

THE HIGH COURT

[2004 No. 4239 P]

BETWEEN

TIMOTHY CREMIN AND OXYVENT LIMITED

PLAINTIFFS

AND

ECOPLUS LIMITED, PHIL CAROLAN, HUMPHREY O'LEARY,

PAUL MURPHY AND DECLAN KEANE

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy delivered the 13th day of March 2012

1. Pleadings**1.1. Parties and Representation**

By summons issued on the 6th April, 2004, the plaintiffs claimed a declaration that Irish Patent No. 1 264 146 (the central heating patent) had been infringed by the defendants and/or any of them, injunctive relief, an order providing for the delivery up and destruction, an inquiry as to damages, damages and interest.

Mr. Cremin, the first named plaintiff, was a director of the second named plaintiff, (Oxyvent) and the patentee of the central heating patent which had been filed initially as an Irish application on the 11th May, 2000. A second priority application was filed on the 3rd April, 2001. The Patent Cooperation Treaty application was filed on the 11th May, 2001 which was published on the 15th November, 2001. Mr. Cremin represented himself

Oxyvent was incorporated on the 12th February, 2001, to carry on the business of exploiting the industrial property rights of Mr. Cremin under licence. There was no representation on behalf of Oxyvent.

The first defendant (Ecoplus) was formed on the 6th September, 2001, to carry on the business of the production and sale of equipment for use in heating systems. The directors of Ecoplus as of the 6th September, 2001, were Mr. O'Leary and Mr. Murphy, the third and fourth named defendants. Mr. Keane became a director on the 10th September, 2001.

A Companies Registration Office search from the 7th December, 2011 noted that Ecoplus had been designated as dissolved. Ecoplus had been struck off on the 12th December, 2010, for failure to file returns. The last annual return had been made on the 6th March, 2004. There was no application by any of the parties to reinstate Ecoplus to the Register nor was it represented at the hearing.

The second defendant (Mr. Carolan) was a shareholder in but not a director of Ecoplus. The third, fourth and fifth named defendants, (Mr. O'Leary, Mr. Murphy and Mr. Keane) were shareholders as well as being directors of Ecoplus. Mr. O'Leary was also listed as company secretary. Mr. Carolan purported to represent himself and Mr. O'Leary, who was present, but did not give evidence. Mr. Keane represented himself. There was no appearance by or on behalf of Mr. Paul Murphy.

Each of the parties had been represented in interlocutory proceedings by solicitor and counsel who had drafted the pleadings. There had been changes in representation but at the time of the hearing all solicitors had come off record. As already noted above, neither of the plaintiffs was represented by solicitor or counsel nor were any of the defendants so represented. Mr. Cremin and Oxyvent had been represented by a firm of solicitors from 2004 to 2006 and a second firm from 2006 to 2008.

The court explained the requirement that the second named plaintiff and the first named defendant, required separate representation, but was told that there were no funds available. In any event the first named defendant had been dissolved by the Companies Registration Office before the hearing of this action.

1.2 Claim

By statement of claim delivered on the 14th June 2005, it was pleaded that the defendants or one or other of them had infringed, and threatened and intended to continue to infringe, the central heating patent and further or in the alternative, it was alleged that the defendants received confidential information relating to an invention for use in heating systems which they knew, or had reason to believe, had been disclosed by Mr. Cremin in circumstances of confidentiality.

The particular circumstances arose in the context of discussions between the plaintiffs and Mr. Carolan and Mr. O'Leary on behalf of Winsoft Limited (Winsoft) which is not a party to the proceedings. Winsoft was incorporated on the 3rd December, 2002, it made its last annual return on the 3rd June, 2006. Having been struck off, it was dissolved on the 22nd February, 2008. Mr. Murphy and Mr. O'Leary were listed as directors and a Mr. John Paul Naughton and Mr. O'Leary was listed as company secretary.

It was pleaded that on 30th April 2001, Messrs Carolan and Mr. O'Leary offered to purchase Oxyvent and all patents then pending, subject to due diligence, for a lump sum payment of IRE500,000 with further remuneration thereafter. Mr. Cremin had indicated he was willing to accept that offer in principal. The due diligence process began on the 14th May, 2001, which was expected to be completed within a period of one month. Within that period, it is alleged that Mr. Cremin disclosed confidential information and technical drawings to a Mr. Karl Steinborn on behalf of and at the request of Mr. Carolan and Mr. O'Leary.

On or about the 15th May, 2001, Mr. Carolan requested that Mr. Cremin invite a Mr. Franz van Dommelen, an advisor to Winsoft, to attend a meeting on the 31st May, 2001, to discuss the method and logistics of the manufacture of Mr. Cremin's central heating system invention. The meeting was chaired by Mr. Carolan and attended by Mr. Cremin, Mr. Van Dommelen and Mr. O'Leary, Mr. Steinborn and others.

Neither Mr. Steinborn nor Mr. van Dommelen were called as witnesses.

It was pleaded that at that meeting the entirety of the confidential information that is particularised in the pleadings was disclosed by Mr. Cremin.

It was pleaded, that on the 2nd June 2001, Mr. Carolan attended at the home of Mr. Cremin with Mr. O'Leary and indicated verbally, despite the terms of the original offer made, that he would clear a debt of IRE70,000 of Mr. Cremin with a personal cheque and that "the rest would be paid when the technology was transferred by Mr. Carolan to the company to be established further to the proposed agreement". It was pleaded that, following this conversation, the offer of the 30th April, 2001 was not genuine.

On the 8th June, 2001, the offer made by Winsoft was formally withdrawn by a letter of that date from Hudson & Browne, solicitors for Winsoft.

It was pleaded that insofar as elements of the confidential information particularised were disclosed in the central heating patent, that these fell into the public domain on the date of the publication of the application on the 15th November, 2001.

It was also pleaded that the defendants owed an equitable and fiduciary duty to Mr. Cremin to use or disclose confidential information only for the purpose for which it was disclosed, that was to bring about the exploitation of the heating system invention in the context of an agreement between Mr. Cremin and Mr. Carolan and/or those to whom Mr. Carolan was understood to represent. The defendants acted in breach of their equitable and fiduciary duty by using the confidential information other than for the purposes for which it was disclosed and had thereby occasioned the plaintiffs damage and loss.

A further corporate body, Bodenhill Properties Ltd (Bodenhill) incorporated on the 5th February, 1999, appeared to be the intended purchaser of Oxyvent rather than Winsoft. Mr. O'Leary and Mr. Murphy were listed as directors of Bodenhill while Mr. O'Leary was also company secretary. Bodenhill made its last return on the 1st September, 2006, and was dissolved on the 7th November, 2008. It is not a party to the proceedings.

