

PARTIES: DARWIN FIBREGLASS PTY LTD

v

KRUHSE ENTERPRISES PTY LTD  
trading as VIKING SWIMMING  
POOLS AND SPAS

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: CIVIL, exercising Federal Jurisdiction

FILE NO: 131 of 1997 (9714282)

DELIVERED: 10 July 1998

HEARING DATES: 4 June 1998

JUDGMENT OF: MILDREN J

### CATCHWORDS:

Intellectual property – copyright – preliminary question – infringement – no single test to determine meaning of “building” – plug or mould of a swimming pool is a model of a building – a swimming pool is a building – all are protected by copyright as a protected original form

Intellectual property – copyright – meaning of “structure” – no requirement for human or living species habitation – requirement of permanence need not be a fixture – need not be built up *in situ* – no prerequisite of architectural plans or drawings – swimming pool once permanently affixed to ground and connected to filtration pipes is structure – mould or plug of a swimming pool is not a structure.

Intellectual property – copyright – “meaning of article of manufacture” – “design” applies to article – model of work or artistic craftsmanship is “article” – does not prevent copyright existing.

Intellectual property – copyright – meaning of “model” – 2 relevant primary meanings – mould of a substantial portion of a work should be included within meaning of “model of a building”.

### Legislation

*Supreme Court Rules* – r47.04

*Copyright Act 1968(Cth)* – s77(1)(a); s77(2); s32; s32(3)(a); s32; s36(1); s10; s10(1); s116(1); s23; s23(1); s23(2); s23(3)

*Copyright, Designs and Patents Act 1988(UK)*

### Texts:

1) *Copinger and Stone James on Copyright*, Thirteenth Ed., Sweet and Maxwell, 1991, London

Cases:

- 1) *Meikle and Others v Maufe and Others* [1941] 3All ER 144 applied
- 2) *Kevlacat Pty Ltd v Trailcraft Marine Pty Ltd and Others* (1987) 79 ALR 534 at 543 referred
- 3) *Reg v Rose and Another* [1965] QWN 42 discussed
- 4) *Half Court Tennis Pty Ltd and Others v Seymour and Another* (1980) 53 FLR 240 referred

**REPRESENTATION:**

*Counsel:*

Plaintiff:	A Wyvill
Defendant:	W Houghton QC, with G Schoft

*Solicitors:*

Plaintiff:	Noonans
Defendant:	Morgan Buckley

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

No. 131 of 1997  
(9714282)

BETWEEN:

**DARWIN FIBREGLASS PTY LTD**  
Plaintiff

AND:

**KRUHSE ENTERPRISES PTY LTD**  
trading as **VIKING SWIMMING**  
**POOLS AND SPAS**  
Defendant

CORAM: MILDREN J

## REASONS FOR JUDGMENT

(Delivered 10 July 1998)

MILDREN J:

### **Introduction**

The plaintiff and the defendant have at all material times been engaged in the business of the manufacture and sale of pre-cast fibreglass pools in Darwin in competition with one another.

The plaintiff claims to have been at all material times the owner of the copyright in a plug and mould used for the manufacture of pre-cast fibreglass swimming pools, and of the copyright in the pools to be made therefrom. It alleges that, in 1997, the defendant breached the plaintiff's copyright and it has brought this action in order to enforce its alleged rights. The defendant denies that the plaintiff has the rights it asserts, and it puts this denial on a number of differing bases, one of which challenges whether the plaintiff's work is capable of being the subject of protection under the *Copyright Act 1968* (Cth).

By consent of the parties I ordered that the following issues be tried as separate questions before the trial of this matter pursuant to r 47.04 of the *Supreme Court Rules*:

- 1a. Are any of:
  - (i) the plug (as defined in paragraph 3 of the statement of claim);
  - (ii) the plaintiff's mould (as defined in paragraph 4(a) of the statement of claim);
  - (iii) the pool (as defined in paragraph 6(a) of the statement of claim and as depicted in the photographs identified in paragraph 27 of the affidavit of Tam Van Bui sworn 19 June 1997);a "building or a model of a building" within the meaning of section 77(1)(a) of the *Copyright Act 1968* (as amended) (Cth)?
- 1b. If the plug, mould or pool are not buildings within the meaning of the *Copyright Act*, has the plaintiff:
  - (i) applied a design corresponding to the pool, mould and/or plug industrially in Australia, and

(ii) sold or exposed for sale pools which the corresponding design has been applied within Australia,

so that by reason of the operation of section 77(2) of the *Copyright Act* there has been no infringement of the copyright (if any) of the plaintiff.

