

THE HIGH COURT**2008 7269 P****BETWEEN****ROCHE IRELAND LIMITED****PLAINTIFF****AND****ROGER O'MAHONY AND INTRINSIC DEVELOPMENTS LIMITED****DEFENDANTS****Judgment of Miss Justice Laffoy delivered on the 14th day of December, 2010.****1. The parties**

1.1 The plaintiff is an Irish company which carries on business as a pharmaceutical company, including manufacturing and sale of pharmaceutical products, at its Irish premises and plant at Clarehill, Clarecastle, County Clare (the Roche premises). It is a company in the Roche Group of companies which carries on business worldwide with headquarters in Basel in Switzerland.

1.2 The first defendant (Mr. O'Mahony), either solely or jointly with his wife, Linda O'Mahony, or through the medium of the second defendant, is the owner of lands comprising 1.31 hectares at Clarecastle, County Clare (the O'Mahony lands) adjacent to the Roche premises. Originally, Mr. O'Mahony was represented by a firm of solicitors and counsel in these proceedings. However in January 2010, Mr. O'Mahony entered an appearance in person and he appeared in person at the hearing. The second defendant is an Irish company, of which, as I understand it, Mr. O'Mahony is the proprietor, using that expression in a non-technical sense. Mr. O'Mahony is the managing director of the second defendant, but he accepted that he could not, in that capacity, represent the second defendant. In the circumstances, the second defendant was not represented at the hearing.

2. The factual background

2.1 While it is not clear in whom the title is vested, on the evidence it appears that Mr. O'Mahony purchased the O'Mahony lands in 2006 as a commercial project. In early 2007 he obtained planning permission from Clare County Council for the development of the O'Mahony lands as light industrial units and offices. What is also clear on the evidence is that Mr. O'Mahony perceived the plaintiff as being a potential purchaser of the development on the O'Mahony lands and he had a number of contacts with the then managing director of the plaintiff, Mr. John Liddy, in late 2006 and in 2007. However, it was at all times made clear by the plaintiff to Mr. O'Mahony that it was not interested in acquiring the O'Mahony lands or being involved in the development proposed by Mr. O'Mahony.

2.2 Around the same time, 2006 and 2007, the plaintiff embarked on a landfill remediation project on the Roche premises. Part of the work involved the capping of what were known as waste deposition cells 1 to 7 on the Roche premises. The plaintiff carries out its manufacturing activity at Clarecastle under an Integrated Pollution Prevention and Control (IPPC) licence issued by the Environmental Protection Agency (EPA), a revised licence having issued on 12th May, 2006. The work of capping the landfill, which involved covering it over with a large filler, subsoil and topsoil, was carried out subject to the approval of the EPA.

2.3 The building agreement for the capping of the landfill project was the subject of a tender process. The successful tenderer was TAL Ltd. (TAL), a Northern Ireland company, which entered into a contract with the plaintiff to do the works, the contract price being in the region of €1.3m. The project was supervised by RPS, a firm of engineering consultants, retained by the plaintiff. The landfill capping project necessitated the bringing on to the Roche premises subsoil and topsoil from outside. The responsibility for sourcing that material was with TAL under its contract with the plaintiff and the consultants were responsible for approving the material.

2.4 Sometime in 2006 Mr. O'Mahony was introduced to Mr. Stephen Murphy of Milltown Engineering Ltd. (Milltown) and discussions ensued between them in relation to a joint development of the O'Mahony lands. Eventually, in 2007, the parties came to an agreement in principle that Milltown would purchase the O'Mahony lands and adjoining lands which Mr. O'Mahony was to acquire. On foot of the agreement in principle and with the consent of Mr. O'Mahony, Milltown went on site in or around September 2007. It stripped the topsoil to base level and removed subsoil to prepare for the installation of services, such as foul sewerage. According to Mr. Murphy, Milltown then put hardcore on the site and rolled it off. Mr. Murphy's evidence was that this work was carried out with the agreement of Mr. O'Mahony, because September was a suitable time of year to strip the topsoil before the weather deteriorated.

2.5 At the same time as the topsoil was being stripped on the O'Mahony lands, TAL required topsoil in connection with the landfill capping project on the adjacent Roche premises. Mr. Murphy's evidence was that Milltown's foreman was approached by TAL. As a result TAL purchased topsoil and subsoil from Milltown at a price of just over €96,000 exclusive of VAT. The material was delivered to TAL. Milltown issued an invoice to TAL on 8th October, 2007.

2.6 Around the same time, a company called Martins Construction Ltd. (Martins) was carrying out landscaping works on the Roche premises under contract from the plaintiff. Milltown sold topsoil and subsoil from the O'Mahony lands to Martins and delivered it to Martins. Milltown issued an invoice in the sum of €7,500 exclusive of VAT to Martins on 8th October, 2007.

