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Case number HC 04C 03870

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Date: 16 December 2005

Before Her Honour Judge Frances Kirkham

Between :

POINT SOLUTIONS LIMITED

Claimant

and

(1) FOCUS BUSINESS SOLUTIONS LIMITED
(2) FOCUS SOLUTIONS GROUP PLC

Defendants

Mr Giles Fernando and Miss Anna Edwards-Stuart of Counsel (instructed by Withers) for the
Claimant

Mr Peter Colley of Counsel (instructed by Moore) for the Defendants

Date of hearing: 21, 22, 23, 24, 25 and 30 November 2005

Date of draft judgment: 12 December 2005

JUDGMENT I am obliged to Mr Fernando, Miss Edwards-Stuart and Mr Colley for their assistance with this matter.

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Introduction

1. The claimant, Point, has been established since about 1995. It carries on business as a provider of computer software services for financial service institutions. It develops, writes and supplies software for use by companies in that sector. The second defendant owns the entire issued share capital of and controls the first defendant. For the purposes of this action, there is no material difference between the two defendants and I refer to them, collectively, throughout as Focus. Focus was also established in about 1995. They are substantial players in the provision of computer software and services in the financial services sector.
2. I am obliged to Mr Fernando and Miss Edwards-Stuart for Point and Mr Colley for Focus for their assistance with this trial.
3. This has been a trial of Point's claim for declaratory relief. Point claim that Focus have asserted that Point's Acuo Software infringes Focus' copyright in Focus' Goal Software. Point seek the following:

A declaration that the claimant's Acuo software modules, namely (i) Acuo Enable/Professional (ii) Acuo Web and (iii) Acuo SDK, do not infringe the literary copyright (if any) subsisting in the source code for the Focus Goal software or any of its constituent modules, namely (i) Goal Offline Viewer (ii) Goal Online Viewer (iii) Goal Builder, or any other copyright (if any) subsisting in any work making up the Focus Goal software.

An injunction to restrain Focus from representing to any person that the Point's Acuo software infringes any copyright owned by Focus.

4. In closing, Mr Fernando, Counsel for Point, suggested that the declaration might, instead, be worded to state non-copying of the source code or software in the development and writing of the Acuo code.
5. Point's case is that Focus have asserted that Point's Acuo Software infringes Focus' copyright in their Focus software as follows: There was protracted correspondence from Focus from 9 October 2002 until 14 December 2004 (the date on which Point began proceedings) in which Focus themselves, and through their solicitors, asserted expressly and by implication that the Acuo software infringed the literary copyright in the Focus Goal software. Point relies on the totality of the correspondence passing between them and Focus and on the following:

The contents of a letter dated 9 October 2002 from Focus to Point.

From 15 October 2002, Focus and Point discussed a proposed

voluntary arrangement for determining whether or not infringement had taken place. Focus expressly and by implication maintained their allegations of infringement during these discussions.

In or around December 2002, Mr Mark Loosmore acting for and on behalf of Focus represented to Richard Leadbeater of Swiss Life that Point's Acuo software infringed the copyright in the Focus Goal software, thereby seeking to prevent Swiss Life from purchasing Point's software and services.

Frank Murray, acting for and on behalf of Focus, represented implicitly to Paul Creamer of Marlborough Stirling that the Acuo software infringed the copyright in the Focus Goal software.

In their defence dated 10 January 2005, Focus repeated at paragraph 7 the allegation that Point's software had been created in an "impossibly short time frame" and thereby expressly and/or implicitly alleged that Point's software infringed the literary copyright in the Focus Goal software.

6. Point say that, unless the declaration and injunction are granted, they will suffer further loss and damage. They will be disadvantaged in the market place and this will impede their ability to make sales. They will be unable to raise venture capital funding. They will be unable to proceed to a flotation of their business.
7. On day two of the trial, Point began to make an application for permission to re-amend its particulars of claim. By that re-amendment, Point wished to broaden the case substantially, by making reference to express and implied assertions said to have been made by Focus' sales force, including Mr Muchmore and Mr Smith, sufficient to trigger the declaratory jurisdiction. It was alleged that assertions had been made to AXA, National Australia Bank and Legal & General that the Acuo software had been copied from the Focus: Goal software. By new sub paragraph 6, Point sought to be permitted to rely on such evidence as came to light. However, Point did not pursue that application to re-amend.
8. Focus deny that they have asserted to Point that the Acuo software infringed copyright in Focus: Goal software. They deny they have made any such assertion to third parties. Focus have never alleged copyright infringement. They have consistently maintained that they do not know if there is good reason for them to suspect copying. Focus have not seen Point's software. Point has (deliberately, Focus say) given incomplete evidence. Point has not permitted comparison of its code with Focus'. Point asks Focus to acknowledge non-infringement but without putting Focus in possession of the facts. The question on which Point seek relief is, to a degree, a theoretical one.
9. There are issues between the parties (which I deal with later) as to opportunities for

Focus to inspect Point's software. Steps were taken to arrange for independent expert scrutiny, on a confidential basis, of the parties' software before these proceedings began but these came to nothing. Within these proceedings, the parties were given permission to rely on a jointly-instructed expert but, shortly before trial, it was decided not to proceed with such expert evidence. I am, therefore, in a position where I have no expert evidence to assist me.

10. Mr Fernando submits that Focus are in effect running two inconsistent cases, namely that Focus say (1) that they have never alleged copying or infringement and cannot say whether or not Point's software infringes, but (2) that Point has infringed their copyright and the only dispute is whether or not there has been substantial copying. The first of these is straightforward. Focus' position in this trial has been clear: their case has consistently been that they cannot say whether or not Point's software infringes. So far as the second is concerned, Point rely on assertions made on behalf of Focus in correspondence. For example, in their letter of 22 February 2005, Focus' solicitors say that the issue was whether or not there had been substantial copying, suggesting that that was a prime candidate for a preliminary issue. At the two hearings before Master Bragge in February this year, Focus sought permission for a jointly-instructed expert, presumably because such evidence would go to the question whether or not there had been substantial copying. As I set out in detail below, in 2002 and 2003 Focus' position in correspondence was that the proposed independent expert scrutiny would be concerned with issues relevant to the question whether or not Point had infringed Focus' copyright. In these proceedings, however, broadly Focus' position has been that they have insufficient information to know whether or not Point's software infringes some unspecified copyright of Focus. I do not accept Point's assertion that Focus are running a positive and inconsistent case as to whether there has been substantial copying. Focus have adduced no evidence as to any copyright they might have or as to whether Point's software does copy their own software. Focus have simply challenged Point's evidence in support of its assertions that its Acuo software was independently designed. They were entitled to do so. I am not trying a case as to whether or not there has been copying. The relevant element in this case is whether Point have demonstrated, on balance of probabilities, independent design. The burden is on Point, not on Focus. Mr Fernando warns me of the risk of reaching a conclusion solely on the burden of proof. Whilst I am alive to that risk, this is not a case where I am driven to that position.
11. On the first day of trial, Point sought permission to introduce a second witness statement, dated 15 November 2005, for their Mr Blatchford (Chief Technical Architect). Mr Blatchford wished to annex to that statement a confidential exhibit

comprising a CD said to contain all of the Acuo source code for each of the Acuo software module to which he and all of the other Point software developers, who were to give evidence at trial, had referred. I gave permission for Mr Blatchford's second witness statement to be adduced, with the exception of the paragraph dealing with that confidential exhibit. As a consequence, that confidential exhibit has not formed part of the evidence. No protocol was established whereby Focus could examine and challenge any of the matters contained within that CD. Without assistance from the parties, and possibly expert evidence, I doubt I would have understood anything at all on that CD.