## **The Facts**

Certain facts contained in affidavits sworn on behalf of the parties were not disputed for the purposes of this hearing, which I will now summarise.

In about October 1996 Mr Bui, a director of the plaintiff, purchased a pre-cast fibreglass pool from a firm in Queensland and arranged for this pool to be transported to the plaintiff's premises in Darwin. Mr Bui intended to use this pool to construct a new pool to his own design. The first stage was to develop the pool into a "plug". To do this he cut various parts of the pool to make it deeper and made certain alterations to the coping, steps and seats. He removed existing handrails and added structural reinforcing, a redesigned skimmer box and redesigned lifting lugs. A number of panels of a non-skid (textured) surface was glued onto the pool at various places. The whole "plug" was then levelled and reinforced so as to be incapable of movement. The internal surfaces were then finished to give it a high polish. This process completed the plug. The purpose of the plug is that it is used to create a mould which in turn is used to make pools. The mould, when created, is a mirror image of the internal surfaces of the plug.

The mould was made by the plaintiff by coating the internal surfaces of the plug with a number of coats of wax, and then applying a tooling gel-coat to

the internal surfaces of the plug. Thereafter epoxy-modified resin was applied to the surfaces of the plug until a thickness of about 15 mm was obtained. Reinforcing was then built onto the internal exposed surfaces to make the mould rigid. After curing for about ten days, a two axle trailer was placed upside down onto the mould and secured to it. The external reinforcing to the plug was then removed and the trailer, plug and mould, which at this stage weighed in excess of five tonne , was turned over using a crane. The plug was then removed, (and in this process it was destroyed). After repairing the resin surface of the mould by a process of cutting and polishing, release wax was applied to the mould and allowed to cure. This completed the creation of the mould.

Pools are made by the plaintiff by spraying over the outside surfaces of the mould and building up the surfaces of the pool by spraying layers of fibreglass onto the mould, to which there is added reinforcing. The pool, when finished, is released from the mould using a crane.

A hole is dug on the site where the pool is to be located reflecting the size of the pool which is transported thereto and lowered into the hole by crane where it rests on compacted sand previously spread at the bottom of the hole. Using various techniques, the pool is made to fit snugly into the hole in a bed of surrounding compacted sand. As part of this installation, the plaintiff installs a pump, filter, skimmer box and “return arrangements” including all necessary underground pipework. Thereafter the pool is tested and handed

over to the owner who usually engages other contractors to install paving or concrete around the pool.

Once in position, a pool of this type does not need to be removed, and usually remains permanently in *situ*. It is possible to remove such a pool without destroying it and to reinstall it on another site. In order to remove it, it is necessary to remove any concrete or other surrounds using suitable equipment such as a jackhammer, to disconnect any piping and to lift the pool from the ground onto a suitable vehicle using a crane.

The precise dimensions and weight of the plug, mould or a pool made by the plaintiff from this mould is not in evidence. It is not disputed that the plug, mould and pool are large and heavy objects.

For the purposes of this hearing, the defendant accepts that the plug was an original work, although this will be in issue should this matter proceed to trial.

Mr Kruhse, in his affidavit sworn on behalf of the defendant, takes issue with some of the methods used by the plaintiff in making the plug, mould and pools, but it is conceded that nothing turns on this for the purposes of this hearing.

### **The Submissions of the Parties on the First Question**

Senior Counsel for the defendant, Mr Houghton QC submitted as follows:

1. The mould and the pools cannot be the subject of copyright because they are not in themselves original artistic works, but are merely unoriginal adaptations of the plug.
2. There is no copyright in the plug, mould or pool because they are not “buildings”.
3. To the extent that the plug or mould could be said to be a model of a building, (assuming the pool is a building) there is a lacuna in the *Copyright Act* in that s32(3)(a) does not protect a model of a building.

Counsel for the plaintiff submitted:

1. The plug, mould and pool are all “buildings”.
2. Alternatively the plug and mould are models of a building and the pool is a building.
3. s32 should be construed so as to afford protection to a model of a building.

### **The First Question**

S32 of the *Copyright Act* provides:

### **Original works in which copyright subsists**

**32. (1)** Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author:

- (a) was a qualified person at the time when the work was made;  
or
- (b) if the making of the work extended over a period-was a qualified person for a substantial part of that period.