2.7 TAL used the topsoil and subsoil from the O'Mahony lands in the landfill capping project. Martins also used topsoil and subsoil from the O'Mahony lands in landscaping works on the Roche premises. For the sake of brevity, I will henceforth refer to the topsoil and subsoil from the O'Mahony lands which was incorporated in the Roche premises as "the material".

2.8 According to Mr. Murphy, he or Milltown (and it is not clear who the intended contracting party was) pulled out of the deal with Mr. O'Mahony in October 2007, because Mr. O'Mahony had not succeeded in acquiring the adjoining lands which were to be included in the sale. As regards what happened between the parties during the period between entering into the agreement in principle and Milltown pulling out, Mr. O'Mahony's evidence was consistent with Mr. Murphy's evidence to the extent that he acknowledged that he got a request from Mr. Murphy in 2007 to come on the site but his account was that the permission was granted to do boundary works and suchlike. His case is that the material was taken off the site by Milltown without his consent and the site was left 1.5 metres below road level, so that it is prone to flooding.

2.9 The solicitors originally on record for Mr. O'Mahony, Tynan Murphy Yelverton, first wrote to the plaintiff in relation to the removal of the material from the O'Mahony lands to the Roche premises on 27th November, 2007. That letter suggests that it is Mr. O'Mahony and his wife, Linda O'Mahony, who own the O'Mahony lands, not Mr. O'Mahony solely nor the second defendant. However, in the context of the resolution of these proceedings, nothing much turns on where the title lies, although I will return to this issue later. Further, that letter suggests (as does the evidence in general) that it was unclear whether it was Mr. Murphy or Milltown which had entered into the agreement in principle with Mr. O'Mahony. Again, nothing much turns on the identity of the intended ultimate purchaser. What is significant is that the letter stated that the clients of Tynan Murphy Yelverton, Mr. O'Mahony and Mrs. O'Mahony, "entered into an agreement with [Mr. Murphy] and/or Milltown and the said parties have not concluded the transaction with our clients". In the letter, having stated that a substantial amount of topsoil had been removed from the O'Mahony lands and delivered to the Roche premises and having sought clarification of the arrangement under which that was done, Mr. O'Mahony's solicitors stated that they were satisfied that Mr. Murphy, Milltown, the plaintiff and the intermediary who introduced Mr. O'Mahony to Mr. Murphy were responsible and liable to compensate Mr. O'Mahony and his wife "for their loss, damage, expense and costs".

2.10 The plaintiff referred the matter to its solicitors. As early as 11th December, 2007 the plaintiff's solicitors informed Mr. O'Mahony's solicitors that the plaintiff was not in a position to state the quantity or provenance of any materials used in the project on the plaintiff's premises and referred them to the independent contractors, TAL. The plaintiff's solicitors also informed Mr. O'Mahony's solicitors that Martins had obtained topsoil from the O'Mahony lands and a small quantity of the topsoil had been used on the Roche premises in a separate project and the plaintiff was investigating that matter. It was denied that Mr. O'Mahony had any cause of action against the plaintiff. By letter dated 20th December, 2007, the solicitors for TAL in Northern Ireland confirmed to Mr. O'Mahony's solicitors that TAL had acquired soil from Milltown and furnished a copy of the purchase order dated 24th September, 2007, the invoice dated 8th October, 2007 and a credit note which Milltown issued to TAL. It was contended that TAL was a purchaser for full value without notice of any question as to the title of the subsoil and it did not consider that it had any liability to Mr. O'Mahony. However, the solicitors for TAL offered to withhold payment to Milltown in order to give Mr. O'Mahony's solicitors adequate time to see how the matter could be resolved.

2.11 Mr. O'Mahony's solicitors issued proceedings in the High Court against Milltown in January 2008. However, the proceedings were not prosecuted and, on the basis of the evidence, it appears that they were ultimately struck out for want of prosecution in the Master's Court in November 2008.

2.12 The Court was told that the sum due by TAL on foot of the invoice it received from Milltown is now held by Milltown's solicitor, apparently by arrangement with TAL's solicitors, and that Milltown intends instituting proceedings to procure its release to Milltown.

2.13 Matters took a turn in January 2008 when Mr. O'Mahony commenced e-mailing the head office of the Roche Group in Switzerland. As a result, the plaintiff's solicitors wrote to Mr. O'Mahony's solicitors on 24th January, 2008 requesting him to desist from communicating with the plaintiff directly and to withdraw allegations that either the plaintiff or the plaintiff's solicitors were withholding or concealing information and were threatening or bullying him. Despite many reminders, that letter elicited no response other than that the plaintiff's solicitors' correspondence would be communicated to Mr. O'Mahony. The e-mails continued.