12. In summary, therefore, I am asked to make a declaration that software which I have not seen does not infringe any copyright there may be in software I have not seen and where I have no expert evidence to assist me.
13. Shortly before trial, Focus found and disclosed some documents which had not previously been disclosed. Focus' position is that these were not documents which they were, on Point's pleaded case, required to produce pursuant to CPR31.6; Focus had disclosed these voluntarily. Point's position was that Focus had failed in its duty of disclosure. Point had intended to make an application for specific disclosure on the first day of trial, but in the event did not proceed with that.
14. In the light of the documents disclosed at that late stage, Mr Loosmore (Focus' Business Development Director) Mr Thelwell (Managing Director of the first defendant and Chief Operating Officer of the second defendant) and Mr Walker-Smith (Major Account Manager of Focus) all amended their previous witness statements.
15. In cross examination of Focus' witness, Mr Fernando was very critical of Focus' approach to disclosure. In my judgment his attack was inappropriate. Point could have pursued an application for specific disclosure, but chose not to do so. The question whether or not Focus had complied with CPR Part 31 was not directly argued, but I was gaining the impression that Point might not persuade me that Focus had not complied with its duty of disclosure in relation to the specific and limited particulars contained in paragraph 3 of its Amended Particulars of Claim. Had Point proceeded with and been successful in its application to re-amend its pleading, its case would have been put on a wider footing. Instead of the limited allegations actually made, Point's case would have been one, as has been characterised in this case, of Focus' "bad mouthing" Point in the market place. Point's case was to some extent run on the basis that Focus' policy was to use a potential dispute between Focus and Point as a selling point and that there was a concerted effort by Focus to fend off the competition from Point. However, that was not the pleaded case I dealt

with at trial and I deal only with the pleaded case.

Background

16. Focus have for some years been the dominant supplier of software to financial services institution. In April 2001, Point and Focus entered into an outsourcing agreement pursuant to which Point agreed to and did undertake work for Focus, including a review of Focus' latest Goal: Builder Tool. Mr Green (Managing Director of Point) carried out the work. In connection with that, Point were provided with some of Focus' software modules, namely: Goal: Builder Versions 2 and 2.1, Goal: Renderer Version 1.43 and Goal: Utilities.
17. In May 2001, Point were approached by Clerical Medical International (CMI) who had a development project and were considering PAC technology (Product Application Components). Mr Green met a representative of CMI and proposed use of an industry-standard ISML Renderer, including Focus' Renderer. CMI subsequently decided not to use Focus' software. Instead, Point and CMI agreed whereby Point would develop the solution which CMI wanted. That agreement set Point on the road: CMI would become its first paying customer and the agreement stimulated the development of the Acuo software. Point quickly assembled a team to do this. Point began to develop their Acuo software on 2 July 2001.
18. Focus subsequently asked Point to return Focus' software to them. Point say that they did so at the end of October 2001. In November 2001, at Focus' request Point produced a schedule of software which it had returned to Focus.
19. From 2 July 2001 and into 2002, Point developed the Acuo software products. Point's fully tested electronic application was delivered to CMI on 11 January 2002. Point then turned to development of other Acuo products. The first prototype of Acuo Web was available for demonstration purposes by February 2002 and the first commercial release was delivered in August 2002.
20. Mr Murray (Chief Technology Officer of Focus) wrote to Point by letter dated 9 October 2002. That letter is important and I set it out in full as follows:

“We wrote to you last year (8 November 2001) in connection with the return of our software and manuals for which we asked you to provide a completed schedule which itemised the software which you duly completed and returned on the 30 October 2001.

Original Contractual Relationship

By an agreement (Software Outsourcing Agreement) dated 25 April 2001 you agreed to use your expertise to configure and use software packages supplied by Focus to perform services referred to in the above agreement.

I am now writing to seek confirmation of the provenance of the software you have developed in order to compete with Focus. Our main concern relates to the speed with which you have developed your product.

You may be aware that we had a partnership with Synaptic Systems, as a result of which they, like you, had access to our software. We subsequently discovered that they, like you, had developed a product to compete with ours in an impossibly short time frame. We took legal action against Synaptic, as a result of which they were forced to admit substantive copying, obliged to pay our costs and substantial damages and also required to destroy their code (on oath). Focus values its partner relationships and has put a great deal of trust in these in the past. However, we cannot allow such relationships to result in our IPR being compromised. Synaptic significantly breached our trust and copied our software in order to compete with us.

What has happened between Focus and Point Solutions is strikingly similar to what happened between Focus and Synaptic. As a result of this and particularly the speed at which you have launched a competing product, I am sure you will understand that I need to seek confirmation that you have not undertaken any copying of Focus' software and solutions. I strongly suggest that before you reply, that you give serious thought to what constitutes copying. Indeed, Synaptic failed to understand that copying covers more than just literal code copying, it also covers, for example, the use of the structure of the product as a 'springboard' in producing your own product. It was Synaptic's initial arrogant response in this respect which caused us so much offence and strengthened our resolve.

Copyright works

We wish to assert that Focus products are original copyright works and to which the copyright vests in Focus.

Confirmation request

Without a court order for advance disclosure or the carrying out of further investigations (including the analysis of your product), we are not in a position to confirm that no copyright infringement has taken place. Therefore we are requesting both a written confirmation from you in this respect and a voluntary disclosure by Point Solutions of such material that would confirm that no copyright infringement has

taken place. We believe such material would be made available through a court order were we to seek any advance disclosure and, indeed case law supports the principle that an unreasonable refusal by you now to make advance disclosure may deny you the costs of doing so if a court is minded later to so order.

We are concerned to establish a voluntary agreement to determine that no copyright infringement has taken place and we look forward to hearing from you accordingly.”

21. Mr Green of Point replied by letter dated 15 October 2002, stating as follows:

“I am writing in response to your letter dated 9 October 2002 concerning the provenance of our software.

I understand your concern following your experience with Synaptic.

I am therefore happy to confirm that we have neither copied code nor based any of our product suite on Focus’ software or solutions. I would also like to make it clear that we have not used the structure of any of your products as a ‘springboard’ in producing our Acuo product suite.

We have been developing our Acuo product suite for over 15 months, and during the height of development have had a team in excess of 20 people working on it. We estimate that more than 20 man-years work has been carried out in the development of Acuo.

Because we believe that the architectural approach that we have taken provides us with a strong competitive advantage over other providers of PAC technology, including Focus, we would be unwilling to allow Focus representatives to have access to our source code.

We are, however, happy to make a voluntary disclosure of such material that would confirm that no copyright infringement has taken place, to a mutually agreeable third party. This is provided that Focus pay for all costs incurred and is on the understanding that no products, architectural diagrams, or source code will leave our premises.

I believe that it is in the interest of both companies to resolve this issue as soon as possible and clear any doubt over the provenance of our software.

I look forward to a speedy resolution of this matter.”

22. Mr Murray replied by letter dated 7 November 2002. He suggested an independent review of Focus’ and Point’s software and proposed that the parties should agree an independent expert skilled in software design and development. The process would be confidential so that neither party should see the other’s software. He suggested

that the expert should be able to decide which of the parties should pay his costs based on whether the expert had “found any evidence of copyright infringement and whether or not any party had behaved in an unreasonable or obstructive manner in the conduct of the review”. He made it clear in his letter that the review would be conducted on a ‘without prejudice’ basis but the conclusions section of the expert’s report would not be without prejudice. It should not amount to a binding determination. Mr Murray said “the reason for this provision is to ensure that the expert’s decision is not final and binding but that it would be usable by either party should litigation then commence as to the issue of costs in such litigation.” Mr Murray expressed the expectation that the expert should be able to complete his report within six to eight weeks of commencing it.