The particulars of breach of duty were that one or more the individual directors disclosed the confidential information to Ecoplus and to Bodenhill, of which Mr. O'Leary and Mr. Murphy were directors. It was alleged that Bodenhill used the information to make patent applications on the 21st January, 2002, the 6th November, 2002 and the 21st January, 2003 and to ultimately obtain the grant of an Irish patent registered under the No. S83184 "the heat exchange system patent", the grant of which was published in the Patent Office Journal on the 26th November, 2003, and made a further application for an international patent (WO 03060384) on the 21st January, 2003, which, at the date of the pleadings, was pending.

It was further alleged, *inter alia*, that Ecoplus and Mr. Murphy had used the confidential information in selling and offering for sale units of the Ecoplus pressure reduction tank (PRT) in the State and had used the confidential information of Mr. Cremin in creating a document entitled "Ecoplus PRT Installation Manual". It was further claimed that Mr. Cremin was the author of technical drawings which were infringed by Ecoplus, either by the copying a substantial part of the technical drawings, or by making adaptations of a substantial part and making available to the public copies and/or adaptations of the technical drawings, which, it was pleaded, infringed the copyright of Mr. Cremin.

1.3 Particulars

Particulars were given of joint liability and conspiracy. It was pleaded that Mr. Carolan, who had been described as chairman of Ecoplus signed the offer of the 30th April, 2001, on behalf of Winsoft.

In December 2002, Ecoplus published an information memorandum as part of a business expansion scheme which identified Mr. Keane, Mr. Murphy and Mr. O'Leary as directors. They were identified as the inventors/applicants on the heating exchange system patent granted to Bodenhill of which Mr. Murphy and Mr. O'Leary were directors.

Particulars of loss and damage were given in that sales, which would have been affected by Oxyvent had been diverted to Ecoplus. The plaintiffs pleaded that they had been deprived of their opportunity to exploit Mr. Cremin's monopoly rights and develop a new market without facing illicit competition. Furthermore, it was pleaded that the breach of confidence on the part of the defendants concerning the information prior to the 15th November, 2001, provided a springboard in the advancement of the business of Ecoplus after that date and thus served to occasion loss and damage to the plaintiffs.

A schedule of particulars of confidential information disclosed thirteen details including the physical design of a square tank utilised in the invention which had been manufactured in steel and which would increase the flow rate of water through the system and thus make it more efficient and bring about a fuel saving.

A schedule of original and copied works instances six drawings in the Oxyvent application which were infringed by drawings in the Ecoplus installation manual, after publication of the application for the (plaintiffs') patent on the 15th November 2001, and prior to the issue of proceedings.

The particulars stated that:-

(a) Ecoplus and Mr. Murphy or one or other of them ... offered and/or put on the market central heating reservoirs as claimed in claim 5 of the patent, and imported and stocked the said reservoirs for these purposes;

(b) Ecoplus offered to supply and/or supplied in the State a person, other than a party entitled to exploit the patent invention, with means, relating to an essential element of that invention, for putting central heating systems as claimed in Claims 1, 3 and 4 of the patent into effect in the State, when it was obvious that those means were suitable and intended for putting those central heating systems into effect.

Mr. Cremin relied on the contents of the installation manual distributed by Ecoplus in conjunction with units of the Ecoplus pressure reduction tank.

A notice for particulars raised by the 15th particular, raised by Mr. Keane, the fifth named defendant on the 8th December, 2005, asked for confirmation that no case was being made against him under the particulars of infringement or particulars of circumstances of confidentiality and disclosure.

The notice also asked for a listing of the patent applications that were the subject of breach of equitable and fiduciary duty of confidence and asked for a quantification of loss and damage.

Mr. Keane, having noted that there was no suggestion that confidential information was disclosed to him, asked for confirmation, that it was not being alleged that he received confidential information or was in breach of any equitable fiduciary duty. He required full particulars if it was so alleged.

His request for particulars of loss and damage in the notice for particulars was not answered.

While the plaintiff pleaded that they reserved the right to adduce further particulars, the evidence given by the Mr. Cremin did not particularise either loss or damage.

1.4 The Defence of Mr. Keane

The defence of the fifth, Mr. Keane, delivered the 13th December, 2005, denied that he carried out any of the acts of infringement or threatened or intended to infringe the central heating patent, that he received confidential information, that he owed an equitable or fiduciary duty to Mr. Cremin or acted in breach thereof by using confidential information not caused himself to be listed as an inventor in respect of the heating exchange system. If he was so listed, it was without his knowledge. He denied having authorised acts of copyright infringement or that he was liable as alleged or at all. Mr. Keane admitted that he became a director of Ecoplus on the 10th September, 2001.

He denied that the plaintiffs had suffered the alleged or any loss or damage and if they had, this was not caused by any infringement of patent, copyright or conspiracy on his part.

At the end of the plaintiffs evidence, an application was made by Mr. Keane for a direction that no case had been made out against him in the evidence given by or on behalf of the plaintiffs. The court, having considered the evidence of Mr. Cremin, Mr. Carolan and of Mr. Moore, his patent agent, acceded to the application and noted that Mr. Keane was not seeking his costs of defending the matter to that date or of the application.

1.5 Other Defendants' Defence

The defence of the remaining defendants, Ecoplus, Mr. Carolan, Mr. O'Leary and Mr. Murphy, was delivered the 10th December, 2007, three years after Mr. Keane's defence, and two and a half years after the statement of claim which had been delivered by the plaintiff.

The defendants accepted that Mr. Carolan was a shareholder and that the other defendants were directors of Ecoplus. The defendants made no admission in relation to the other paragraphs of the statement of claim, and denied that the alleged acts constituted a breach as alleged.

It was further denied that the plaintiffs or either of them, suffered loss damage, inconvenience and expense.

1.6 Further Pleadings

A notice of intention to proceed dated the 6th April, 2011 was served on the defendants.

A reply to the defence of the fifth named defendant was delivered on the 1st June, 2011, repeating the pleadings and stating that further details would be provided at the trial.

On the same date, a reply to the defence of the first, second, third and fourth named defendants also stated that details would be available at the trial and repeated the paragraphs of the statement of claim. A notice of trial was served on the 16th June, 2011. The matter was not heard until the 29th November, 2011. After six days of hearing the court reserved its decision on the 7th December, 2011.

2. The Plaintiff's Evidence

2.1 Mr. Cremin introduced the case and was reminded that he could not give evidence until sworn.

2.2 Mr. Moore's Evidence

The first witness was Mr. Barry Moore, Chartered Patent Attorney and partner of Hanna, Moore and Curly European Patent Agents who was formerly with Tomkins and Co. patent and trademark agents

Mr. Moore confirmed that he was looking after Mr Cremin's patent Register no. 1264146 entitled "Central Heating Patent" while he was with Tomkins and Co.