**(2)** Subject to this Act, ,where an original literary, dramatic, musical or artistic work has been published:

- (a) copyright subsists in the work; or
- (b) if copyright in the work subsisted immediately before its first publication-copyright continues to subsist in the work;

if, but only if:

- (c) the first publication of the work took place in Australia;
- (d) the author of the work was a qualified person at the time when the work was first published;  
or
- (e) the author died before that time but was a qualified person immediately before his or her death.

**(3)** Notwithstanding the last preceding subsection but subject to the remaining provisions of this Act, copyright subsists in:

- (a) an original artistic work that is a building situated in Australia;  
or
- (b) an original artistic work that is attached to, or forms part of, such a building.

**(4)** In this section, “**qualified person**” means an Australian citizen, an Australian protected person or a person resident in Australia.

Given Mr Houghton QC’s concession that the plug is an original work, the plug could be subject to copyright if it is an “artistic work”. That

expression is defined by s10 to mean, *inter alia*, “a building or a model of a building, whether the building or model is of artistic quality or not”.

It may seem strange that the parties wish to debate whether the plug is subject to copyright given that it has been destroyed, and what is alleged by the plaintiff is that the defendant manufactured a mould from one of the plaintiff’s pools (rather than from the plug or mould) from which the defendant made or intended to make a pool or pools. However, if copyright existed in the plug, destruction of the plug does not prevent the plaintiff from claiming a breach of copyright: *Kevlacat Pty Ltd v Trailcraft Marine Pty Ltd and Others* (1987) 79 ALR 534 at 543. The plaintiff pleads that the defendant’s mould reproduced in a material form the plaintiff’s pool, mould, or plug and further was a “plate” of the pool within the meaning of the Act. Pursuant to s31(1)(b), copyright is, *inter alia*, in the case of an artistic work, the exclusive right to reproduce the work in a material form. Pursuant to s36(1) the copyright in an artistic work is infringed if a person unlawfully does or authorises the doing in Australia of any act comprised in the copyright. S116 (1) of the Act entitles the owner of copyright in a work in respect of any infringing copy or of any plate intended to be used to make infringing copies, to certain rights and remedies as if he had been the owner of the copy or the plate at the time it was made. “Plate” is defined by s10 to include a mould.

The right to reproduce a work in a “material form” includes “any form (whether visible or not) of storage from which the work or adaptation, or a

substantial part of the work or adaptation, can be reproduced.”: s10(1).

“Work” is defined to mean “artistic work”.

Copyright can exist in a building in addition to that subsisting in any plan or drawing of the building. These are two independent copyrights, and the subsistence of one is not dependent upon the subsistence of the other: *Meikle and Others v Maufe and Others* [1941] 3 All ER 144. In this case it is not asserted that there are any plans or drawings of the plug, mould or swimming pool.

I do not accept that there is a lacuna in s23 in relation to models of buildings. Whilst it is true that s23(3) applies only to buildings, models of buildings are protected either by s23(1) if they are “unpublished” or by s23(2) if they are “published”.

I note that it is not pleaded or suggested by either party that the plug or the mould is a sculpture or engraving: *c.f. Kevlacat Pty Ltd v Trailcraft Marine Pty Ltd, supra*, at 544 and authorities therein referred to.

As to what is a “building”, s10 provides that “building includes a structure of any kind”. “Structure” is not defined. It is plain that the ordinary meaning of the word “building” includes structures, but not all structures (in the ordinary meaning of that word) are buildings. The addition of the words “includes a structure of any kind” in the definition of “building” was clearly intended to broaden the concept of what is a building, to include structures

which would not ordinarily be buildings; the words are not mere surplusage: c.f. *Reg v Rose and Another* [1965] QWN 42 at 43 per Gibbs J. *Copinger and Stone James on Copyright* Thirteenth Ed, Sweet & Maxwell, 1991, London, at p31 observes (in reference to a similar definition in the *Copyright, Designs and Patents Act 1988* (UK)):

A work of architecture is defined by the 1988 Act as being a building or a model for a building, and “building” is defined by such Act as including any fixed structure, and a part of a building or fixed structure. Apart from this statutory definition, no general definition of “building” can be given, although it has been said that, prima facie, a “building” means “a block of brick or stone work covered in by a roof.” The term must be construed reasonably, having regard to the object of the statute. Upon this principle, it is thought that the building or structure must be of such a character as is usually erected upon, or constructed under, the ground and that in each case it involves something of substance, with an element of permanence. If a building or structure has these characteristics, then it will be entitled to protection, not only as a whole, but in individual architectural features, including internal features of design. On this basis a chimney-piece might, it is thought, be entitled to copyright. It has been held that a garden, consisting of a layout including steps, walls, ponds and other structures in stone, was capable of protection as “a structure”.