23. Mr Green replied by letter dated 18 November indicating Point’s willingness to participate in such process and expressing the hope that it would be completed as soon as possible. Mr Green made comments on Mr Murray’s proposals and stated “we see this process as a way of exonerating ourselves and as such assume that Focus will accept the findings of the report.” Mr Green hoped that the expert would be able to complete his report in a shorter timescale. He said that they would now look to identify a suitable candidate. Point were not willing to bear any cost in connection with the process. It was Focus who had initiated this and Focus would have to meet all of the costs.
24. Mr Murray replied by letter dated 16 December 2002. He did not accept Mr Green’s position on costs. He made the point that Focus’ proposal would tend to encourage both parties to keep the costs of the expert to a minimum. His proposal would provide a fair means of apportioning costs based on whether evidence of copying was found or not. Point, therefore, did not risk paying the expert’s fees unless the expert determined that infringement had taken place, or Point had acted unreasonably. As far as the scope of the review was concerned, Mr Murray agreed with the points which Mr Green had made.
25. Mr Green wrote to Mr Murray on 8 January 2003. By that letter, he agreed Focus’ proposals as to how costs should be dealt with and reiterated Point’s desire to bring the matter to a “speedy resolution”.
26. There was then some correspondence between the parties as to the identity of the expert. Focus nominated Dr Drossopoulou and Dr Knottenbelt. By letter dated 16 February 2003, Mr Green noted Point’s acceptance of Dr Drossopoulou and Dr Knottenbelt. Mr Green then made some suggestions as to how the process might be speeded up so that the review might begin the following week.
27. By letter dated 20 February 2003, Mr Murray wrote suggesting terms of reference for

Drs Drossopoulou and Knottenbelt and specific questions to be addressed by them. He suggested that Focus and Point should co-operate in providing a “technical primer” for the experts, providing industry context, basic software structure and such other information of a technical nature as the parties believed the experts might require. He also suggested that the parties should co-operate in providing a “legal primer” for the experts, to take the form of copies of relevant cases and current legal texts, to enable the experts to understand copyright infringement in software in their legal context.

28. Mr Green sent Mr Murray a long letter dated 7 March 2003, with suggested terms of reference for the appointment of Drs Drossopoulou and Knottenbelt. In that letter, Point proposed that the experts undertake a code comparison; that the basis of the experts’ appointment was to reach a view as to whether, based on their examination and the legal primer, Point’s software infringed the copyright (as defined in the legal primer) of the Focus software. Point set out an expanded explanation of what the legal primer was to comprise. They set out the proposed timescale within which the experts should carry out their preliminary review. After that preliminary review, the experts should report whether or not the Point software infringed the copyright of the Focus software.
29. Focus replied to that by letter dated 14 March 2003. Mr Murray suggested that Point were making a fundamental error as to the role of the experts. The experts would not be equipped to determine the issue of copyright infringement; they would be able to determine only the issue of use and/or copying. He reiterated that Focus were not prepared to agree that the experts’ opinions be determinative of the issue of infringement. Mr Murray set out in a long paragraph what he considered to be Point’s fundamental mistake as to the nature of copyright infringement in the context of computer software and finished by saying that the experts should be asked to examine the development of the history of the Point software as well as considering if any Focus software had been used in developing the Point software. “We will then be able to take a decision as to whether we consider that these findings demonstrate a case for copyright infringement.”
30. Mr Green responded by letter dated 26 March 2003. He reiterated that Point had in no way infringed the copyright of Focus and had not used any Focus product as an aid to developing its own. He suggested that if Focus were not happy that the experts should determine whether copyright infringement had taken place, then the parties use a professional technical dispute resolution service, for example, CEDR Solve. Mr Green expressed concern at Focus’ unwillingness to accept the experts’ findings to be determinative of the issue of infringement. He finished by saying: “I now ask you

carefully to consider how you intend to move forward. As I see it, the options open to you are:

- i. To sign and return to us our terms of reference document and draft a legal primer for our review.
- ii. To agree to use a professional technical dispute resolution service with expertise in copyright infringement [ie CEDR] or
- iii. To accept our written confirmation that no copyright infringement has taken place and confirm that unless and until you commence litigation the matter is closed.”

31. In that letter, Mr Green also raised Point’s concerns that Mr Loosmore had drawn to the attention of potential customers the difficulties between the parties and that this was placing a restriction on Point’s ability to compete fairly in a market which Focus currently dominated. That was not acceptable to Point. The question whether or not Point had infringed the copyright of Focus needed to be determined as soon as possible. Mr Green expressed concern about what he described as the unreasonable delay in the process of achieving this.

32. Mr Murray replied by letter dated 3 April 2003. He suggested a meeting, accompanied by lawyers, to agree the terms on which the issue might be determined. He identified what Focus considered to be the role of the experts noting that, if the matter were referred to a court or some form of determinative dispute resolution, such process would require experts to answer the questions which Focus had posed. Focus considered it to be inappropriate for computer programming specialists to be asked to determine the issue of copyright infringement. Mr Murray noted with interest the proposal to use CEDR, but queried whether they would be able to find someone who could address both the technical and the legal issues. He asked Mr Green to let him know what was proposed with respect to alternative dispute resolution and indicated that Focus would consider any reasonable suggestion. If Point was suggesting mediation then, Mr Murray indicated, Point would have to allow Focus access to its code and code development environment.

33. Mr Green replied on 24 April 2003 agreeing the proposal for a meeting and suggesting dates and a venue. As regarding the role of the experts, he said this: “If your experts conclude that there is no copyright infringement based on a clear legal primer, I still cannot see why you would not accept their decision. I am sure that any court would take a dim view on (sic) you issuing proceedings against Point in such circumstances and we would certainly consider it to be further evidence of your anti-competitive stance”. He said that he had contacted CEDR Solve and expressed confidence that that body could provide an appropriate skilled expert; he would

provide further details once available.

34. Mr Murray replied on 30 April 2003, answering various points in Mr Green's letter. He noted that Focus' solicitors (Messrs Hammonds) were familiar with CEDR; they had expressed surprise if CEDR were to be able to find an appropriately skilled and appropriately trained expert. (In fact, the CEDR option was not pursued or, so far as I am aware, mentioned after this letter.)
35. As agreed, the parties met on 1 May 2003. The meeting was held on a 'without prejudice' basis. Correspondence ensued following that meeting. One of the matters which had been agreed between the parties at the meeting on 1 May 2003 was that Focus would not mention the dispute to third parties. In fact, immediately after that meeting, on 2 May 2003, Mr Thelwell suggested to Mr Smith of Focus' sales team how Mr Smith might discuss with customers the dispute between Focus and Point. Mr Thelwell had not attended the meeting and I accept his evidence that he had not known, on 2 May 2003, what had been agreed at the meeting.
36. Following the 1 May meeting, the parties progressed to preparation of terms of reference for scrutiny by Drs Drossopoulou and Knottenbelt. These were set out in a long letter from Mr Green to Mr Murray dated 3 August 2003. Mr Murray responded on 18 August, apologising for the delay in replying (caused by his holiday). He said "I am happy to proceed subject to the strict terms of the contract. As far as I am concerned the timetable will not commence before we get a quote from the experts". He asked Mr Green to sign the documents and the parties could then move forward.
37. The terms of reference were finally recorded in a long letter dated 25 August 2003. Section 1 explained the code comparison of the software. Section 2 set out the specific questions to be addressed by the experts, including:
 - "Is it plausible that the Point software has been independently developed by (or on behalf of) Point?...
 - What evidence or indication is there (if any) that the Focus software has been used or is being used... by Point in the development of the Point software?
 - Can the experts identify any direct or indirect copying or other evidence of copying of the Focus software in the Point software?
38. Section 3 provided for each party to provide a technical primer containing such information as the parties believed the experts might require "to understand and to efficiently carry out their examination of the software".
39. Section 4 set out the timetable to be followed. Section 4.1 provided, that subject to the issue of costs estimates, the parties should use all reasonable endeavours to instruct the experts within 14 days of the signing of the letter. The experts were to be asked to complete their examinations within 28 days of their having been instructed

and to provide a preliminary report within 14 days of completion of their examination and a final report within 21 days of the preliminary report.