Mr. Cremin's original short term Irish applications were filed on 11th May 2000, in advance of the "convention priority year". Mr Cremin asked him to file the Patent Cooperation Treaty application which he did on 11th May 2001, at the European Patent Office.

In 2003 he left Tomkins and set up set up the firm of Hanna, Moore Curley and continued to work with Mr Cremin.

He had examined documents relating to Bodenhill 's applications.

He was referred to a letter dated 7th March 2003 from Tomkins to Gorman & Co., patent agents, referring to a potential patent infringement in relation to the 3rd, 4th and 5th defendants. He confirmed that he wrote that letter.

In his opinion, figure 2 on Mr. Cremin's patent was similar in function, operation and form to fig 21 on the defendants' patent. It was not a copy.

In figure 21 of the Bodenhill patent application there are two holes (94 and 97) at the top and the Cremin application has only one hole. The description of the operation of the inlets and the outlets and the flow are the same.

Mr Moore referred to paragraphs 21 and 22 of the patent application which read as follows:

"21. Referring to the drawings and initially to Fig. 1 there is shown a central heating system in accordance with the invention indicated generally by the reference numeral I. The system I has a boiler 2 connected to a coil inlet 3 of an indirect cylinder 4 on an outward circuit indicated generally at 5. The outward circuit 5 also has an expansion

tank 6. A return circuit indicated generally at 7 connects a coil outlet 8 to the boiler 2 through a pump 9 and a central heating system reservoir 10.

22. In more detail and referring now to Fig 2 the reservoir 10 has an inlet 11 for receiving water from the cylinder 4 and an outlet 12 for delivering water from the reservoir 10 to the pump 9. The reservoir 10 has two radiator flow tappings 14, 15 and two radiator return tappings 16, 17."

Mr Moore concluded that those elements while numbered differently are arranged in the same fashion in figure 2 of the Cremin patent. This appears to describe the same in operation as what is happening in figure 20 of the Bodenhill patent.

The schematic on fig 2 of the Cremin patent and the schematic at 21 of the Bodenhill Patent, describe two rectangular boxes; both have a circular hole on the top and at the sides. The schematics are not exact carbon copies in that the Bodenhill has an extra hole at 97 and they are numbered differently but other than that, the form and function are the same.

2.3 Cross Examination of Mr. Moore

Mr. Carolan, in cross examination referred to Mr. Moore's letter to Mr. Gorman of the 9th August, 2002, which raised the defendant's product, Ecoplus, in light of Mr. Cremin's patent application. It was a "cease and desist" letter.

Mr. Gorman in his response confirmed that he acted for Ecoplus and stated that the defendants' product was not infringing and made reference to s. 53 of the Patents Act, 1992 ("Remedy for groundless threats of infringement proceedings").

Mr. Moore explained that Mr. Cremin's PCT application had already been filed on 11th May 2001. On November 1st 2001, Mr. Moore had received an international search report with prior art cited against it. In June 2002, he contacted the international examiner who was the European Patent office examiner and he had agreed that there was patentable subject matter in the application. The application then entered the European regional phase from the PCT application in August 2002 and Mr Cremin succeeded in getting the European Patent on 16th April 2003.

Therefore, Mr Moore said, at the time of receipt of the in 2002, Mr Moore on behalf of Mr. Cremin had already had been in touch with the European examiner, and had an indication that there was a patentable subject matter. He awaited the end period of the international phase (31 months from the original priority date on 11th May 2000) to file a European Patent Application. It was to allow the filing of other international applications which was done in the U.S., Canada and Europe.

Mr Moore agreed that while the application on the 11th May, 2001, appeared to have coincidentally been in the middle of the due diligence, it was more importantly 12 months from the original priority application of 11th May, 2000. The Paris Convention sets a 12 month period from the first filing of an application to file subsequent applications. So as the first priority application had been filed on 11th May, 2000, Mr Cremin's application had until the statutory bar date of the 11th May 2001 to file the PCT application. Mr Moore said that the PCT is usually filed towards the end of the priority convention year to allow the applicant full development time, in order to ascertain if any additional research material is to be included. On 3rd April 2001, a second Irish application had been filed, and on 11th May 2001 a PCT application was filed claiming Convention priority of the first Irish application of the 11th May 2000 and the second Irish application of 3rd May 2001.

Two products were already patented and the third one lacked the necessary to go to patent.

He believed that Mr. Gorman, the defendant's patent agent, was in error because an application was filed and a patent had been granted by European Patent Office, and subsequently by the US Patents office.

The application of 11th May 2000 and the follow-up of May 2001 were both subsumed into the application of the 11th May 2001. They formed the basis of the subject matter of the application of May 2001. The claims were amended, as was completely conventional, in light of prior art. This was normal, in all patent prosecutions. As a result of the correspondence he had with the examiner, the claims were amended. They succeeded in getting European Patent in April 2003.

It was put to Mr. Moore that he had not replied to Mr. Gorman's letter of the 24th October, 2002.

He replied that that letter back of the 24th October 2002 simply advised that Mr. Gorman was acting on behalf of Ecoplus Limited, and that he had considered the application and advised Mr. Carolan that it did not infringe. That was Mr. Gorman conclusion. It was not his policy to infringe patents.

It was put to Mr Moore that Mr Cremin had attempted to sell three patents in May 2001 to the defendants. Mr Carolan said that the correspondence had clearly referred to 3 patents, which Mr Cremin did not have.

Mr Moore clarified that in May 2001, Mr Cremin had three patent *applications*, an Irish application filed 11th May 2000, a follow on application filed on 3rd April 2001 and the PCT application filed on 11th May 2001 so three individual patent applications did exist. They were the three applications, not patents. People often refer to applications as patents, and *vice versa*, he said.

Mr. Gorman's letter of the 5th October, 2011 to Winsoft Ltd. referred to PCT/IE/00/00115 patent applications as PCT/IE00/00115, W001 /23810 and the corresponding Irish Short term patent S 81843.

Mr. Moore agreed that there had been another second international application numbered W001/23810 that Mr Cremin had at the time. He had heard it being referred to in Court proceedings earlier on, as an earlier attempt to provide a tank which cost 3,000 Euro or Pounds. This application had subsequently been withdrawn because it was did not work.

