

## THE HIGH COURT

[2004 No. 4239 P]

BETWEEN

TIMOTHY CREMIN AND OXVYVENT LIMITED

PLAINTIFFS

AND

ECOPLUS LIMITED, PHIL CAROLAN, HUMPHREY O'LEARY, PAUL MURPHY AND DECLAN KEANE

Defendants

**SUPPLEMENTAL JUDGMENT of Mr. Justice Roderick Murphy dated the 26<sup>th</sup> day of April 2012**

This judgment relates to the question of damages and costs following on the judgment of this Court on the 13<sup>th</sup> March, 2012, where the court was satisfied from the evidence that the defendants' application infringed claim 1 and claim 5 of the plaintiff's patent.

Mr. Cremin, the first named plaintiff, submitted that he had suffered loss, but this loss was virtually impossible to quantify.

He asked the court to award exemplary damages, because of the devious means by which the defendants had infringed his patent.

In relation to costs he said that he had to engage solicitors and counsel and, while the hearing all parties approach without representation, he sought an order for costs against the defendants to be taxed in default of agreement. He thanked the court for its patience in dealing with the hearing.

Mr. Carolan on behalf of the defendants suggested a number of amendments to the judgment of the 13<sup>th</sup> March, 2012, with which Mr. Cremin had no objection.

In the courts view the most important of these was a request that a reference be made to the circumstances of the formal withdrawal of the agreement to purchase the plaintiff's patents on the 8<sup>th</sup> June, 2001. It was agreed that evidence had been given to the court of a written request by the defendants to Mr. O'Connor, the then solicitor for the plaintiffs requesting the numbers of the plaintiffs' patent applications. The fax and hard copy was sent from O'Connor's solicitors to the defendants refusing to give the numbers which resulted in the letter of the 8<sup>th</sup> June, 2001.

A further amendment, accepted by the court, was that it was F.F. Gorman the defendants' patent agent who has filed the application for the first named defendant.

Mr. Carolan said that he did not accept that the plaintiffs had suffered any loss. The plaintiffs had walked away from an offer of €500,000 which was confirmed to their solicitor by the solicitors for the defendants.

The first notification of any claim was in August 2002, when the plaintiff's patent agent wrote to the defendants' patent agent alleging an infringement.

Nothing happened until pleadings issued in April 2004. A further two years elapsed until 2006 and 2008 and the present proceedings in 2012 which suffered from a change in the plaintiffs representation. On each of those occasions, Mr. Carolan submitted, the defendants engaged with the plaintiff's.

Mr. Carolan submitted that at no stage was there any opposition to the defendants application.

Mr. Carolan accepted the finding of the court that there was a technical infringement of the plaintiff's patent.

His evidence was that the subject matter of both the plaintiffs' and the defendants' patent, despite the considerable investment made by the latter, proved unsalable. The building contractors did not want to commit to a more expensive heating system that would have a saving on future heating bills.

Mr. Carolan said that he was, at all stages, willing to resolve the issue between the parties, but that at each change of the plaintiffs' solicitors, the plaintiff continued "gung ho" for over eleven years.

The principles underlining the award of damages and the account of profits are that damages are intended to restore the claimant to the position he would have been in, but for the infringement. Damages can be awarded not only for the loss of sales of the patented item, but for goods commonly sold with the patented item. Where the claimant does not manufacture the invention, or licence the patent to third parties, a quantum of damages may be assessed by regard to a reasonable royalty rate as provided for in *Meters Limited v. Metropolitan Gas Meters* [2011] 28 R.P.C. 157. A reasonable royalty rate would be that in which a potential licensee not yet in the market would pay.

There was no evidence in this case of any loss despite the request of the court that it required such evidence. Where there is no evidence as to loss, a court cannot assess damages. It is not a case of a request being made for an account of profits from the defendant. If such a request was made, while it is clear from the evidence of Mr. Carolan that the first named defendant had incurred significant quantified losses, there was no such evidence from the plaintiffs' witnesses.

The plaintiffs had not proved any loss.

There is, accordingly, no basis on which the court can embark on a quantification of loss not claimed.

The court will, accordingly, refuse the plaintiffs' application for damages. In the circumstances a consideration of exemplary damages does not arise.

The plaintiff seeks his costs of the action.

Section 47(2) of the 1992 Act, provides that

"The Court shall not, in respect of the same infringement, both award the proprietor of a patent damages and order that he shall be given an account of the profits."

It flows that, in the circumstances where the court's request for details of damages was not forthcoming and where the court has made no award of damages, that the plaintiffs are not entitled to seek an account of profits.

No evidence has been given by the plaintiff in respect of any costs incurred, including costs to the solicitors which had been on record and who would appear to have come off record some time before the hearing was commenced before this Court.

The matter of costs due to a lay litigant can include costs of advice furnished by solicitors not on record was considered in *Albert Dawson, Dudley Dawson t/a A.E. Dawson and Sons v. Irish Brokers Association* [2002] 2 I.L.R.M 210, where the Supreme Court (Keane C.J. Murphy and Hardiman J.J.) considered the following facts.