2.14 In May 2008, however, a mediation process was put in place to mediate the dispute between Mr. O'Mahony and his wife, on the one hand, and the plaintiff, on the other hand. Unfortunately, the mediation, which was conducted by an independent mediator and the costs of which were defrayed by the plaintiff, was not successful.

2.15 In June 2008 Mr. O'Mahony, through his solicitors, issued two invoices in the name of the second defendant to the plaintiff claiming VAT inclusive sums of €316,536 and €26,136 in respect of material removed from the O'Mahony lands in September/October 2007. In addition, Mr. O'Mahony recommenced his e-mail campaign to the plaintiff and to the headquarters of the Roche Group in Basel and he also commenced e-mailing third parties. Once again, by letter dated 20th June, 2008 to Mr. O'Mahony's solicitors, the plaintiff's solicitors requested that Mr. O'Mahony desist from his e-mail campaign. He did not do so.

2.16 In fact, Mr. O'Mahony escalated the campaign against the plaintiff by sending e-mails to third parties alleging serious wrongdoing and criminality on the part of the plaintiff. To take one example, in an e-mail of 28th July, 2008 to the plaintiff's auditors, KPMG, he asserted that the Directors' Report and Financial Statements in the plaintiff's accounts, as audited by KPMG, were unsafe as the plaintiff was the receiver of stolen material and was in breach of the United States compliance code known as the Sarbanes-Oxley Code. It was also stated in the e-mail that Mr. O'Mahony had had a meeting with the Fraud Investigations Office of the Revenue Commissioners on 24th July, 2008 and that the United States Securities and Exchange Commission (SEC) had been made aware of the theft and that he was in correspondence with the SEC "as Roche is increasing its shareholding in specific US firms".

2.17 By letter dated 31st July, 2008 to Mr. O'Mahony's solicitors, the plaintiff's solicitors threatened proceedings against Mr. O'Mahony if he did not communicate withdrawal of the allegations of wrongdoing to the parties to whom he had made them, apologise to the plaintiff for the damage he had caused to the plaintiff's reputation and standing, and undertake to cease and refrain from making such allegations in the future. The response which eventually came from Mr. O'Mahony's solicitors was that their instructions were that he would "continue to request full accountability for the material disclosed by your clients, as having come from our client's site and now lying within your clients' premises".

2.18 These proceedings were initiated by plenary summons which issued on 3rd September, 2008. Counsel for the plaintiff informed the Court that the plaintiff was very reluctant to initiate and prosecute the proceedings against Mr. O'Mahony. However, as Mr. O'Mahony had a grievance against the plaintiff and was obsessed with it, the plaintiff had no option but to bring the proceedings. That the plaintiff is a reluctant litigant against the defendants is consistent with the evidence and the manner in which the proceedings were prosecuted. In fact, it was Mr. O'Mahony who served notice of trial on the plaintiff's solicitors on 18th January, 2010. It is only fair to record that at the hearing Mr. O'Mahony conducted his defence and pursued his counterclaim without rancour.

3. The progress of the proceedings and the case as pleaded

3.1 In the indorsement of claim on the plenary summons, the plaintiff sought various declaratory and injunctive reliefs against Mr. O'Mahony and the second defendant, which I will outline later. The plaintiff also sought damages for various torts, namely, intentional interference with economic relations, slander of title, injurious falsehood, defamation, breach of statutory duty under s. 12 of the Criminal Law Act 1976, and harassment and/or intimidation. At the hearing, counsel for the plaintiff informed the Court that the plaintiff was not seeking an award of damages and was merely seeking declaratory and injunctive relief.

3.2 After these proceedings were initiated, the plaintiff brought an application for interlocutory relief, which was returnable for 10th September, 2008. On that day a consent order was made by the Court (Hanna J.) restraining the defendants pending the trial of the action from communicating to any person written allegations of wrongdoing on the part of the plaintiff and from repeating the allegations the subject matter of the proceedings. In addition, on 10th September, 2008 Mr. O'Mahony, on his own behalf and on behalf of the second defendant, signed a letter addressed "To Whom It Concerns", in which he stated that he thereby "unconditionally" withdrew "any allegations (whether made directly or indirectly) of wrong doing on the part of [the plaintiff] or any company or person in the Roche group (including without limitation allegations of criminal behaviour or allegations of breaches of regulatory and/or financial reporting obligations)" relating to removal of the material from the O'Mahony lands. The original letter of retraction was furnished by Mr. O'Mahony's solicitors to the plaintiff's solicitors with a covering letter dated 12th September, 2008. Notwithstanding the consent order, Mr. O'Mahony continued to make allegations against the plaintiff and the plaintiff's solicitors were constrained to threaten an attachment and committal application, as a result of a communication to KPMG in November 2008, and again in early 2009, as a result of communications by Mr. O'Mahony with KPMG, the Revenue Fraud Squad and the Office of the Director of Corporate Enforcement. At that stage the plaintiff's solicitors delivered their statement of claim.