40. The parties agreed to move forward on that basis. There is some suggestion that this might not amount to a binding agreement. It is not necessary for me to decide whether or not as a matter of law this was a binding contract. What is clear is that this letter set out the understanding reached between the parties as to how they were to move forward.
41. Focus proceeded to prepare its technical primer. Mr Fernando sought to submit that there was some question mark over whether or not they had done so. However, it was not put to Focus' witnesses that they had not undertaken work on their technical primer and I have no reason to doubt their evidence that they did prepare it. But matters did not otherwise proceed with any urgency. By e-mail dated 10 October 2003, Mr Lunn of Focus sent to Mr Green an e-mail which stated "We have agreed the following way forward (below) with the experts this a.m. We hope it meets with your approval. We are keen to start early next week". Mr Lunn included in that e-mail to Mr Green the text of a message passing between Mr Lunn and Dr Drossopoulou concerning the cost and timetable. That reiterated that an initial primer would be supplied by both parties to the experts. In December 2003, Focus raised with Dr Drossopoulou some concerns regarding the costs of the exercise. There was a discussion, which was conducted between Focus and the experts but without reference to Point, as to whether the experts could provide a capped estimate of fees. Dr Drossopoulou raised that point with Focus' solicitor by e-mail dated 2 February 2004.
42. Mr Moore, Focus' solicitor, sent an e-mail to Mr Green and Mr Blatchford of Point dated 19 March 2004 stating "As you know, the software assessment process has stalled. Focus has finished its technical primer, but I have been having an extended discussion with the experts relating to concerns which they raised on the allocation of costs and concerns which Focus raised on the costs themselves. I think we have reached a solution which I am ready to put to you..." He then went on to ask whether Point had their own solicitors, in which case Mr Moore would correspond with them rather than with Point (as professional etiquette required). Mr Green replied by letter dated 18 April 2004. He said this:

"Our offer to enter into a non-determinative review made on the 25 August 2003 was on the understanding that Focus Solutions would move quickly forward with the review and that the process would commence within 2 weeks of Focus Solutions receiving the quote from the experts.

This clearly has not happened, the quote was received in September and despite receiving an e-mail on the 3 November from Frank Murray, stating that the review was just about to start, we have received no further correspondence until your e-mail.

We have suspected for a long time that Focus Solutions were trying to prolong the process and their inaction over the last 6 months has added further weight to this viewpoint. If Focus Solutions genuinely believed that we have infringed their copyright then they would have moved forward with the review without hesitation.

We do not accept the explanations you have provided as being valid reasons for such a long delay in the process. As a result of the inaction over the last six months and a change in our own circumstances our approach to this issue has now changed. We are not prepared to allow Focus Solutions to use this issue as an open ended threat and will not expend any more time, effort, or expense in any process that is non-determinative.

Instead we are now embarking on our own process to seek resolution. As a result of Focus Solutions not taking us up on our offer within the agreed timescales we reserve any rights and remedies we may have in relation to the statement made by Mark Loosmore to Richard Leadbeater.

You will be hearing from our solicitors in due course.”

43. Thereafter, the parties corresponded on the question why the expert scrutiny had not proceeded. It is clear from Mr Green’s letter of 18 April 2004 that Point blame Focus, accusing Focus of having dragged their feet. In my judgment that accusation is unfair. Point had not chased Focus at all following the letter of 25 August 2003. Point left it to Focus to negotiate with the experts although the 25 August 2003 letter placed an obligation on both parties to instruct the experts. Point did not seek to speed up that process. In cross examination, Mr Green said that he chased by e-mail and telephone calls but no such e-mails have been disclosed and Mr Green made no mention of that in his witness statement. It is not clear to me that Point made any enquiry of Focus as to progress. It is now clear that, unlike Focus, Point had not prepared a technical primer at all. Mr Green explained at trial the reason for this. He had sought venture capital funding for Point and had, prior to August 2003, been in discussion with a Welsh venture capitalist. After agreement had been reached with Focus in August, the venture capitalist told Mr Green that the outcome of the agreed expert scrutiny process would not provide sufficient certainty or comfort. Mr Green

decided that he would proceed, nevertheless, because he had no alternative. He could not afford to take any other step. The expert scrutiny was all he could get at the time. Even though the Welsh venture capitalist had said it would not be sufficient, Point nevertheless wanted something, but could not afford anything else. Mr Green said that he did not proceed with Point's "technical primer" because he was busy working on other matters. His approach was to deal with matters on a "just in time" basis, the inference being that he would deal with this when it was needed and not before. The impression it gives me, however, is that Mr Green had no sense of urgency at all so far as the expert scrutiny was concerned.

44. Curiously, it is said that The Exchange (see the relevant section below) indicated that it could not move forward with purchase of Point's product until after the outcome of the expert scrutiny was known. Notwithstanding, ultimately Mr Green decided not to proceed with that process. The impression I gained is that at some stage Point decided not to proceed with the expert scrutiny process, but did not get around to telling Focus until their letter of 18 April 2004.
45. By letter dated 28 May 2004, Charles Russell (Point's solicitors) wrote to Hammonds (Focus' then solicitors) to say that they were instructed to seek a declaration of non infringement of copyright; they were reviewing the documents and would write again as soon as they were able, setting out the basis upon which Point sought such a declaration, namely that Point's software was a product of independent design and consequently there had been no infringement of any copyright which Focus might allege they owned in their software.
46. Hammonds replied by letter dated 4 June 2004. They took the view that the parties had agreed a procedure for scrutiny by the experts and queried why Point were pursuing declaratory relief. They reiterated Focus' position, namely that it would be difficult to construct an expert determination structure to resolve the issue between the parties. They had not been able to identify any single expert who would have sufficient technical understanding to deal with code comparisons across different software languages and sufficient legal understanding to assess the question of copyright infringement. They suggested that the expert scrutiny which had been proposed would have been in Point's interests. They added this:

"If [Point] is concerned that [Focus] is wishing to preserve the ability to claim that its copyright has been infringed by [Point's] product subsequent to the expert determination, we can confirm that [Focus] would agree not to do so in the event of the experts finding no copying, since [Focus] does accept that copying is a pre-condition of copyright infringement"

Hammonds went on to query how Focus could be in a position to provide an acknowledgment of non infringement, as Charles Russell had requested. They said this:

“[Focus] has raised serious concerns with [Point] as to the circumstances in which the software in question came about. Bearing in mind the time, effort and expense involved in [Focus] developing its software, [Focus] has concerns as to the speed of development of [Point’s] competing product which coincided with [Point] being given access to [Focus’s] software. [Point] is simply not in a position to demand such an acknowledgement, without having given [Focus] a sufficient factual basis upon which to make a judgment. Since [Point] is (understandably) sensitive to the issue of allowing [Focus] access to its software development history [Focus] proposed a third party determination as a way of resolving this issue. In this light, we hope that [Point] will recognise that both its request and its proposed action are fundamentally misconceived.”

47. On 12 July 2004, Point’s solicitors sent a letter of claim. I return to the detail of that in due course. On 14 December 2004, Point began these proceedings.

48. I have already summarised Point’s pleaded case. Within the proceedings, Focus made a Part 18 request for further information. Point replied in July 2005. Requests numbered 9-12 asked Point to identify, in a schedule, each and every version of Acuo Enable/Professional, Acuo Web and Acuo SDK and, for each such module and version, Point were asked to identify each person who was an author, co-author or contributor, setting out the precise dates on which each person had worked on such module or version. The request asked, in relation to Messrs Green, Blatchford, Hillicks and Townsend of Point, to identify each module and so on to which they had contributed and when. Point replied as follows:

“This is not a claim for copyright infringement in which the claimant must identify each copyright work on which it relies and give particulars of subsistence and ownership of copyright in each such work. Whether or not the claimant’s own software enjoys the benefit of copyright protection is in fact irrelevant to the claimant’s claim. In terms of copyright issues, the only issue that forms part of the claimant’s positive case is whether or not the claimant’s software infringes any copyright owned by the defendants. As part of that case, the claimant has pleaded facts to support its claim that the Acuo software was written and developed without reference to the

defendants' source code. Without prejudice to the foregoing, the claimant has prepared a Components Schedule which is annexed to this Response to Request for Further Information which identifies each component piece of software that forms part of the claimant's Acuo software.

The programs listed in the Components Schedule have the original author of the program identified in the left-hand column, with the date of file creation and revision dates in the right-hand column. The original creator of each file was likely to have been wholly or substantially responsible for any subsequent amendments. It is possible that further individuals (being part of the claimant's development team or external consultants), who cannot be identified without an expensive, disproportionate and possibly fruitless enquiry, were from-to-time (sic) involved in suggesting alterations or additions to files identified in the Components Schedule even though their names do not feature in the left-hand column. However, the contribution of these further individuals to any file of which they were not the original authors is likely to have been limited."