However, the *Copyright, Designs and Patents Act 1988* definition of “building” includes only “fixed” structures, and to this extent is narrower than the Australian definition. In Australia, a half-tennis court was held by Dunn J to be a “building”, but there is no discussion in the case of the relevant criteria: *Half Court Tennis Pty Ltd and Others v Seymour and Another* (1980) 53 FLR 240 at 247-248.

Dictionary definitions suggest that a structure is “something built or constructed; a building, bridge, dam, framework etc” (*Macquarie Dictionary*, Third Edn., Delbridge *et al*, *The Macquarie Library*.); “a thing which is built or constructed; a building, and edifice. More widely any framework or fabric of assembled material parts.” (*The New Shorter Oxford English Dictionary*, Lesley Brow, Clarendon Press, 1993, Oxford).

I consider that, in interpreting what is meant by the word “structure”, the correct approach is to have regard to the object and purposes of the Act as a whole, the context within the Act in which it is used, and the history of the legislation. Buildings and models of buildings were first given protection as “architectural works of art” in the *Copyright Act* 1911. Under that Act, some artistic quality was required, but this is no longer a requirement because, under the Berne Convention, it is a requirement that all works of architecture be protected: see Ricketson, *The Law of Intellectual Property*, Law Book Company, 1984, Sydney, p124. Nevertheless even before 1968, the courts interpreted the necessary “artistic character and design” requirement “in a fairly liberal way” (Ricketson, *ibid*). As previously stated, copyright exists not only in the plans of a building, but separately and independently in the building itself (as well as in models thereof).

I was referred to a number of authorities which discuss what is a structure, in the context of other legislation. I do not think assistance is gained from considering these authorities, as the word must take its meaning

from the purpose and context of the relevant Act in which it is to be found. For example, in *Reg v Rose, supra*, it was held that a caravan was a structure within the meaning of “building or structure” in s1 of the *Criminal Code* (where the words were included in the definition of “dwelling house”), so that Gibbs J accepted a plea of guilty by the defendant, who broke into a caravan used as a residence, to a charge of breaking and entering a dwelling house. I do not consider that a caravan, which is obviously not intended to remain permanently in one place, is a structure for the purposes of the *Copyright Act*. In the context of the *Copyright Act*, there is no requirement that the building or structure be occupied for human habitation, or that it is even occupied by living species at all, as it obviously includes bridges and dams, which are not inhabited. At least some structures designed for the keeping of animals, produce, plants or fish such as stables, silos, greenhouses or fish ponds would be included. Thus, there is no necessity for a structure to have steps, doors, a roof, or windows. In the case of dams, or large storage tanks, these could well be structures even though they are designed to store water or fuel. I think that the word ‘structure’ implies something which is of some substance, and is usually erected upon or constructed upon or in the ground with an element of permanence, although it need not be a fixture, so that *prima facie*, a prefabricated building which is designed to be removed may be a structure, and may still remain a structure even though it is in the process of being removed or is left temporarily unattached to the soil. I do not see why buildings, and therefore structures, need be built from concrete or stone; surely the form of building material used is not important, so long as the building or structure is a thing of some permanence. It flows from this that it

is not necessary that the building or structure be built up from the ground *in situ*. Modern materials and methods of construction include buildings which are prefabricated off site; nevertheless I do not see why such buildings are not “buildings” in the ordinary sense of the word, if the intention is that the building when delivered on site will become permanently, or relatively permanently, fixed to the ground. I do not accept Mr Houghton QC’s submission that the Act contemplates only structures which are built from architectural plans or drawings, although it is clear that the Act does contemplate that buildings or structures *may* be built from such plans or drawings: see s73 (2) and s217.