3.3 In the statement of claim the plaintiff pleads that it had no knowledge of the specific provenance of the material and was wholly unaware of any dispute in relation to it and, in the premises, that it was a *bona fide* purchaser for value of the material which came from the O'Mahony lands, lawfully took possession of it and at all material times has remained lawfully in possession of it. In the statement of claim the wrongdoing pleaded against the defendants is that they falsely and maliciously made and repeated (knowing them to be false) allegations about the plaintiff's conduct – its alleged involvement in the alleged misappropriation of the defendants' soil as the alleged receiver of stolen material, alleged breaches on its part of regulatory requirements in relation to environmental standards and financial and corporate governance, and that the behaviour of the plaintiff warranted investigation. It is pleaded that the allegations in question had been communicated to the plaintiff, to senior management in the Roche Group and to third parties, including the Office of the Revenue Commissioners (Fraud Investigations), An Garda Síochána, the EPA, KPMG, Deutsche Bank in London and Frankfurt, the Swiss Stock Exchange, the SEC, the Directors of the New York Stock Exchange and to the biotechnology company, Gentech, which in 2008 was in the process of being acquired by the Roche Group. It is also pleaded that the communications were calculated, *inter alia*, to damage the business and reputation of the plaintiff and to interfere with and obstruct its economic relations.

3.4 The declarations and injunctions which counsel for the plaintiff indicated at the hearing are the primary reliefs being sought by the plaintiff against the defendants are:

(A) A declaration that the subsoil and topsoil emanating from the O'Mahony lands and presently incorporated in the landfill deposits on the Roche premises is in the lawful possession of the plaintiff;

(B) A declaration that the plaintiff has no liability in law or otherwise howsoever to the defendants arising from or relating to the acquisition by the plaintiff of the topsoil and subsoil emanating from the O'Mahony lands;

(C) An injunction restraining the defendants from communicating to any person any written allegations of wrongdoing on the part of the plaintiff including, without limitation, allegations of criminal behaviour or allegations of breaches of regulatory and/or financial reporting obligations arising from or relating to the acquisition by the plaintiff of topsoil and subsoil emanating from the O'Mahony lands to such persons and/or entities as the Court shall identify; and

(D) An injunction restraining the defendants from repeating the allegations the subject matter of these proceedings.

In the statement of claim the plaintiff also sought orders that the defendants be directed to withdraw the allegations already made. However, counsel for the plaintiff acknowledged the practical difficulty to which enforcing such orders could give rise.

3.5 The defendants, while still represented by solicitor and counsel, delivered a defence and counter claim on 15th July, 2009. Following an application by the plaintiff, by order of the Court (Murphy J.) made on 12th May, 2010 certain paragraphs of the defendants' counter claim were struck out.

3.6 In the defence, the matters pleaded in the statement of claim are traversed. Specifically, it is denied that the plaintiff had no knowledge of the specific provenance of the material from the O'Mahony lands and it is denied that the plaintiff was a *bona fide* purchaser for value thereof, lawfully took possession and has remained lawfully in possession thereof. Further, it is denied that the communications complained of in the statement of claim were published or communicated with false or malicious intent.

3.7 In the counterclaim, as it stands, it is pleaded that, in contemplation of the contract for sale of the lands between O'Mahony and Mr. Murphy/Milltown being signed and monies paid over to Mr. O'Mahony, the defendants allowed Mr. Murphy/Milltown to enter the O'Mahony lands and "begin development" in September 2007. However, it is pleaded that the removal of the material from the O'Mahony lands was performed without the defendants' knowledge or consent and that the plaintiff was at all times aware of the ownership and source thereof. It is contended that the plaintiff knowingly acquired the material knowing that Milltown was not the true owner thereof, and that the plaintiff did not perform due diligence in determining the lawful owner thereof and was reckless in accepting it, not having determined the identity of the lawful owner. It is pleaded that, in the light of the foregoing, the plaintiff has not come to Court with clean hands and should be refused the reliefs claimed. The reliefs claimed in the counterclaim include an order for the return of the soil removed from the O'Mahony lands to the defendants or, in the alternative, monetary compensation to the true value of the soil removed.