49. Point annexed to that document a schedule. That was described as a "list of Acuo components that go to make up the Acuo product set including on and off-line renderers, the SDK (PAC Builder) and Handler. Along with the original author of the component". There then follows a very lengthy schedule which lists components, by reference to brief description. In many cases, the author is identified. Against each component listed is shown the date on which the component was first worked and the dates of subsequent amendments. It is explained that dates prior to July 2001 will usually refer to the start date of open source components being utilised within the Acuo product. There is no explanation of this schedule. It is, frankly, meaningless to a layman. There is nothing to help me understand what, if any, significance it has to the question whether Point have demonstrated that their software does not infringe any copyright which may subsist in Focus' software.

Focus' advice to sales force 2002/2003

50. Focus' dispute with Synaptic, concerning allegations of copying by Synaptic of Focus software, had left Focus sensitive to these issues and, indeed, to what might be said publicly. In December 2002, Focus sought advice from its solicitors as to what its sales force could and could not say in relation to the dispute with Point. Mr Moore of Hammonds wrote to Mr Loosmore by letter dated 20 December 2002 including the following:

“What can be said about Point? At present Focus is engaged in correspondence with Point. Focus believes that Point has infringed the copyright in its computer software and has taken legal advice in relation to that issue. We are not in a position to say, at this stage, whether or not Point has, as a matter of fact, infringed our copyright. On the basis of the foregoing, you are entitled to tell customers the following:

That Focus has concerns about the provenance of the Point product.

That Focus is engaged in correspondence with Point in relation to the foregoing and that Focus is taking legal advice in that respect.”

51. On 22 January 2003, Mr Lunn of Focus e-mailed to Mr Murray, copied to Mr Thelwell (Managing Director of Focus) and others, to say that he had spoken to Mr Moore briefly in respect of specific advice to Focus employees who were engaging with potential clients and that Mr Moore’s advice was “that we are entitled to say ‘we are currently taking legal advice in respect of the copying of our software’”.
52. That e-mail was copied to Mr Moore who responded quickly to say “I would prefer not to appear to assert copying, rather than to state ‘we are currently taking legal advice in respect of our concern that Point may have copied our software’ or ‘we have informed Point that we are concerned that they may have copied our software and we are taking legal advice’.” Later that afternoon, Mr Lunn confirmed to Mr Murray, copied to Mr Thelwell and Mr Moore, the advice which Mr Moore had given. By e-mail dated 29 January 2003, Mr Loosmore notified the Focus sales and marketing team as follows:

“I have recently been asked for general guidance as to what the Focus sales force can and cannot say in relation to the dispute with Point Solutions. As you appreciate, this is an important issue because Focus needs to be very careful not to make any statements which it cannot substantiate, otherwise it might find itself subject to a defamation claim...

What can be said about Point Solutions

At present, Focus is engaged in correspondence with Point Solutions. Focus believes that Point Solutions has infringed the copyright in its computer software and is taking legal advice in relation to that issue. We are not in a position to say, at this stage, whether or not Point Solutions has, as a matter of fact, infringed our copyright. On the basis of the foregoing, you are entitled to tell customers the following:

- That Focus has concerns about the provenance of the Point Solutions product;
- That Focus is engaged in correspondence with Point Solutions in relation to the foregoing issue and that Focus is taking legal advice in that respect.”

53. That e-mail was sent on 09:34 hrs. Some six minutes later, Mr Smith (a member of the sales team) e-mailed Mr Loosmore to ask whether they could “any way liken it to the Synaptic situation? ie we had concerns which proved to be true. In the case, they may or may not, so we are doing the things you laid out below.” Mr Loosmore replied to say “I certainly think we can say that we won a dispute with Synaptic and then say this led us to review other situations and then lead into the statements below”. Again, very promptly after Mr Loosmore’s initial e-mail that morning, Mr Muchmore contacted Mr Loosmore by e-mail stating “I have communicated this to both AXA and NAG in these terms. I am sure this will get back to Point and it will be very interesting to see how they react.” Mr Loosmore responded to Mr Muchmore to say “Point have written to complain that I bad mouthed them at Swiss Life. My view - tough! As long as we are in line with the guidelines there is not a lot they can do!”
54. Mr Loosmore gave a sales briefing to the Focus sales force in February 2003. It is likely that those members of the Focus sales force who were available attended that briefing. Shortly before trial, Focus produced the Powerpoint presentations prepared for that briefing. Some slides deal specifically with Point. One gives a brief overview of Point (when formed, number of employees and so on). It includes the statement that Point were due to launch a competitive Builder shortly and already were marketing it actively. Another slide was headed ‘Financial Stability?’ and noted some financial information about Point. (There are some questions as to the source of this information, but these matters are not material to the issues I must decide in this case.)
55. One of the slides is headed ‘Selling against Point Solutions’. On this slide are listed 11 points, of which ten Focus considered to be negative or weak so far as Point are concerned. It shows that Focus were aware that Swiss Life was likely to be Point’s first paying customer. It states “We are actively investigating the providence [ie provenance] of their software through our lawyers. We have applied for patents. Point may end up breaching these. Their solution may not follow interpretation of ISML so there will be incompatibles with our software... Point are trying to raise capital - one venture capitalist who viewed their business plan claimed that it was very poor and that they would be surprised if they raise any money. They are cheap

but there is a reason for that - to purchase a solution from Point is very risky.”

56. A further Powerpoint slide lists other considerations, including the proposition that “Competition is good! Customers don’t like a monopoly supplier. Adds credibility to the technology. Weak competition is even better.” Focus’ case, as this last slide illustrates, is that they welcomed some competition because customers and potential customers are uncomfortable with monopoly suppliers. Further, another supplier selling similar technology adds credibility to the technology which Focus are selling. In circumstances where Focus were very much the dominant player in the field, it was helpful for there to be other suppliers of similar technology. Focus’ evidence was that their approach, and that of their sales force, was to accentuate the positive features of Focus’ products and not to knock the competition. Apart from any other factors, that often had a negative impact on customers.
57. Mr Loosmore sought to present a rather rosy picture in relation to these matters. However, this is not supported by the documentary evidence and the evidence of Focus’ approach to Swiss Life. In broad terms, the impression I gained was that Focus recognise that some competition was inevitable, and probably desirable, but would be happy if that were not fierce competition. It is neatly encapsulated in the Powerpoint slide which notes that competition is good but weak competition is better.
58. Focus’ salesmen were paid substantial commission when sales were achieved. Whilst I accept that the demeanour of Focus’ witness was the antithesis of “double glazing salesmen” (the analogy used during the hearing), it would be surprising if Focus’ salesmen did not take any opportunity to sell against Point. The available documents indicate that they probably did so. The evidence in relation to Swiss Life (see below) shows that Mr Loosmore himself used the existence of the dispute to try to sow seeds of doubt in Mr Leadbeater’s mind. It is likely that other members of the sales team also did so.

Expert evidence in the proceedings

59. In their Allocation Questionnaire dated 3 February 2005, Point indicated that they wished to rely on expert evidence at trial. Point prepared draft directions for a CMC held in February 2005, in which they suggested that each party have permission to call expert evidence in the field of software programming and they suggested a timetable for steps to be taken. At the CMC on 24 February 2005 Master Bragge gave permission for the parties jointly to instruct an expert. Mr Fernando took the unusual step of writing to Master Bragge on 25 February, identifying what he considered to be potential difficulties with one jointly-instructed expert and asking Master Bragge to reconsider. I understand that Master Bragge did consider Mr Fernando’s letter but did not change his mind about the order he had made.