In the case of buildings and models thereof, the construction of a building, or model does not amount to publication of the work (s29(3)) and s77 does not apply to buildings or models of buildings. Mr Houghton QC submitted that these provisions suggest that objects the corresponding designs of which are *prima facie* capable of protection under the *Designs Act* are not ‘buildings or models of buildings’, as copyright protection continues to subsist in buildings and models of buildings notwithstanding the evident policy of the Act to exclude copyright protection (whether or not the corresponding design is registrable under the *Designs Act*) once the corresponding design has been applied industrially to an artistic work by the owner of the copyright or with his licence. It is not difficult to suppose that the corresponding design of a structure could have sufficient appeal to the eye to be registrable as a design, but only features applicable to “articles” are capable of being “designs” under the *Designs Act*: see s17, and the definition of “design” in s4. “Article” is

defined to mean “any article of manufacture” (s4). The expression “article of manufacture” is not defined. In *Shacklady v Atkins and Another* (1994) 126 ALR 707, at 718 Davies J said:

Section 4(1) of the Designs Act defines the term to mean “any article of manufacture”. Both words have a wide denotation. The term “article” is one of the widest words there is. In the context it refers to a thing of manufacture.

In *Re Concrete Ltd's Application* (1939) 57 RPC 121, Morton J held that the article to which the design is to be applied “must be something which is to be delivered to the purchaser as a finished article”. Thus a fixed building structure (a concrete air-raid shelter) was not an article, but a portable structure could be an article. His Honour did not decide that a building or structure could never be an article.

In *Tefex Pty. Ltd. v Bowler and Another* (1981) 40 ALR 326, Rath J held that the plaintiff's fibreglass swimming pools which were sold either as fibreglass units or in kit form, but were not installed by the plaintiff, were “articles”. In *Re Christopher Russel John Hansly* (1988) AIPC 90-465, the Assistant Registrar of Designs, Mr J. L. Roveta, held that the design of a building which was intended to be a fixed and not a portable structure, was not an article.

The problem with this line of reasoning is that s77(1)(a) not only excludes buildings, but models of buildings, and works of artistic craftsmanship. It is hard to see why a model or a work of artistic

craftsmanship is not an ‘article’, as usually a model or such a work is perfectly capable of being easily moved. I therefore do not accept this argument.

In my opinion having regard to the evident policy of the *Copyright Act* to which I have referred, all that can safely be said is that there is no single test for what is or is not a “building” although there are a number of factors which are relevant including size, the evident proposed use of the object to an independent observer, whether or not the object is evidently fixed to or under the ground, or whether it is evidently intended to be portable, and the degree of permanence in location which it apparently has including the likely life-span of the object.

In my opinion neither the plug nor the mould is a “building”. Although large objects, there is little else to commend them as structures. The “plug” is designed to be destroyed in the process of making the mould. Neither it nor the mould is intended to be placed on or in the ground with any degree of permanency. On the other hand the plaintiff’s swimming pools are not complete until placed into the hole in the ground, compacted into position with sand, and fixed to underground pipes which are in turn fixed to the filtration system and pumps. The photographs show that these pools are large objects – certainly as large as some small buildings. There is no evidence of this, but I think I can take judicial knowledge of the fact that fibreglass has a relatively long life. It is commonly used to build large boats as well as inground swimming pools and although it may require more maintenance than stone or concrete it was not suggested that fibreglass was not an enduring material if

properly maintained. In my opinion, such a swimming pool is a structure, notwithstanding that it is largely manufactured off-site, and it is capable of being removed. In my opinion the evident intention is that it is intended to be relatively permanently located in the same position for many years, and it is sufficiently large to be substantial enough to be described as a structure. The decision in *Tefex Pty. Ltd. v Bowler and Another, supra*, is distinguishable because the owner of the design in that case did not install the pools, but sold them in kit form without ancillary equipment. In any event, Rath J did not find that the pools in question were not buildings.

If such a pool is a building, this leaves open the possibility that the plug and the mould are “models of a building”. There is no definition in the Act of what is a “model of a building” and counsel were unable to refer me to any authorities on the topic. The *Shorter Oxford English Dictionary* defines “model” as including “a representation in three dimensions of some projected or existing structure, or of some material object, showing the proportions and arrangements of its parts.”; “a mould; something that envelops closely.” The *Macquarie Dictionary* (1981) refers to “a representation, generally in miniature, to show the construction or serve as a copy of something”; “an image in clay, wax or the like to be reproduced in more durable material.” In New Zealand, it has been held to include a prototype made from the same fabric as the finished article: *BONZ Group (Pty) Ltd v Cooke* (1994) 3 NZLR 216 at 221. The *Copyright Act*, s10, includes a “mould” within the definition of “plate”, and the definition of “sculpture” includes “a cast or model made for the purposes of sculpture”.