The application, the subject of these proceedings was not published until 15th November 2001, so any searches done by Mr Gorman around October 2001 would not have uncovered the application at issue because it was not yet published. The front page of the international application has an international publication date of 15th November 2001, so if Mr Gorman actually searched around October 2001, he may well have found W001/23810, but that is not the application the subject matter of the proceedings. Mr Moore agreed that Gorman's was a reputable office.

The applicant the subject matter of these proceedings was international application W001/86212. The application claims the benefit of convention priority 11th May 2000 and 3rd April 2001, and that application was filed on 11th May 2001.

The original application was filed on 11th May 2000. The search report which he believed Mr Gorman conducted appears to be a

search on the international application was not what was discussed at hearing.

He was aware that Mr Cremin had W001/23810 which had been published by 5th October 2001. It never proceeded to grant because Mr Cremin did not spend any more money on it. Instead he went ahead with the second application. So though there were references to prior art, John Baker, R&D, etc he did not believe they were relevant to the patent question, because it was a different patent application.

Mr. Moore said that the European patent that was granted had two claims, which were no.s 1 and 5 which were particularly of relevance.

Claim One states:

"A central heating system of the type having a boiler (2), a cylinder (4), a pump (9) and a central heating reservoir (10) characterised in that the reservoir (10) is an in-line reservoir located only on the return circuit from the cylinder to the boiler and has a liquid inlet (11) in the top of the reservoir offset from an associated liquid outlet (12) such that liquid passing through (sic) the inlet from the cylinder to the reservoir enters downwardly into the reservoir, and that the reservoir further includes a plurality of flow (14,15) and return tapplings (16,17) for a series of radiator circuits, the flow tapplings being provided in an upper region of the reservoir and the return tapplings (16,17) in a lower region of the reservoir at substantially the same height within the reservoir as the liquid outlet (12)."

Claim Five states:

"A central heating reservoir (10) for use in a central heating system of the type having a boiler (2), a cylinder (4), and a pump (9) characterised in that the reservoir (10) has a liquid inlet (11) in the top of the reservoir (10) offset from an associated liquid outlet (12), and a plurality of flow (14,15) and return (16,17) tapplings for connection to a series of radiator circuits, the flow tapplings being provided in an upper region of the reservoir and the return tapplings (16,17) in a lower region of the reservoir at substantially the same height within the reservoir as the liquid outlet (12), and wherein, in use, the reservoir is an in-line reservoir located only on the return circuit from the cylinder to the boiler such that liquid passing through the inlet (11) from the cylinder (4) to the reservoir (10) enters downwardly into the reservoir."

He compared Claim 5 of the European Patent (EP) as granted and figure 2 of the Bodenhill patent application, "a perspective view of the device of Fig. 1 for removing dissolved gases from the liquid heat exchange medium of the heat exchange system." He found that all the features were present in the defendant's application and that it would infringe claim 5 in his opinion. In the arrangement of that cylinder (fig 2) in the circuit diagrams, the reservoir is located within the circuit, on the return circuit going back to the boiler, and all of the other features of the claim are there. It was his view that this constituted an infringement of this patent, EP 1264146.

He said that the European Patent office did grant a patent to the plaintiffs as did the US and Canadian offices. He had reviewed the claims of grants of patents, looked at the disclosure of the Bodenhill application and found that the system as described would infringe Claim 1 and Claim 5 at least.

He said that the international application was filed by Mr Gorman - he was Bodenhill's agent. At the European regional phase, Mr Gorman was not acting for Bodenhill. The application was filed by Mr O'Leary who signed the documents.

In 2006 his office looked at the search reports being conducted by the European Patent Office in relation to the Bodenhill application. The Bodenhill application claimed priority at 21st January 2002, which meant that any prior art up to 21st January 2002 had priority against it. Mr Cremin's application was published in 2001 which means there was full priority against it. He wrote to the EPO on behalf of Mr Cremin in 2006 and filed observations. The office forwarded the observations to the patentee. There was no response and the application was withdrawn, and the defendants' European application never proceeded to grant.

Mr. Moore agreed with Mr Carolan that the defendants' Irish patent proceeded to grant but he commented that that was a formality. He explained the difference between the EPO in Munich and the procedure in the Irish Patents Office. The Irish Patent Office as a result of the Patents Act 1992 did not do a substantive examination of an application, as the European Patents office does.

An application to the EPO actively seeks priority and sends detailed commentary on it. The applicant and the EPO then engage with each other, to see whether or not there is any room for a monopoly to be granted in the light of the prior art found by the EPO. If the patentee does not convince the office that there is such room, the patent is rejected. If the patentee is successful and does convince the EPO that there is room for a monopoly to be granted, the patentee is granted a monopoly, on the basis of the restricted or allowed subject matter.

The Irish patents office grants two types of patents - the first is the short term patent, valid for ten years subject to a formality examination only (under the 1992 Act) it is subject to a formality examination of formats and line numbering. The Patent Office will grant that patent, so no prior art is ever searched against it by the Patent Office. One cannot assert an Irish short term patent until a search is conducted against it. Effectively it's really just a registration process. It would be unfair if these rights were asserted without a search being conducted.

The Irish Patent Office also grants a full term patent lasts for 20 years subject to renewal fees being paid. The application undergoes an examination of a sort. One can rely on the grant of another application corresponding to this, made somewhere else in the world, and file evidence of novelty - as provided for in ss 27-30 of the Patents Act 1992.

The other way is to ask the Patents Office to conduct a search under the 1992 Act. Irish registered patent agents can advise the Patent Office that an amendment is required or no amendment is required. In the light of the material in the search report there may be no amendment required. The Patents Office must accept it. There is nothing similar in the Irish procedure to the rigour in the European office.

The third way to get an Irish patent is through the validation of a European patent. That was how Mr Cremin got his patent by way of a re-registration of an already-granted patent. The Patents Act 1992 transposes the European Patent Convention into Irish law and therefore the validation process is a formality because the substantive work of examination proper has been undertaken by the European Patent Office.

While the defendants had obtained the grant of an Irish patent, they did not receive the grant of the Irish Patent through the rigour of the European Patent Office. In May 2006 the European Register indicates that they failed to respond to the objections by the Examiner. The defendants had only gone through the filing process necessary to obtain the grant of an Irish Patent.

In further evidence on day 6 of the hearing, Mr. Moore had been given a schedule of letters from Mr Gorman and was asked to review and comment on them. There were three documents which consisted of a report of 30th September 2001, a letter of 5th October 2001 and finally a report of 17 January 2002. They all related to advices that Mr Gorman gave to Ecoplus and associated parties in relation to both the patentability of the PRT unit and also in relation to Mr Cremin getting a patent of his own and the impact of the patent on Ecoplus.

Mr Gorman referred to the patent application of Winsoft - which was assigned to Bodenhill ultimately.