60. On 5 April 2005 Focus applied to the court for an order asking the court to select the joint expert in default of agreement. The Focus application was returnable on 22 June. On that day, Master Bragge made amendments to the timetable for directions and ordered the expert's instructions to be agreed by 12 August 2005. On 27 July 2005, the parties' respective solicitors met the expert, Mr Turner, who expressed concerns about the limited time in which he was to produce his report. Focus proceeded to provide a draft of joint instructions; Point dragged their feet in responding to this. Mr Turner was not instructed until 25 September 2005. It appears that little progress was made. Mr Turner contacted solicitors for both parties dated 20 October 2005 saying "Two weeks have passed since my initial meetings with the parties and it seems likely that I will not be able to finalise my Requests [for information] for some time yet. The consequence of the delays to date is that it is now extremely unlikely that I will be able to complete any agreed basis of comparison before 21 November 2005" (that being the first day of trial). On 21 October 2005 Moore wrote to Mr Turner confirming that he should continue with his work and they would investigate possible trial dates if the trial date of 21 November were vacated. By letter dated 26 October 2005, Moore wrote to Mr Turner to say that Focus did not need expert evidence to succeed on their pleaded case but that Point did need expert evidence because Point was making a positive assertion of non infringement, the onus being on Point to prove its entitlement. Withers, for Point, replied the same day, to suggest that the only reason that the joint expert had been appointed was because Mr Moore and Focus had so insisted. Withers said that they did not want a joint expert at all; they did not want or need evidence from an expert to prove their pleaded case. The appointment of a joint expert would not assist the court.
61. The parties reached the stage where it was pointless continuing with expert evidence within these proceedings and the decision was taken that Mr Turner should not continue.

The Law

62. I have been referred to the following:

CPR Part 40.20, which provides that the court may make binding declarations whether or not any other remedy is claimed.

CPR Part C1-001: Paragraph 1.4 which provides that the objectives of pre-action protocols include (1) to encourage the exchange of early and full information about the prospective legal claim and (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.

Statutes

S70 Patents Act 1977 (as amended)

S71 Patents Act 1977

Copyright Designs & Patents Act (CDPA) 1988: Sections 1, 16, 18, 50A-50D, 107, 110 and 253

Text book :Laddie Prescott & Vittoria: Paras 3.125, 3.126 and 3.127

Cases

Clay, Clay & Booth [1919] 1 Ch 66

Russian Commercial & Industrial Bank -v- British Bank of Foreign Trade [1921] 2AC 438.

Wallersteiner -v- Moir [1974] 1 WLR 991

Metzger -v- Dept of Social Security [1977] 3 All ER 444

Leco & Land Pyrometers [1982] RPC 133

Amstrad Consumer Electronics Plc -v- The British Phonographic Industry Ltd CA Fleet Street Rep 1986, p159

Filhol Ltd -v- Fairfax (Dental Equipment) Ltd [1990] RPC 293

Patten -v- Burke Publishing [1991] 1 WLR 541

Plastus Kreativ AB -v- Minnesota Mining & Manufacturing Co [1995] RPC 438

Wyko Group Plc -v- Cooper Roller Bearings [1996] FSR 126

Messier-Dowty -v- Sabena [2000] 1WLR 2004

L'Oreal -v- Johnson & Johnson [2000] FSR 686

Stoddard International Plc -v- William Lomas Carpets Ltd [2001] FSR 44

FSA -v- Rourke [2002] CP Rep 14

Guild -v- Eskander Ltd [2003] FSR 3

Stephens -v- Cannon [2005] EWCA Civ 222

Lever Faberge Ltd s-v- Colgate Palmolive [2005] EWHC 2655 (Patents)

63. I am obliged to Mr Fernando and Mr Colley for their assistance with the law in this unusual case. I derive the following guidance from the statutes and cases to which I have been referred.
64. Proof of copying will generally be required to demonstrate infringement of copyright. Evidence of independent design is, as Mr Fernando puts it, the trump card.
65. Whilst Section 71 Patents Act 1977 contains a provision for a party to seek a declaration of non-infringement, Part 1 of CDPA contains no provision giving a cause of action based on “unjustified threats” or “groundless threats”.
66. The power of the court to make declarations has been considered in a number of authorities, both pre- and post CPR. In **Wallersteiner**, Buckley LJ referred (on page 1029) to the principle that the making of a declaration is a judicial act. In **Metzger**,

Megarry VC said that a court's declaration should constitute what it has found after proper argument. In **Messier-Dowty**, Lord Woolf MR considered negative declarations in paragraphs 34-42 of his judgment. He said "The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive. The approach [to the grant of a declaration] is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the court should not be reluctant to grant such declarations. They can and do assist in achieving justice". **Messier-Dowty** indicates that there is now little real distinction between positive and negative declarations. The modern approach is more flexible. I have been taken to cases where the court has been willing to make a declaration as to rights in intellectual property matters even without the detailed inquiry which would be conducted at full trial eg **Patten -v- Burke** and **Lever Faberge**.

67. Mr Colley relies in particular on **Wyko**, where Ferris J concluded that declaratory relief could not be obtained against a person who had not asserted any right: a party should be allowed to choose his own proceedings at a time and manner of his own choosing and should not be brought into court by the opposing party to resist a claim for a declaration of non-liability. Mr Colley also relies, in particular, on **Russian Commercial** in which the House of Lords considered how the court should exercise any jurisdiction to make declarations. Lord Dunedin referred, with approval, to the approach taken by the Scottish Courts, identifying three propositions, namely that the question must be real and not a theoretical question; the person raising it must have a real interest to raise it; and he must be able to secure a proper contradictor ie someone presently existing who has a true interest to oppose the declaration sought.
68. Guided by these authorities I approach the issues as follows. The absence of a statutory right to a negative declaration does not preclude the court from making such a declaration if satisfied, in all the circumstances, that it would be just to do so. It is open to the court, under its inherent jurisdiction, to consider whether there has been sufficient assertion of right to trigger the exercise of the discretion to grant a declaration of the nature sought by Point. Following **FSA**, the matters asserted must be established to the court's satisfaction. The court should consider whether in all the circumstances it is appropriate to make the order. In doing so, the court should take into account justice to both claimant and defendant and whether the order would serve any useful purpose, and should consider any other special reason why the court should or should not grant the declaration. The three principles set out by Lord

Dunedin in **Russian Commercial** are of assistance here; Following **Wyko** the court should be slow to require a party who has made no allegation of copying to answer a negative case of non-copying. In this exceptional case (in the sense that I have limited information) I should proceed with caution.

69. Mr Colley refers me to Sections 107 and 110 CDPA which provide that acts constituting infringement of copyright may give rise to criminal liability. In the **Amstrad** case, the Court of Appeal refused a declaration of non-infringement of copyright because of concerns that such a declaration might affect or prejudice subsequent criminal proceedings. There has been no suggestion in this case that there might be criminal proceedings. In circumstances where Focus have not even seen Point's software, it is difficult to see how there could be any realistic possibility of criminal proceedings. In those circumstances, the warning contained in the **Amstrad** case would seem to have no application to this case.

The Issues

70. I deal with the following:

Has there been a sufficient assertion of right to trigger the exercise of the discretion to grant declaratory judgment.

Has Point established on the balance of probabilities that it did not copy Focus' source code in creating its Acuo range of products?

Independent expert scrutiny.

Utility

Whether the discretion should be exercised in favour of Point.

Has there been a sufficient assertion of right to trigger the exercise of the discretion to grant declaratory judgment?

71. Point rely on (a) Focus' letter dated 9 October 2002 and the subsequent correspondence between the parties; (b) the Swiss Life incident; (c) the incident concerning Marlborough Sterling; (d) paragraph 7 of Focus' defence in these proceedings and some of the contents of Mr Colley's opening skeleton argument.
72. So far as the letter of 9 October 2002 is concerned, Point's case is that by that letter Focus asserted, whether expressly or by implication, that Point's Acuo software infringed the literary copyright in Focus's Goal Software. Focus' case is that this was a carefully worded letter. They did not assert copying but merely raised their concerns. Mr Green's response dated 15 October 2002 is telling: he said in that letter that he understood Focus' concerns. He knew Focus, having been in a commercial relationship with them before proceeding with his own business. In his response, Mr Green did not indicate that he found Focus' approach to have been bullying or to give rise to difficulties. He went along with the suggestion which Mr Murray had made to

try to resolve matters without resort to litigation. Mr Colley submits that Point were not, in fact, concerned by Focus' letter of 9 October 2002 until June 2004.