3.8 In its reply delivered on 10th November, 2009 the plaintiff joined issue on the matters pleaded in the defence and counterclaim and reiterated that it was a *bona fide* purchaser for value of the material and lawfully took possession of it and has remained in lawful possession of it.

4. The issues

4.1 The primary issues, in my view, which arise on the pleadings and on the facts are the following:

(a) whether the plaintiff is in lawful possession of the material which emanated from the O'Mahony lands and which was

incorporated into the Roche premises in the course of the landfill remediation works and landscaping or, alternatively, whether Mr. O'Mahony as the owner of the O'Mahony lands has a claim against the plaintiff for return to him of the said material or to be compensated to its value; and

(b) whether, in making and repeating the communications that the plaintiff acted wrongfully in acquiring, using and retaining that material, the defendants have been, or if they continue to make or repeat such communications will be, liable under any of the torts invoked in the statement of claim, thus entitling the plaintiff to the ancillary injunctive relief it seeks.

4.2 There is a myriad of peripheral issues arising from other allegations made by Mr. O'Mahony in relation to the plaintiff's conduct. I propose focusing on what I have identified as the primary issues but, as regards the peripheral issues, I think it is appropriate to record the following findings from the evidence.

5. Findings on peripheral issues

5.1 On the basis of the evidence of Mr. Pat O'Shea, the current Operations Director of the plaintiff, I am satisfied that the plaintiff did not commit any breaches of the Waste Management Acts 1996 to 2008 arising out of the removal of the material from the O'Mahony lands to the plaintiff's premises. It was confirmed by letter dated 11th March, 2009 from Clare County Council to Mr. O'Shea that that was the view of Clare County Council and that no further action was deemed necessary.

5.2 On the basis of the evidence of Mr. Caoimh n Nolan, Inspector of Environmental Enforcement with the EPA, I am satisfied that the EPA has no issue as to the manner in which the capping of the landfill on the Roche premises was implemented by the plaintiff. It is clear on the evidence that Mr. O'Mahony has been repeatedly informed by the EPA that the issue of the removal of the material from the O'Mahony lands is not a matter for the EPA or the enforcement of the IPPC licence held by the plaintiff and, therefore, the EPA has no intention of launching an investigation as he requested. That position was reiterated in a letter of 1st July, 2010 from the EPA to Mr. O'Mahony.

5.3 As a result of a written complaint to An Garda Sioch na made by Mr. O'Mahony on 4th September, 2008 a criminal investigation was carried out and a file was sent to the Director of Public Prosecutions on 2nd February, 2009. However, there is no evidence that the investigation related to alleged criminal activity on the part of the plaintiff and there is no evidence that a criminal prosecution has been initiated against any party.

6. Ownership/lawful possession of the material

6.1 As regards the legal principles which govern the issue of entitlement to possession and ownership of the disputed material, that is to say, the subsoil and topsoil from the O'Mahony lands, unfortunately, the relevant principles are identified to a limited extent only in the pleadings and in the submissions made at the hearing, which is understandable because Mr. O'Mahony was not legally represented. While to the lay person the principles may be difficult to understand, having regard to the history of this matter, and, in particular, the conduct of Mr. O'Mahony, which has clearly arisen from a grievance he harbours against the plaintiff, I will endeavour to summarise them in terms from which he will appreciate their implications.

6.2 To recapitulate, the plaintiff's case is that as a result of the plaintiff having paid TAL and Martins for the works they carried out on the Roche premises and TAL and Martins, in turn, having purchased the material from Milltown, and either having paid for it or accepted liability for payment, the plaintiff, having no knowledge of the provenance of the material or any dispute in relation to it, was a *bona fide* purchaser for value of the material, lawfully took possession of it and is lawfully in possession of it. As I have recorded, what the plaintiff seeks is a declaration that it is in lawful possession of the material and that it has no liability to Mr. O'Mahony arising from its acquisition. Mr. O'Mahony has pleaded that the defendants are the owner of the O'Mahony lands, that the material was removed from the O'Mahony lands without the defendants' knowledge or consent, that the plaintiff was at all times aware of the ownership and source of the material, that the defendants are the true and lawful owners of the material and are entitled to its return or to be compensated for its true value. So, the plaintiff is claiming to be in lawful possession of the material and Mr. O'Mahony is claiming ownership and an entitlement to possession. Although the wrong which the defendants allege against the plaintiff is not spelt out in the pleadings, the defendants' claim must be based in tort for detinue or conversion of the material by the plaintiff.