The overall summary of the report of 13th September 2001 appeared to be that Mr Gorman didn't believe there was much point in proceeding to make a patent application for Winsoft. The summary states as follows:

"In our opinion, the disclosure in PCT Specification No. WO 01/23810 of Mr Cremin will undoubtedly make it difficult to obtain grant of a patent on the Winsoft pressure reduction unit. Additionally, in our opinion any patents granted on the Winsoft pressure reduction unit will be of limited value, in that

(a) they would be vulnerable to an attack on the ground of obviousness,

and

(b) such patents could not be used to prevent third parties manufacturing and selling any of the systems disclosed in Mr Cremin's PCT specification. While in our opinion Claims 8, 9 and 10 of Mr Cremin's PCT Application would be infringed by Winsoft pressure reduction unit, in our opinion none of these three claims would result in the grant of valid patents on the ground that the invention claimed lacks novelty.

Based on the prior art which has already been revealed by the International Search Report carried out against Mr Cremin's PCT Application, it is possible that Mr Cremin may be able to restrict the scope of Claim 8 in order to obtain grant of a patent, which more than likely would be infringed by the Winsoft pressure reduction unit. However, we believe that if further searching were carried out, more relevant prior art would quite likely be revealed which would invalidate such claims. However, without carrying out further searches, we cannot advise with certainty as to whether Mr Cremin would end up with a patent which could be used to prevent manufacture and sale of the Winsoft pressure reduction unit."

Mr Moore examined the prior art that Mr Gorman appeared to be relying on. It appears that prior art was to the fore of Mr. Gorman's mind, because he had acted for the two parties with related patents being Menard and Mr Baker. Mr. Gorman was well aware and well familiar with these patents, as he had acted for both companies.

The Baker and Monard systems operate in a manner distinguished by the grant of patent- it is quite specific. It says that the reservoir of Mr Cremin *"inline reservoir...is located only on the return circuit from the cylinder to the boiler."* ... The functionality of what Mr Gorman was relying on is that they are located on both the return and on flow circuits and so were on both circuits.

It appeared that Mr Gorman accepted there could be a *prima facie* case of infringement - he had alluded to the fact that the defence would be a defence based on invalidity based on prior art. The patent was amended during the prosecution and was differentiated from the pieces of prior art that Mr Gorman was relying on to support that defence. Winsoft Pressure Reduction Unit infringed Claims 8, 9 and 10 of Mr. Cremin's PCT application. The grant of the patent in 3 different jurisdictions by 3 different patent offices that reviewed it: Europe, Canada and US gave at least a presumption of validity. The European patent office engaged with review of prior art and forces the applicant the patentee, the applicant to justify why he should get monopoly. Through this process Mr. Cremin was successful. The European patent was ultimately validated in Ireland, UK, Netherlands and other countries.

The reservoir of claim 8 of that PCT application WOO123810 which ultimately became claim 1 of PCT application WOO1 /86212 and European Patent EP 1264146. So although there are some overlapping dates between the two PCT applications, this was not unusual. Mr. Moore explained that the applications could be somewhat confusing if you look at them just as numbers. He said that he had mapped out the two patent applications beside each other. The original priority application of the 11th May 2000 was a departure from an earlier technology that Mr Cremin had been developing - which was actually putting a tank around a tank - it was not cost effective. On the 11th May 2000, before the application was filed Mr Cremin then realised that the separation of the reservoir from the cylinder within the system would result in a benefit. The first disclosure of this was on 11th May 2000- the understanding of that technology was developed from May 2000 to May 2001. In April 2001 Mr Cremin had a further realisation with regards to modifications which was subject of a further application of 3rd April 2001. Ultimately in 11th May 2001, the PCT application based on the disclosure of original Irish application S00357 of 11th May 2000 was filed within the 12 month period convention time.

Mr. Moore believed that it constituted a valid claim to priority. The subject matter that was shared in part in the earlier PCT application. Mr Gorman was analysing claims in his letter of 13th September 2001. Ultimately this claim 8 or an analogous form of it became claim 1 of the instant PCT application. So the conclusions that were reached can be readily transferred from one PCT application to what ultimately was granted as a European Patent.

Mr. Moore said that when he reviewed the prior art that was cited by Mr Gorman he believed that the claims were distinguished and differentiated from the prior art.

Mr Moore noted that the reservoirs in both products are similar. Both involve a volume of liquid located within a specific location in the central heating circuit with the intention of separating to separate the flow and return from the radiators. Both serve the function. What is in the claim is that it has flow and returns independently. In both Mr Cremin's system and the versions of the Winsoft/Bodenhill there are that they have 2 additional couplings for flow and return. Ultimately the radiator circuits are fed off a tank which is fed from a flow and return from a central heating system with the result that the hot water that is fed from the radiators is taken from a reservoir that is separate to the conventional reservoir from which it would be taken. The prior art that M Gorman cited in his report of 5th October 2010 referred to a manifold arrangement (the Manard product). The water flows into the manifold, it then flows from the manifold to the radiators, it then flows from the radiators back to the manifold and then it flows from that return circuit back within the central heating system. If the radiator circuit were taken out of the Manard system there would be no means of transferring the liquid that enters into the manifold back out of the manifold. The Cremin and the Winsoft system have a blank on the flow and return tappings on the radiator circuits. The water can circulate as a whole, because it decouples the radiator circuit from

the remainder circuit, which is not done in the manifold arrangement of the prior art. If the radiator circuits were removed out of the manifold arrangement of prior art, there would be no way of reintroducing the liquid back into the conventional circuit. It is the same with the second arrangement which effectively shows the operation of two manifolds within a single box. What happens is that there is a flow going from a cylinder into the manifold going from the manifold into the radiator it then goes onto another manifold then back onto the remaining part of the circuit. It is similar to the Manard manifold but effectively it's a large box around two smaller boxes but they operate independently of each other even though they are encapsulated within a larger box. If the radiator circuits were taken out of there would be no fluid communication between the first and second manifold, so there would be no flow. And in both the Cremin system and the Ecoplus/Bodenhill system one could blank the radiator circuits. They are fundamentally different to the prior art Mr Gorman cited. However, in his letter of 5th October 2001, Mr Gorman stated: "in light of the disclosure of Baker and Manard, I can see no possibility of Cremin obtaining grant of a patent which would act as a bar to manufacture and sale of the pressure reduction unit of Winsoft." In his report of 17th January 2002, he states that "all the claims of Mr Cremin's PCT specification as they currently stand are invalid on the ground that they clearly lack novelty."