73. Mr Colley raises a public policy point: if a letter like that of 9 October 2002 amounts to sufficient assertion, how then could someone with genuine concerns express those concerns without creating difficulty? Mr Colley relies on CPR C1-001: Paragraph 1.4. I am not assisted by the provisions of that Part, which deals with pre-action protocols in general terms. If a party writes a pre-action protocol letter, it must follow that, in doing so, he is asserting a right or setting out the legal basis on which he claims to be entitled to the relief he claims. A pre-action protocol which did not contain such positive assertion would not be considered a pre-action protocol letter at all. It seems to me that the only question here is whether the 9 October 2002 letter merely set out Focus' concerns or whether it contained implicit or express assertions.
74. In their 9 October 2002 letter, Focus did not expressly allege infringement. Indeed, they specifically stated that they were not in a position to do so, hence their suggestion for a voluntary arrangement for independent expert scrutiny. They specifically did not allege that Point had copied. Having said that, in my judgment, the inference from the letter is that Focus believed that Point had copied Focus' software. In my initial reading and, indeed, in subsequent readings, of that letter, the impression I gained was that Focus were implicitly asserting that Point had copied the Focus Goal software. They asserted that their products were original copyright and that copyright vested in them ie subsistence and ownership. The reference to production of the Point product "in an impossibly short timeframe" implicitly voices a suspicion that Point had copied or otherwise used Focus' software. The reference to the Synaptic experience supports the inference that Point had copied. The references in that letter to legal action against Synaptic, to a court order for advanced disclosure and to the way in which a court might award costs all indicate that Focus considered that legal proceedings might ensue. And the letter indicated that Focus were considering their options including legal action. The letter went further than merely expressing Focus' concerns, as they allege. Of itself, in my judgment the letter does assert, by implication, that Point had copied and it was, at that time, sufficient assertion of right to trigger the exercise of discretion to grant declaratory relief. I deal later whether, in all the circumstances, the declaration should be granted.
75. The correspondence between the parties between October 2002 and April 2004 is concerned substantially with arrangements for expert scrutiny with brief reference to Focus' mentioning the dispute to third parties. That correspondence is conducted against the background of the matters raised in Focus' 9 October 2002 letter but the subsequent letters, whether individually or collectively, are not such that, in my

judgment, it can be said that the thrust is implicit or explicit assertion of copying.

76. Mr Colley relies on **Wyko** for the proposition that it would not be right, in this case, to drag someone before the court who had not made a properly particularised case when that party was not ready to come and, for those reasons, he submits that the letter does not constitute sufficient assertion of a right to trigger the exercise of the discretion to grant the declaratory injunction. **Wyko**, he submits, is the beginning and the end of the answer to this point. It seems to me that an assertion can be made expressly or by implication whether or not a party is ready to come to court to pursue a claim. The natural reading of Focus' letter indicates that court proceedings are an option which Focus are contemplating.

Swiss Life

77. Point's case is that, in December 2002, Mr Loosmore represented to Mr Leadbeater of Swiss Life that Point's Acuo software had infringed the copyright of Focus' Goal software and had done so with the intention of trying to persuade Swiss Life not to buy Point's software and services.
78. Towards the end of 2002 Mr Leadbeater of Swiss Life was involved in procuring, from a third party supplier, a PAC based solution for a new business venture. He looked at a number of companies including Point and Focus. Swiss Life decided to go with Point. He told Focus of that decision.
79. Mr Fernandes (Point's Sales Manager) told Mr Leadbeater that Point were in dispute with Focus.
80. When Mr Loosmore learned that Swiss Life had chosen Point, not Focus, Mr Loosmore telephoned Mr Leadbeater. He had before him the advice which Mr Moore had sent him. Mr Loosmore said that he told Mr Leadbeater that Focus had concerns about how Point had produced their product in so short a time frame, if they had not copied Focus' product, and that Focus had raised those issues with Point. He also told Mr Leadbeater to be careful of using Point's products because of potential compatibility problems. Mr Loosmore's evidence was that he stuck as closely as possible to what Mr Moore had advised Focus could say (without reading the script word for word) and that he had not said that Point's software infringed Focus copyright.
81. Mr Leadbeater kindly gave evidence. In his witness statement, he said that Mr Loosmore had told him that Swiss Life should take care to ensure that it had a PAC which was legitimate and that there would be no licensing issues or compatibility issues. Mr Leadbeater had been displeased to receive Mr Loosmore's call: he found Focus' approach to have been negative, attempting to knock the competition rather than concentrate on what Swiss Life wanted. He was not concerned about any

compatibility issues, in relation to the specific work in which Point were to undertake, but he was sufficiently concerned about the other matters to raise them with his manager. Mr Leadbeater then contacted Mr Fernandes of Point to let him know of Mr Loosmore's call.

82. Mr Thelwell telephoned Mr Leadbeater to try to retrieve the situation but was unsuccessful.
83. Mr Leadbeater's witness statement had been made in the run up to trial. He did not, when making it, have available e-mails which subsequently came to light. By e-mail dated 2 January 2003, Mr Fernandes said to Mr Leadbeater "Please rest assured that the claims from Focus are groundless and will not impact the effort we have put into your project in any way. To clarify the position, Mr Green will be writing to you shortly." Mr Leadbeater forwarded that e-mail to his manager, Mr McCarthy, with the following message: "Just before Christmas I had a 'phone call from Mr Loosmore... who told me that Focus are looking to take legal action against Point about breaches of intellectual property rights with the implication that anything Point developed for us would not be legal. It came across as a rather crude attempt to dissuade us from using Point. Though Point used to do work for Focus, I have heard (from a third party) that Focus' claims are not likely to stand up in court. However, I have asked Point to clarify the position it would leave us in should any case against them be proven, as well as letting them know what their competitors are saying to potential customers."
84. Understandably, when he was preparing his witness statement, Mr Leadbeater could not recall precisely the words which Mr Loosmore had used in their telephone conversation and, as I have explained, he did not at that stage have available the e-mail he subsequently located. Mr Leadbeater's e-mail to Mr McCarthy was sent in early January, that is after the Christmas and New Year break but not that long after the telephone conversation with Mr Loosmore. It is the closest we have to a contemporaneous document. That e-mail indicates, in summary, what Mr Leadbeater had understood from the conversation. However carefully Mr Loosmore had tried to phrase the points he was making, Mr Leadbeater had gained the impression that Focus were looking to take legal action against Point with respect to breaches of intellectual property rights. That was the message he understood from Mr Loosmore's subtle phrasing. Indeed, one can see that the nuances of Focus' position - not an outright allegation of copying but a strong hint that something was not right - might easily be lost in the circumstances of the rather difficult call which Mr Loosmore made to Mr Leadbeater. I can also understand that Mr Leadbeater could in his own mind easily have paraphrased Mr Loosmore's message as an assertion of

copying by Point. On balance I conclude that, however carefully Mr Loosmore had tried to phrase what he said, Mr Leadbeater's understanding of what had been said was that Focus were contemplating legal proceedings against Point for breach of copyright. In my judgment, that amounted to at least an implicit assertion to a third party of Focus' right and was sufficient, at that time to have triggered the right to ask for a declaration.

85. It is relevant to note that it was, in fact, Point, through Mr Fernandes, who first told Swiss Life about the dispute with Swiss Life. Point were prepared to tell third parties about this. (This was not the only occasion. Mr Fernandes also told The Exchange : see below.) Focus, however, did not know this when Mr Loosmore made his call to Mr Leadbeater.

86. Having been alerted by Mr Fernandes, Mr Green wrote to Mr Leadbeater by letter dated 2 January 2003 as follows:

“On 9 October 2002 we received a letter from Focus Solutions in which they expressed concern over the speed at which we had developed our software. They asked for written confirmation that we had not infringed their copyright, either by copying code or by using their product as a springboard to developing our own. They also asked us to agree to a voluntary disclosure of such material that would confirm that no copyright infringement had taken place, to a mutually agreeable third party.

On 15 October 2002 I replied to the Focus letter, confirming that we had neither copied code nor based any of our product suite on Focus' software or solutions, making it clear that we had not used the structure of any of their products as a 'springboard' in producing our Acuo product suite. I also agreed to make a voluntary disclosure of such material that would confirm that no copyright infringement had taken place, to a mutually agreeable third party.

On 9 November 2002 I received a second letter from Focus Solutions stating that they wanted to proceed with an independent review of our respective software to ascertain whether any infringement of their copyright had occurred, and stating the terms of the review.

On the 18 November 2002 I replied to the Focus letter, providing our response to their terms and once again agreeing to proceed with the review.