6.3 The authorities relied on by the plaintiff in its written submission in support of the proposition that the plaintiff was a *bona fide* purchaser for value without notice of the material and, therefore, was unaffected by the rights of Mr. O'Mahony as owner of the O'Mahony lands all relate to issues concerning land as such (*AIB v. Finnegan* [1996] 1 ILRM 401; *Gannon v. Young* [2009] IEHC 511 and *Kingsnorth Finance Trust Co. Ltd. v. Tizard* [1986] 1 WLR 783). However, as the reference to detinue and conversion in the preceding paragraph indicates, in my view, the legal principles which are applicable to the situation which has arisen here in relation to the material are the legal principles governing possession and ownership of goods. The crucial factor, in my view, is that the material, the topsoil and the subsoil, had been severed from the O'Mahony lands when the plaintiff's contractors agreed to acquire it. It follows that the relevant legal principles mainly derive from the Sale of Goods Act 1893, as amended by the Sale of Goods and Supply of Services Act 1980 (the Act of 1893). It is with a considerable degree of diffidence that I propose outlining these principles, which were not explored at the hearing. However, the principles, which I will outline and apply, are well established. In circumstances in which the defendants are not legally represented and Mr. O'Mahony has no legal training, having considered the matter carefully, I have come to the conclusion that it is not in his interest to invite further legal argument in this matter, which would merely give rise to further legal costs in circumstances in which the legal position is quite clear.

6.4 Even at common law the material severed from the land would have been regarded as a chattel or goods rather than as land. In *Sligo Corporation v. Gilbride* [1929] I.R. 351, in which the plaintiff was seeking injunctions to restrain the defendant from removing a wall and to direct the plaintiff to restore it, in the Supreme Court, Kennedy C.J. stated (at p. 362):

"If the ownership of the wall is actually in the plaintiffs, the action is in substance one for damages for trespass and trover and conversion of the stones in the wall, and the injunction is sought as ancillary to that right of property."

Fitzgibbon J. was of a similar view stating (at p. 366):

"The real cause of action is one of trespass to the plaintiffs' wall – assuming it to be theirs – and trover and conversion of the materials with which the wall was built"

Moreover, consistent with the decision of Gavan Duffy P. in *Scully v. Corboy* [1950] I.R. 141, the material comes within the definition of "goods" in s. 62 of the Act of 1893, which defines that term as including "emblems, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

6.5 Although as I have stated at the outset, it is not clear in whom the title to the O'Mahony lands is vested, it is not in dispute that Mr. O'Mahony is either alone or jointly with his wife, who was in Court throughout the hearing, or through the medium of the second defendant, the owner of the O'Mahony lands. During the hearing, Mr. O'Mahony indicated that he had evidence of his title in Court. However, he was not asked to produce it. For present purposes, I am assuming that he has good title to the O'Mahony lands either solely or as aforesaid. As such, before the material was severed from the land, he owned it. When the material was severed by Milltown he remained the owner of it, subject to the rights, if any, of Milltown. A fundamental principle of our law of property, whether land or goods, like so many other fundamental rules, is known by its Latin tag: the rule *nemo dat quod non habet*. What the rule means is that no one can give a better title to property than his own. However, at common law that rule is subject to exceptions. Moreover, while, in the case of goods as defined in the Act of 1893, the rule was repeated in s. 21 of that Act, it is subject to the exceptions set out in succeeding sections thereof, including s. 25(2). Section 25(2) provides:

"Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

In s. 62(2) of the Act of 1893 it is provided:

"A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not."

6.6 The facts relevant to the application of s. 25(2) to the plaintiff, in my view, are the following. Mr. O'Mahony agreed in principle to sell the lands to Milltown and he allowed Milltown into possession of the lands. Milltown severed the material from the lands while in possession and, accordingly, was in possession of the material, although it remained in the ownership of Mr. O'Mahony until the sale to Milltown would be completed. Milltown sold the material to TAL and Martins, who used it in the landfill capping and landscaping works on the Roche premises in fulfilment of their respective contractual obligations to the plaintiff. TAL paid, or acknowledged the obligation to pay, for the material Milltown sold to it. While it is not clear on the evidence what position Martins has adopted in relation to payment to Milltown, I am assuming it has adopted a position similar to that adopted by TAL. The plaintiff paid TAL and Martins for the works in which they used the material, thereby paying for the material. The plaintiff got actual possession of the material.

6.7 Having regard to those facts, two questions arise in the application of s. 25(2), namely:

(a) Did Milltown get possession of the material with the consent of the plaintiff?

(b) Did the plaintiff receive the material, which was incorporated into the Roche premises, in good faith and without notice of any lien or right of Mr. O'Mahony as the owner of the O'Mahony lands from which the material was severed?