Mr. Moore agreed with Mr Carolan that the defendants' Ecoplus patent application was a lengthy one; there was more description, there were nice drawings, the schematics are done by professional draftsmen. This does not detract from the words of what it says. The additional features did not stop them from infringing. The underlying principle is that the defendant had a tank that infringed what was claimed in 5 of the plaintiffs grant of its European patent. If the defendants had installed the system per figure 15 of their application they would infringe claim 1. On page 13 of the September report, he had said "On balance in our opinion, any patents granted to Winsoft would be of limited commercial value because of the disclosure of Mr Cremin in his PCT specification." This is an unambiguous statement. There is nothing in the material that I have to hand as to why he changed his mind. Mr. Moore was not quite sure, and saw no reason in this material that would allow him to reach a conclusion as to why Mr. Gorman changed his mind, how he would change his mind and advise Winsoft to file the patent.

2.2.4 Mr. Moore's Evidence on effect of Infringement

Mr. Moore was asked by the court what the effect of infringement would be. He said that the statute makes certain remedies available to a successful plaintiff in a patent infringement action: damages, account of profits being the two alternatives and he believes that damages could be quantified in the damage suffered in the marketplace as result of an infringing article coming onto the market place.

In such an event the price of patented products would be diluted. The product might never recover and damages would never satisfy a plaintiff. Irrespective of whether or not the patentee sells the product, the price would be set in the customers mind.

Damages can be quantified on the basis of the question: "Was the absence of sales by the plaintiff directly attributable only to the actions of the plaintiff or were they partly attributable to the actions of the defendant?" If partly attributable to the actions of the defendant evidence is necessary as to what would be the expected market price if the infringing article never having been in place.

It would appear that the defendants were optimistic regarding output and manufactured a large quantity. The question might be did the launch of that product into the market place by the defendant destroy the market of the plaintiff? And was that justifiable in the light of patent infringement especially if the defendant was aware in advance of the patent application that at least there was a chance that a patent would grant and they would infringe. The defendant had received advice that there was a claim and that their defence was that they would have a counteraction for revocation.

Mr. Moore agreed that if there were no loss then damages did not arise. If a patentee did not set up any arrangements in relation to licensing, manufacturing, distribution, the question to be asked was whether the failure to sell was because it was not saleable or was the failure to sell because there was a competing product diluting the market? Even if the patentee had not managed to exploit the patent there could be damage caused by the actions of the other party. In the absence of actual specific evidence was not possible to assess damages.

The loss of reputation was separate to a patent infringement action.

Mr. Moore agreed with Mr. Carolan, that there is always a possibility to improve a patent with another patent. Every innovation is made is based on one before it, just as Mr Dyson was able to get an improved vacuum cleaner in relation to vortex technology.

However, it does not follow that a grant of patent resulted in a commercial product.

Mr. Moore believes that it was a classical question that could lead to confusion. A client asks "can you get me a patent for this" and invariably a patent can be granted. Mr Gorman might have been thinking specifically of the vortex within the device. However, the use of a vortex in Mr Cremin's patent was not explicitly discussed.

The obtaining of a patent is different to the freedom to use the product because freedom to operate is a different analysis to freedom to patent. A patent creates a monopoly but it does not mean you are not interfering with those who already have a monopoly.

Mr Moore said, for example, that Mr. Cremin's box is a very regular shaped box while the schematic form of the Bodenhill product is more curved and has more ribs. Importantly, Mr Cremin's grant of patent did not specify whether curves or ribs were necessary or not. All it said was that there were flow and return pipes for a radiator which were offset from one another and that inlet and outlet were also offset from one another. The advices may have been confused in that Mr Gorman may quite readily and justifiably said something like "let's narrow the patent to the rigs inside the tank and that' would enable the vortex", but this does not give the right to develop and sell the product when there are other products which are the subject of the plaintiff's umbrella patent.

Mr Carolan referred to Mr. Moore to the correspondence from Mr Gorman's office and to the defendants' Irish patent and asked if Mr. Moore was aware that there were 23 American patents for anti gravity machines.

Mr. Moore replied that there was a differentiator. Having a patent does not give one the right to do anything - it just allows one to stop someone else from doing something. It is a negative monopoly that gives one the right to stop somebody else selling competing products. But it does not give the right to sell one's own product because there could be already someone with a related patent. Though one might have obtained patent, that would have given the right to create a monopoly to stop other people coming out with that quite specific feature. One does not have the right to sell a product in the first place if someone else had a patent which was granted before and covered the basic features of a subsequent grant.

Mr. Moore was of the view that Mr Gorman went through all of the claims in a thorough way. He says that Claim 1 specifying the reservoir, was anticipated by Baker and Manard and therefore the specification was invalid. Claim 3 was also anticipated by Baker and

Manard. But what is in all of these claims is that there is no analysis as to the location of the reservoir, only *"the reservoir is an inline reservoir located in the cylinder to the boiler."* None of those claims analysed had that detail in them. In the letter of January 2002, Mr Gorman never commented as to the location of the reservoir nor whether he had prior art or not. Manard and Baker had the reservoir on both the flow and on the return. The elimination of the reservoir on the return circuit from the cylinder to the boiler, differentiated it from Manard and Baker. That amendment was introduced during the prosecution of the plaintiffs application.

Mr. Carolan asked if this was at the time where the parties were having regular meetings. Mr. Moore agreed and added that what was interesting was that the European Patent was granted in April 2003. His understanding was that the defendants made their decision to proceed or not to proceed after April 2003. He was not aware of Mr. Gorman's advice one way or another. The application of the plaintiff differentiated the prior art that was provided to the examiner. So subsequent to Mr Gorman having a look at the PCT application prior to 2002, the European patent was granted in 2003. Mr Moore said that it would appear that either Mr Gorman failed to keep abreast of the plaintiff's application or to maintain a caveat on the European Patent file and the defendants took Mr. Gorman's letter as the basis for the "go ahead."

Mr. O'Leary had no questions for Mr. Moore. Mr. Keane asked whether he was known to Mr. Moore. Mr. Moore said that he was not, but he was aware that Mr. Keane was named as an inventor of Ecoplus.

3. Mr. Prendergast's Evidence

The plaintiffs second witness was Paul Prendergast, accountant, who said that he was present at a meeting in April or May 2001 which was organised by Mr. Carolan.

Mr. Prendergast had been involved in the business plan for Mr. Cremin in relation to the investment by Mr. Carolan and Bodenhill Properties Ltd. Bodenhill, he believed, was now dissolved.

He said he concentrated on the figures in the business plan at the meeting but he did not remember very much details regarding due diligence.

He said that Mr. Cronin and others were there and that the meeting lasted three to four hours. Mr. O'Leary was at the meeting. He could not remember any other attendees.