I think the word “model” has two relevant primary meanings. First, it obviously includes a representation of some structure already built or to be built showing its proportions, shape, design and the arrangement of its parts. In this sense, the model is demonstrative only of what is made or intended to be made. Secondly, it may include a three-dimensional image which is a copy of an object or which is to be copied to make the actual object itself, and so would include a mould. The question is whether in the expression “model of a building” the word is used only in the first sense or in both senses.

Looked at broadly, the object of copyright is to protect original forms in which ideas are expressed, but not the ideas themselves. Consequently, s31(1) confers the exclusive right in the owner of the copyright to reproduce the work in a “material form”, which, as previously noted, includes “any form...of storage from which the work; or a substantial part of the work can be reproduced.” It seems obvious that the plug and the mould stores the form or a substantial part of the form of the pool in a three dimensional way, from which it would be relatively easy to copy the form of the ideas therein expressed. With the advance of new technologies, it is now possible, as this case demonstrates, for quite large structures to be built from a mould, and it is not difficult to see how the form of an idea could be copied therefrom. The same applies to models of buildings in the first sense discussed above. Models, even small ones, store the forms of the structures they are intended to represent. Looked at in this broad way, I consider that it would enhance the

objects of the Act to include a mould of a substantial portion of the work within the meaning of “model of a building”.

It therefore follows that if the plug is protected, so is the mould, as only the owner of the copyright in the plug can reproduce it in a material form, and in my opinion it does not matter that the mould is a reverse image of the plug.

As to the argument that the pool and the mould are mere copies of the plug, and therefore lack originality, this was referred to by French J in *Kevlacat v Trailcraft, supra*, at 543, with reference to a number of authorities there cited, where his Honour observed, (in relation to a prototype and mould produced from sketches) that in that event the relevant copyright existed in the sketches. However, the position with buildings is quite different from other works, in that copyright exists independently in both the plans and the building; see *Meikle v Maufe, supra*, at 147-148. Likewise, I see no logical reason why there cannot be copyright in a model of a building, as well as in the building itself. In *Meikle v Maufe*, Uthwatt J said at p147:

It was contended on behalf of the defendants that there could not be a separate copyright in a building as distinct from a copyright in the plans on which the building was based, and that, if there were a separate copyright in the building, the copyright was in the builder. In the present case, neither of these contentions is material, except in so far as the correctness of either of them may affect the quantum of damages. Upon the first contention, it is argued that the originality lies in the plan, and that, therefore, there can be none in the building which reproduces the plans. Upon the second contention, it is said that, wherever originality may lie, the author, for copyright purposes, is the builder who has built the building, and not the architect responsible for the plans.

In my opinion, neither contention is well-founded. As regards these contentions, an architectural plan finds its meaning and purpose in the use to which it is put. The point of the architect's activities is not the making of plans as such, but the embodiment in the building of artistic and other ideas which he has in mind and which are contained in his plan. The plan is a means to an end, and not an end in itself. To deny originality to the artistic design embodied in a building by attributing originality only to the plans which led to the building would be to give reality to the shadow and refuse it to the substance.

Similarly, the purpose of the plug is to make the mould, from which the pool is largely constructed, and is but a means to an end, and to deny originality to the pool as a structure by attributing originality only to the plug which led to it would "give reality to the shadow and refuse it to the substance." In any event, even if copyright existed only in the plug, it is no answer, in my opinion, that a copy taken from the pool did not infringe the copyright in the plug, as only the owner of the copyright in the plug is entitled to reproduce it in a material form.

### **The Second Question**

This question is predicated upon the plug, mould or pool not being "buildings". But buildings, as well as models of buildings, are excepted from the operation of s77(1): see s77(1)(a). Consequently s77(2) does not apply, and there is no defence open based thereon, regardless of whether or not the mould is protected, and even if copyright vested only in the plug and the pool.

### **Conclusions**

The questions are therefore answered:

- 1a. (i) Yes – it is a model of a building  
(ii) Yes – it is a model of a building.  
(iii) Yes – it is a building.
- 1b. No.

The question of costs is adjourned until final judgment in this matter.