6.8 In relation to the first question, I am satisfied on the evidence that Milltown got possession of the material with the consent of Mr. O'Mahony. It is stated in the letter of 27th November, 2007 from Mr. O'Mahony's then solicitors and it is pleaded on behalf of Mr. O'Mahony in his counterclaim that Mr. Murphy/Milltown was given possession with a view to doing preliminary works in aid of the development of the O'Mahony lands. It was in the course of that work that the material was severed from the O'Mahony lands. Mr. Murphy's evidence was that Mr. O'Mahony knew that the topsoil was going to the plaintiff and he was not challenged on that in cross-examination by Mr. O'Mahony, although the thrust of Mr. O'Mahony's evidence was that he did not know that the material was going off the site. On the basis of the totality of the evidence, I think it is probable that Mr. O'Mahony did know that Milltown was disposing of the material. In any event, I am satisfied that Milltown severed and had possession of the material with the consent of Mr. O'Mahony before the sale to TAL and Martins.

6.9 In relation to the second question, in outlining the factual background earlier, I have referred to the contacts between Mr. O'Mahony and Mr. Liddy, the then managing director of the plaintiff in 2006 and 2007. In April 2007, Mr. O'Mahony notified Mr. Liddy on two separate occasions of his intention to sell the O'Mahony lands. Subsequently, a meeting was held on 4th July, 2007 between Mr. Liddy and Mr. O'Mahony and, on the basis of Mr. Liddy's evidence, I am satisfied that he agreed to the meeting as a courtesy to a neighbour. At the time, while the proposed development on the O'Mahony lands was of some concern to the plaintiff, the concern was not enough to induce the plaintiff to get involved in the O'Mahony lands. Subsequent to that meeting there were two e-mails from Mr. O'Mahony to Mr. Liddy in July 2007, in the second of which, dated 29th July, 2007, Mr. O'Mahony advised Mr. Liddy that he had "three joint venture proposals for the development of the site and four bids for the outright sale of the site" and that, if he did not hear from Mr. Liddy, there would be little point in keeping him advised of further negotiations with third parties. That was the end of the contact between Mr. Liddy and Mr. O'Mahony until the end of November 2007.

6.10 A meeting arranged at short notice was held between Mr. Liddy and Mr. O'Mahony on 3rd December, 2007. At that stage, Mr. Liddy was not aware of the letter of 27th November, 2007 from Mr. O'Mahony's solicitors, as the plaintiff's company secretary was out of the office and it had not been brought to his attention. In any event, Mr. Liddy's evidence was that Mr. O'Mahony told him that Milltown had been allowed on to the O'Mahony lands on condition that a contract would be signed within three weeks but that on 26th November, 2007 the contract had been returned unsigned. Mr. Liddy's evidence was that he was completely surprised by Mr. O'Mahony's statement that Milltown had taken the material illegally. Mr. Liddy's evidence was that Mr. O'Mahony's suggestion that the plaintiff return the material came as a real shock to him and was completely unexpected. He passed the problem on to the plaintiff's legal advisers at that stage.

6.11 A director of TAL, Mr. Martin Hamill, also testified. His evidence was that he was aware that Milltown was doing preparatory work on the O'Mahony lands and was stripping the site. When TAL approached Milltown to purchase the material, he was not aware that Milltown was not the true owner of the soil. On the basis of the evidence of Mr. Hamill, I am satisfied that TAL agreed with Milltown in good faith to purchase the material and received it without any notice of any lien or other right of Mr. O'Mahony in respect thereof.

6.12 Similarly, on the basis of the evidence of Mr. Liddy, I am satisfied that the plaintiff dealt with TAL honestly and in good faith and from the perspective of the plaintiff the material was incorporated into the Roche premises without notice of any lien, right or equity

of Mr. O'Mahony in respect thereof. Having regard to what had transpired between the plaintiff and Mr. O'Mahony before September 2007, and the circumstances which prevailed in September 2007, although honesty, as opposed to reasonableness, is the test of good faith under the Act of 1893, in my view, it was reasonable for the plaintiff, acting by Mr. Liddy and other employees of the plaintiff, and for TAL to assume that Milltown had authority to sell the material.

6.13 In summary, having found that Milltown got possession of the material with the consent of the plaintiff and that both TAL and the plaintiff received the material in good faith and without notice of lien or other right of Mr. O'Mahony, by operation of s. 25(2) of the Act of 1893 the plaintiff obtained good title to the material which was incorporated in its premises as against Mr. O'Mahony and is entitled to retain possession thereof. The plaintiff has no liability to the defendants in respect of the material.