He said he was told that the Ecoplus invention was different, being made of plastic and was lighter. He said he was not there for all of the meeting. He said that he did not know that the Ecoplus product model was a copy of the plaintiffs patent. He was not involved in the patents. He could not remember whether plastic was discussed at the meeting which was ten years ago.

Under cross examination by Mr. Carolan, he said he did not remember the Oxyvent tank in the meeting at the Lake Hotel in Killarney. He remembers the drawings and brochures and the date on the table. He did not examine them.

4. Mr. Sean's Kavanagh's Evidence

The third witness was Mr. Sean Kavanagh, an accountant, who said that he had no experience in heating systems. He had not involvement with the design of patents. He was not an investor. He said he did not remember signing the patent, but invested €25,000 in the project and agreed that he was noted as an inventor on the patent.

5. Mr. Cremin's Evidence

The first named plaintiffs evidence on oath was brief. The court is satisfied that his opening and closing submissions in which evidence was given was repeated in the formal evidence in chief.

Mr. Cremin said that the original patent application was no longer relevant, it was never discussed, and it was too dear. It was that original patent that did not go ahead. Mr. Cremin said that that patent was not part of the due diligence. Mr. Carolan put it to Mr Cremin that he and the defendants were not given patent information. Mr. Cremin said the original patent application was withdrawn and had nothing to do with this case. It was stainless steel because it was for domestic hot water. He did not think a tank within a tank had anything to do with the case. Mr. Cremin referred to a large bundle of publications between March 2003 and September, 2004 from builders and engineers. He referred to documents from TUE, who were the manufacturers of the tank, who had certified the three bar pressure. He referred to Mr. Moore's evidence as to the chronology of and specification of the plaintiffs and the defendants' patent.

He referred to competition of the Cremin tank which has similar functionality and performance to the defendant's product and he referred to the brochure.

6. Prof. McGovern's Evidence.

The fourth witness, Jim McGovern, Chemical Engineer with the Dublin Institute of Technology, specialised in thermal plumbing and heat transfers. He had prepared a report on the 10th March, 2005, having been briefed by William Fry to the then solicitors for Oxyvent.

His report concluded that the square Oxyvent was similar to the cylindrical Ecoplus and infringed the patent.

Dr. McGovern referred to the description of the patent claims 1 to 8 and compared those with Ecoplus. He said that all of the elements 1 to 8 were present in Ecoplus. He also enclosed the Ecoplus PRT and the Cremin Tank Manual, which were published before Ecoplus.

He referred to claim 1 of the extension to the patent which infringed the plaintiff's patent. Claims 3 to 5 were also infringed. There was no infringement in relation to claim 2 or to claim 6 to 8.

He referred to the Ecoplus manual and the installation instructions which he compared for the plaintiffs patent.

The primary and secondary circuits were similar, but distinguished in the expansion vessel.

The defendants Ecoplus did not have an air vent. It was basically the same circuit. It might have been necessary to have a half inch bypass so that there was no air in the circuit.

He referred to Figure 4 in the Cremin manual and compared it to figure 14 in Ecoplus and was of the view that the arrangement seemed to be the same.

He was asked whether the drawings were too similar to be incidental and he said that it was possible, that they were based on the other or based on a common source or had a common origin.

On cross examination, Prof. McGovern was asked whether the inventions were standard in the plumbing industry. He replied that he was not *au fait* with what the standards were years ago. The emphasis was on "push fit" fittings and the standard matrix drawings were common.

He said he did not compare the two patents, that it was a matter for the patent agents in relation to prior art. He referred to articles cited in Cremin's patent which he had read.

In general the provision of reducing tanks was to provide constant pressure on the two circuits. The common problem is the primary and secondary circuit that is due to separation characteristics.

He referred to pressure increases when the fluid enters into a tank.

Mr. Carolan asked him would he describe the products as buffer boxes. He said that he was not aware of that term but would not see anything wrong with using that term. It could be so described.

7. Mr. Kavanagh's Evidence

Mr. Kavanagh was the accountant who was named as an inventor. Mr. Cremin asked if he had signed the defendant's patent application. He replied that he had not and that his name had been included by the patent agent.

8. Mr. Carolan's Evidence

As with Mr. Cremin there was a considerable overlap between the statements made by Mr. Carolan in cross examination, his polite interventions in reply to Mr. Cremin's submissions and his own evidence. Mr. Carolan's evidence was also brief.

It is clear that his evidence was not of a technical nature. He had contacted Mr. Gorman, Winsoft's former patent agent, to give evidence. No evidence was given.

Mr. Carolan gave evidence that he had relied on the letters and reports from Winsoft's patent agent which had been put to Mr. Moore.

Ecoplus had one consignment of less than 100 units for sale through associated distributors but that the venture was not successful.

Mr. Carolan said that there was no question of violation of the plaintiffs patent. He had searches done by his patent agent who assured him that there was no violation.

His evidence was that by April 2003, the defendants decided not to go ahead. He said that he told the company he was not going to continue funding the development of the defendants' patent. He was also not very well and had a heart by pass. He asked the auditors to look at the books of Ecoplus. He cleared all of the debts of €400,000 on August 11th 2004. There had to be a stop, he said. This was also the time that Mr Keane ceased as a financial director. At all stages he had acted positively and thought the idea was terrific. By the end of 2004, Oxyvent was in stasis and no marketing was carried out after that date.

9. Decision of the Court

What characterises this case unfortunately is delay, absence of legal representation, the dissolution of the first named defendant, Ecoplus Limited and the failure to exploit the plaintiffs' and the defendants' invention.

The venture for both the plaintiffs and the defendants resulted in considerable loss. Proceedings commenced in 2004 were delayed for some years. The absence of legal representation for the corporate entities as well as the individual parties, the dissolution of the defendant company, the confusion as to whether Winsoft, Bodenhill or Ecoplus had been advised by patent agents, all added to the delay in prosecution of the proceedings.

The Court has no doubt that the high point of the relationship between the parties was the proposed agreement in May 2001, to transfer the pending application by the plaintiffs to the defendant. Much work had been done by way of due diligence between their parties and their overseas experts. A joint venture would more readily have led to success.

It was unfortunate that relationships broke down when the first named plaintiff terminated the due diligence process towards the end of what was, admittedly, a tight schedule.