The plaintiff insurance brokers had been awarded the costs of proceedings taken by them against the defendant. They claimed that as lay litigants to proceedings they were entitled to recover costs on the same basis as solicitors for preparatory work undertaken by them prior to the trial. They submitted that a solicitor appearing for himself was entitled to recover costs for the preparatory work undertaken by him before a trial, whereas lay litigants in the same position were not entitled to recover the costs of their time and trouble. They further submitted that they were entitled to recover a sum in respect of advice received from solicitors not on record in the proceedings. It was submitted on behalf of the defendant that the plaintiffs were not entitled to costs on the same basis as solicitors and that the court could only measure legal costs and not private expenditure by lay litigants. It was further submitted that, when the powers of the Taxing Master were being clarified the Oireachtas in s. 27 of the Courts and Court Officers Act 1995, no changes were adopted regarding lay litigants despite the existence of English legislation in this regard. Kelly J. refused to grant costs to the plaintiff on the same basis as solicitors and refused to grant costs for advice received by the plaintiffs by solicitors not on record. The plaintiffs appealed.

The Supreme Court dismissed the appeal. It was held that private expenditure to labour and trouble by lay litigants was not recoverable and could not be measured by the courts. The courts could only measure legal costs. Lay litigants appearing in person who obtained legal advice from solicitors who were not on record were not entitled to recover costs for such advice.

In that case, the litigants had sought to recover fees at a charge out rate of £140 per hour in respect of preparatory work carried out by them in preparation of the trial. The Taxing Master had relied on a decision of Finlay P. in *Henehan v. Allied Irish Banks*, High Court 1981 No. 10151, 19<sup>th</sup> October, 1984.

The Supreme Court had considered the judgment of Bowen L.J. in *London Scottish Benefit Society v. Chorley* [1884] 13 Q.B.D. 762 at 876-877 to the effect that costs were a creature of statute to the legal costs of suit, but not the costs and expenses of travel and loss of time.

The Supreme Court commented that it might be thought that it was somewhat unjust that a person who had been wrongfully obliged to institute or defend proceedings should be enabled to recover any costs in respect of the time which he has spent in the preparation of his case and that the unsuccessful party should be under no obligation to pay in respect of that loss. However, that was a matter for the legislature alone to reverse as was done in the *Litigants in Person (Costs and Expenses)* Act 1975, in the United Kingdom.

The Supreme Court also that the firm of Augustus Cullen and Son were on record for a period of time as solicitors for the plaintiffs. The plaintiffs also claimed fees in respect of a period of time during which they were not so on record. The Taxing Master had allowed them the sum of £7,000 in respect of advice which they obtained from that firm while they were not on record. The Taxing Master had made such allowance relying on the judgment of Brett M.R. in *London Scottish Benefit Society v. Chorley* that where an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him; the remuneration paid to the solicitor's money paid out of pocket.

The trial judge was of the view that that passage was not authority for the proposition that the litigant appearing in person who obtained advice from a solicitor in relation to the case was entitled to recover the costs of that advice. He considered that it referred to taking to steps which were necessary in the course of the proceedings and which the litigant could not take himself.

The Supreme Court was satisfied that he was correct in so holding and that the Taxing Master should have disallowed that item.

In *Thomas King v. Minister for the Environment and Others* *Benedict Cooney v. Minister for the Environment and Denis Riordan v. Government of Ireland, Minister for the Environment and Others* [2007] I.R. 296 at note on 327, the reporter noted that the plaintiffs, who were represented by solicitor and counsel were awarded the costs of the High Court and of the appeal. The third plaintiff was awarded such out of pocket expenses incurred in the proceedings in the High Court and the appeal, when ascertained. It follows from the above that the plaintiff is entitled to his out of pocket costs when ascertained.

The court should consider the manner in which the plaintiff initiated and pursued the litigation.

Firstly, the litigation was unduly protracted and was far from expediently prosecuted. The court has already referred to the "stop-go" nature of the proceedings from 2004 to 2012.

Secondly there was a more appropriate manner in which infringement proceedings could have been pursued under Article 100 of the European Patent Convention.

Thirdly, no such opposition to the defendants' application was notified to the European Patent Office at the time of the plaintiff's patent agent's letter to the defendants in August 2002.

The court has a concern in relation to the claim for conspiracy in relation to which no evidence was adduced. The court also notes that in the present application, the plaintiff referred to the "devious means" by which he alleged the defendants had infringed his patent rights. There was no evidence of such and, accordingly, no findings in relation thereto. It seemed to have re-introduced and continued to sustain a degree of bitterness on the part of the first named plaintiff.

The application made by Mr. Declan Keane for a dismissal, to which the court acceded, was made without any request for his costs.

Mr. Carolan raised an issue in relation to the non notification of Mr. Paul Murphy to the hearing of the proceedings. While it would have been more appropriate for Mr. Murphy to have raised this issue, it would appear that the absence of notification was a critical oversight. Mr. Cremin did not satisfy the court that Mr. Murphy was notified.

Therefore in the circumstances the court will make an order in favour of the plaintiffs for one half of the out of pocket expenses actually incurred by the plaintiffs to include payments made to solicitors while on record to be taxed in default of agreement as against the first, second and third named defendants.