6.14 While it is clear that Mr. O'Mahony feels aggrieved that the sale to Milltown fell through after Milltown had sold the material to TAL which was used in fulfilling TAL's contractual commitments to the plaintiff, he must appreciate that, in the circumstances of the events of September 2007 which I have outlined, the law protects the plaintiff, which acted honestly in its dealings with TAL which, in turn, acted honestly in its dealings with Milltown. It was Mr. O'Mahony who allowed Milltown to go into possession of the O'Mahony lands and to do the pre-development works which created the material and thus facilitated the sale of the material by Milltown to TAL. Whatever, if any, redress Mr. O'Mahony has arising out of the failure of Milltown to complete the acquisition of the O'Mahony lands and from the sale by Milltown of the material can only be pursued against Milltown. It is not a matter for the Court in these proceedings.

7. Mr. O'Mahony's communications alleging wrongdoing on the part of the plaintiff

7.1 The plaintiff has invoked a plethora of torts in alleging wrongdoing against the defendants and in seeking civil law remedies to redress such wrongdoing. As the plaintiff has decided to forgo its claim for damages, it is unnecessary to consider whether the plaintiff has established liability on the part of the defendants for all or any of the torts alleged. Further, in the light of the findings which have been made as to the ownership and entitlement to possession of the material which was severed from the O'Mahony lands and is now incorporated in the Roche premises, in my view, the only issue which requires to be determined is whether, if the defendants were to continue to make or repeat the type of communications complained of by the plaintiff which alleged that the plaintiff acted wrongfully in acquiring, using and retaining the material, they would be liable in tort to the plaintiff, so as to entitle the plaintiff to the ancillary injunctive relief it seeks. In this context, of the torts invoked by the plaintiff, that which would obviously come into play if the defendants were to continue making or repeating such communications is injurious falsehood encompassing slander of title and slander of goods.

7.2 If, notwithstanding the making of the declaration which I intend to make that the material is in the lawful possession of the plaintiff, Mr. O'Mahony or the other defendant were to communicate to third parties the assertion that, in receiving and retaining the material, the plaintiff received and retained stolen goods, in my view, the plaintiff would unquestionably be able to establish the ingredients of the tort of injurious falsehood as outlined in *McMahon and Binchy on The Law of Torts*, 3rd Ed., at paragraphs 35.26 to 35.30, for the following reasons:

- (a) the statement alleging receipt and retention by the plaintiff of stolen goods would be untrue;
- (b) such statement would be made maliciously, because there would be no basis on which Mr. O'Mahony or the other defendant could assert some just cause, excuse or proper motivation for making the statement; and
- (c) such statement could only be viewed as calculated to cause pecuniary damage to the plaintiff and being published in permanent form in writing or electronically (as, on the basis of the evidence, it is probable would be the case) the plaintiff would, by virtue of s. 20(1) of the Defamation Act 1961, be relieved from the requirement to prove special damage.

7.3 I am satisfied that the defendants' allegation that the plaintiff has not come to court with clean hands is utterly without foundation. On the other hand, it is a matter of concern that after September 2008, notwithstanding the existence of the order of the Court made with the consent of Mr. O'Mahony, Mr. O'Mahony persisted in communications alleging wrongdoing on the part of the plaintiff. Accordingly, I consider it appropriate to grant the plaintiff injunctive relief in the terms sought by the plaintiff and set out at (C) in paragraph 3.4 above framed to cover communications to the plaintiff and its associated companies, any officer or employee of the plaintiff and its associated companies, and any third party. An injunction in the terms set out at (D) would merely replicate the content of the injunction in the terms set out at (C) in a vague manner and, for that reason, I do not propose to grant it.

7.4 Even if, despite the information furnished to him from December 2007 onwards as to the circumstances in which the material was incorporated in the Roche premises and the steps taken by TAL to ensure that the defendants would not be prejudiced by the payment of the price of the material directly to Milltown after Mr. O'Mahony raised the issue of the ownership of the material with the plaintiff and after his solicitor's letter of 27th November, 2007, Mr. O'Mahony honestly believed that he had a good claim against the plaintiff, once the Court has decided that he does not have a good claim against the plaintiff he must appreciate that he would be acting wrongly by asserting otherwise and that he must desist from doing so. In relation to what I have referred to as the peripheral issues, having regard to the findings which I have made in paragraphs 5.1 and 5.2 above, Mr. O'Mahony must also appreciate that he must desist from alleging breaches by the plaintiff and its agents of waste management and environmental enforcement legislation in connection with the removal of the material from the O'Mahony lands and its incorporation in the Roche premises.

8. Order

8.1 The Court will make the following orders on the plaintiff's claim:

- (1) declarations in the terms set out at (A) and (B) of paragraph 3.4 above; and
- (2) an injunction in the terms set out at (C) in paragraph 3.4 restraining communications to the plaintiff and its associated companies and any officer or employee of the plaintiff and its associated companies and any third party.

8.2 There will also be an order dismissing the defendants' counterclaim.