This unfortunate impasse led to Winsoft, Bodenhill, and ultimately Ecoplus developing a similar patent. In their letter of 5th October 2001, F.F. Gorman examined the prior art of Monard Research and Development Limited and of John Baker in connection with PCT, patent application number PCT/IE 00/0015. The patent examines the PCT application number WO 97/08 498 of Monard and Irish patent specification number 50285 of John Baker. In Mr. Gorman's opinion Mr. Baker discloses the features of claims, 8, 9 and 10 of Cremin but did not disclose the feature of claim 11, 12, 13 or 14. Mr. Gorman concluded:-

"Accordingly, in the light of the disclosure of Baker and Monard I can see no possibility of Cremin obtaining a grant of patent which would act as a bar to manufacture and sale of the pressure reduction unit of Winsoft Limited".

He also says that he believed that there was no risk of infringement of any patent granted to Monard. However, in his opinion there was a risk of infringement of the Irish patent of Baker and recommended that Winsoft seek advice in connection with regard to infringement.

In addition Mr. Gorman said that the prior art of both Baker and Monard was a double edged sword in that while the prior art is valid is against Cremin it is also equally valid against the proposed Winsoft pressure reduction unit.

The Court is satisfied from the extensive and detailed evidence of Mr. Moore, that Mr. Cremin's application and subsequent grant was a development on what had previously been the subject of his original application. That development had not been analysed by Mr. Gorman. It would appear that Mr. O'Leary and not Mr. Gorman had filed the application.

The court is satisfied from the evidence of Mr. Moore that the defendant's application infringed Claim 1 and Claim 5 of the plaintiffs' patent.

It is, of course, unfortunate that the defendants proceeded on the basis of assurances without examining the developments of the Cremin application. They did not choose to lodge a caveat which might have alerted them to those developments.

Though full details were not given to the Court, it is clear that considerable investment was undertaken by the individual defendants in relation to the development of the Ecoplus product.

The plaintiffs had claimed injunctions restraining the defendants and each of them from infringing the Irish patent of the first named plaintiff registered under the No. 1 264 146 and an injunction restraining the defendants from using or disclosing confidential information disclosed by the first plaintiff in May 2001, and subsequently during the due diligence process up to the 8th June 2001, when the offer made by Winsoft was formally withdrawn on the 8th June 2001.

The plaintiffs pleaded that six days before that, Mr. Carolan attended Mr. Cremin's home with Mr. O'Leary and indicated verbally that he would clear the debt of IR£70,000 of the first named plaintiff with his personal cheque and that the rest be paid when the technology was transferred by Mr. Carolan to a company to be established further to the proposed agreement. The plaintiffs pleaded that this offer was despite the terms of the original offer that was made on the 30th April 2001 to purchase the second plaintiff and all the patent then pending subject to due diligence, for a lump sum payment of IR£500,000 and further remuneration thereafter which Mr. Cremin indicated that he was willing to accept.

It was pleaded by the plaintiffs that, as a result of the meeting of the 2nd June 2001, the offer of the 30th April 2001 was not genuine. However, no evidential basis was given for this pleading.

While there were extensive pleadings in relation to ownership and infringement of copyright and technical drawings, of joint liability and conspiracy the damages resulting were not particularised.

What was particularised in relation to loss and damage in terms of para 20 of the statement of claim was the following two elements:

- (1) That the plaintiffs had been deprived of their opportunity to exploit the first plaintiffs monopoly rights and develop a new market without facing illicit competition, and
- (2) In respect of the plaintiffs claim in confidence, to the extent that certain confidential information fell into the public domain on the 15th November 2001, the breach of confidence on the part of the defendants concerning that information, prior to November 2001 provided a spring board in the advancement of the business of Ecoplus after that date which occasioned loss and damage to the plaintiffs.

While the plaintiff reserved the right to adduce further particulars in that regard no such particulars were adduced nor, indeed, was any evidence given from the market place.

There was no evidence of any attempt by the plaintiff to sell his product or evidence that a price had been set in the consumers mind by the admitted consignment of less than a 100 products given to distributors by the defendants.

The Court had sought to clarify the evidence in relation to damages.

The Court was satisfied that the plaintiff had bought an Ecoplus product. The court accepts the evidence given by Mr. Moore and Professor McGovern that the Ecoplus boiler did infringe the plaintiffs patent. This was notified to the defendants.

The question in all cases such as this is whether the absence of sales by the plaintiff was directly attributable only to the actions of the plaintiff or whether they were partly attributable to the acts of the defendant.

In the absence of actual specific evidence of loss it is not possible to assess the damages either for infringement or for breach of copyright. Where there is no evidence as to loss, the court cannot determine damages.

The Court is satisfied in relation to the fifth named defendant, Declan Keane, that he was not involved in the due diligence meeting in May 2001, and despite being included as an inventor, he was not, and accepts his defence of the 13th December 2005 on the basis of his sworn evidence given to the court, it accepts that he was only a director from September 2001 to 7th October 2004 and that he was listed as an inventor without his knowledge.

The other defendants by defence dated the 10th December 2007, denied that they carried out the acts referred to in the particulars of infringement. The court is satisfied that there was infringement in that the defendants were investors, were named as investors in Ecoplus and, other than Mr. Carolan, were directors of Ecoplus.

In relation to the confidential information they claimed that the same did not amount to disclosure of confidential information and that they were included in a published patent application that fell into the public domain.

Professor McGovern was asked by Mr. Cremin whether the drawings of the defendants were too similar to those of the plaintiffs' to be co-incidental. His reply that it was possible that they were based on a common source or had a common origin. The Court is not satisfied in the circumstances, that was a breach of confidential information.

The Court is not satisfied, in the circumstances of the case, given the delays and the lack of specificity that an enquiry should be made as to damages (including aggravated and/or exemplary damages) for infringement of copyright nor, indeed that the plaintiffs are required to make discovery of the financial records of the relevant defendants, on account of the profits made by the defendants and each of them by reason of infringement of copyright.

The court is satisfied that there is no evidence of any profit having been made by the defendants. Indeed the evidence of debts of IR£400,000 being discharged by Mr. Carolan in relation to the matter and the complete evidence of investors being invested considerable sums, leads the Court to conclude that it would be improper to make such an enquiry.

No evidence was adduced in relation to conspiracy.

The Court is satisfied, based on the evidence provided by Mr Moore and Prof. McGovern, and the lack of evidence to the contrary provided by the defendants in conducting their defence, that that the plaintiffs are entitled to a declaration that the second, third and fourth defendants have infringed the Irish Patent of the plaintiff registered under the No. 1 264 146. The Court is satisfied that

the first, second, third and fourth defendants are equally responsible for the infringement which took place.

As stated at para. 1.1 above, there was no application to restore the first defendant company to the register. Therefore, from the date of dissolution, Ecoplus had ceased to be a party to the proceedings, and as it is dissolved, no declaration can be made against it and no relief can be granted against it.

Approved: Murphy, J