, I would add that even if it could be assumed that, contrary to my own view, examination of what is drawn and written on the two engineering drawings would suffice to create in the mind of ordinary non-experts a visual picture of the actual Hart panels corresponding to Ex. 6, I would nonetheless be of the view that it would not appear to non-experts that the Edwards absorber panels were a reproduction of that envisaged object. It seems to me that, once they progressed beyond the starting point that the absorbers of solar hot water systems are, customarily and functionally, regular-shaped black panels with parallel vertical ridges, non-experts would, on a careful comparison between the Edwards and Hart panels, be likely to be as much struck by differences as by similarities. There are observable differences between the two panels with respect to (among other things): the shape (proportion of width to depth); the dimensions; the spacing between riser tubes; the length of riser and header tubes; the housing of the glass cover; the top edge to the sides of the panels; the presence of side insulation; the connexion between absorber casing and header (nuts, casing and rubber pad inside opening); the presence of dimples in header pipes at

¹⁰¹ [1963] V.R., at pp. 734-736.

¹⁰² [1984] F.S.R. 358, at p. 371.

connexion with riser pipes; the presence of a copper bend and nut for connexion of top header with storage cylinder pipe, and the presence of the distinctive Hart "gull-wing" vertical edges. It is, however, unnecessary to pursue the matter since, as has been said, the requisite comparison is a visual one of the Edwards panels with the actual drawings which constitute the artistic work and not with some notional three-dimensional object which an expert might visually or actually construct by studying the information which the drawings convey. As I have already indicated, it would not, in my view, appear to non-experts as a result of any visual comparison between Hart's two engineering drawings (as elucidated by what is written upon them) and the Edwards absorber panels that the latter were a reproduction of the whole or of a substantial part of either or both of the engineering drawings.

In the result, I am of the opinion that the defence under s. 71 of the Act was made good in respect of the alleged infringement of copyright in each of Hart's two engineering drawings. It follows that I am of the view that the appeal should be dismissed with costs. It is unnecessary to examine the question whether Edwards had, by fabricating its absorber panels and associated parts, in fact reproduced both or either of Hart's engineering drawings.