Since that date we have not heard from Focus Solutions.

I would like to reassure you that Point Solutions have neither copied

code nor based any of our product suite on Focus' software or solutions.

We have been developing our Acuo product suite for over 15 months, and during the height of development have had a team in excess of 20 people working on it. We estimate that more than 15 man-years work has been carried out in the development of Acuo.”

87. Swiss Life were not deterred from buying from Point and Point did not lose the Swiss Life sale. They continued with their purchase of Point's product.

The Exchange

88. Point's case is that, in about February or March 2003, Mr Murray of Focus represented implicitly to Mr Creamer of Marlborough Stirling that Point's Acuo software infringed the copyright in the Focus Goal software, thereby seeking to prevent Marlborough Stirling from purchasing Point's software and services.
89. Mr Walker-Smith was at material times Focus' Account Manager for The Exchange, a division of Marlborough Stirling. The Exchange had been a customer of Focus since about September 1999. Towards the end of 2002 or early 2003, Focus negotiated with The Exchange for a change to their relationship. One of Mr Walker-Smith's contacts at The Exchange was Mr Creamer. A meeting was held at Focus' premises on 7 January 2003 attended by representatives of Focus (including Mr Murray and Mr Walker-Smith) and of The Exchange (including Mr Creamer.) Mr Walker-Smith's recollection is that Mr Creamer raised the question of Point and asked Focus what they thought of Focus using outsourced software development products. Mr Walker-Smith recalls that at that meeting, Mr Murray said that Focus had no plans to use outsourced software development. Mr Walker-Smith does not recall Mr Murray saying anything about infringement of copyright in Focus' software or to that effect. Mr Murray was unable to recall attending the meeting on 7 January 2003, though he accepts that as Mr Walker-Smith's note records that he was present, he probably did attend. Mr Murray does not recall speaking to Mr Creamer. In March 2003, the Exchange confirmed that they would be proceeding with use of Focus technology. In about July 2003 Mr Goodman of The Exchange asked Mr Walker-Smith whether the dispute with Point had been resolved. Mr Walker-Smith was not challenged on his evidence that he did not raise the subject, it was Mr Goodman who raised it, and Mr Walker-Smith simply said that Focus were still in dispute with Point, but said nothing about infringement of copyright.
90. After Mr Walker-Smith had learned that The Exchange was planning to run Point's software in parallel to Focus' software, he prepared an action plan. This was dated 25 February 2003. That document lists actions to be taken by various employees of

Focus. Mr Loosmore was to contact Mr Klim to query The Exchange's decision to run Point software in parallel to Focus' software (ie to deal with compatibility issues). Mr Walker-Smith was to contact Mr Creamer. Mr Muchmore was to contact Ms Summers of The Exchange with the objective of gaining information, insight into The Exchange's decision making process and to "gain insight into longer term situation (eg is this a holding pattern until legal action against Point is resolved...)".

91. Mr Creamer has not given evidence. The evidence suggests that Mr Creamer learned about a dispute between Point and Focus from Mr Fernandes. It seems likely, given the Walker-Smith action plan, and in the light of Mr Loosmore's advice to the sales force in January and February 2003 as to how they might sell against Point, that someone at Focus would be speaking to The Exchange personnel, including Mr Creamer. However, there is no evidence to indicate when, if at all, that happened. If it did happen, there is no evidence as to what was said. There is certainly no evidence that Focus made, whether expressly or by implication, an assertion to Mr Creamer of the sort which Point allege.
92. I am not persuaded that any assertion was made to The Exchange.
93. This was another circumstance where Point was apparently content proactively to inform a customer that there was a potential problem concerning copyright infringement by Point. There is no evidence that Point lost any business as a result of any discussion which there may have been between Focus and The Exchange or, indeed, as a consequence of what Mr Fernandes told Mr Creamer.
94. If Point's case had been that Focus had "bad mouthed" them in the industry, the evidence of Mr Walker-Smith's action plan may have carried some weight. However, given the limited basis on which Point is pursuing its case, that evidence is of no assistance to me.

Focus' defence

95. It seems to me to be fanciful to suggest that Focus' actions in defending itself by pleading in its defence to Point's allegations and making submissions to this court through Mr Colley might count against Focus and somehow be relevant to the question raised prior to proceedings whether Point were entitled to the declaratory relief it sought.

Has Point established on the balance of probabilities that it did not copy Focus' source code in creating its Acuo range of products

96. For reasons I have explained earlier, I do not have Point's software, I do not have Focus software, I have no assistance from an independent expert. I have referred already to the Part 18 request which Focus made and Point's response to that. As I have explained, the information contained in the schedule annexed to Point's

response is of no practical help to me at all.

97. I have heard evidence from some, but not all of those involved in development of the Acuo software, namely Mr Green, Mr Blatchford, Mr Townsend (at material times a Technical Consultant employed by Point), Mrs Horne, Mr Helm and Mr Gale (who were all, from time to time, software developers employed by Point). Each of these has given evidence to the effect that he or she did not copy the Focus' Goal software.
98. Point claim to have spent no more than six man years on development of version 1 of the Acuo Renderer and Builder. Focus say it took them some 65 man years to develop their Goal software. Mr Murray analysed Focus' records of employees and consultants who had contributed to the software programme which make up the Focus modules. He calculated that 50 development staff had contributed to the development between March 2001 and March 2002, a total of 65 man years. These programmes were second generation of the goal technology development. He acknowledges that there is no direct comparison with Point's software, but could not see how that had been produced in such a short time by a mere handful of programmers, even if they were exceptional. Point doubt that Focus spent as long as Mr Murray claims in producing their software. There is little evidence available to me to test the assertions made by either Point or Focus as to the number of man years spent on their respective products. I am unable to make any comparison as I do not know whether I am comparing like with like. An assertion by Point that it took only six man years to develop some of its software, in the absence of detailed and tested information as to how the software was created and developed, is of no assistance to me.
99. Save for one minor exception, Focus have not put to any of Point's witnesses that Point copied Focus. That was consistent with their position that they were not running a copying case. Focus have, however, raised a number of matters both in cross examination of witnesses and in closing submissions to cast doubt on the evidence of independent design. These fall into two broad categories, namely (1) concerns as to the credibility of Mr Green and Mr Blatchford who were most intimately involved with the development of Acuo software and (2) incomplete evidence.
100. In 2001, Point were working for Focus using Focus' software. In the autumn of 2001, Point agreed to collect Focus software and hand it back to Focus. It is not clear to me how this process was actually managed: the evidence on this is somewhat confusing and unsatisfactory. In any event, there was a period of overlap from 2 July 2001 when Point began work on Acuo until October 2001, when Focus' software was said to have been collected. As Focus do not run a positive case of copying they do

not (for example) allege that Point's possession at one stage of Focus' software indicates a likelihood of copying. That is not their case. They rely only on the failures by Mr Blatchford and Mr Green to refer to the knowledge which each in fact had of the Focus: Goal software. Their reliance goes only to credibility of both witnesses.

101. I have concerns about the evidence given by both Mr Green and Mr Blatchford. Mr Green was casual in his approach to the evidence. He was not concerned as to the obvious inaccuracies in the letter of claim. He did not engage carefully with the questions put to him, finding it difficult to distinguish between matters he knew and matters which he said he believed, whether or not there were grounds for such belief.

102. The letter of claim of 12 July 2004 set out, in a schedule, the names of the Point project team said to have worked on the Acuo project and under a column headed 'Knowledge of Focus Goal Technology' a comment as to the knowledge of each of those persons. Against Mr Blatchford's name is the word 'None'. That was simply incorrect. Mr Blatchford had (prior even to his joining Point in 2001) been sent a disk containing Focus' software. In his statement he says he was given "a CD containing the Focus Renderer and Builder ie PAC developer list as an introduction to the software we would be working with and so I could hit the ground running. I took the opportunity to have a look at the Focus software and to familiarise myself with it although of course I had no access to any source code." He says he looked at this CD for half a day. In giving his evidence, Mr Blatchford sought to make a distinction between an exercise to familiarise himself with software and being familiar with it. Even if there is a valid distinction (which I doubt) it is not one which helps me here. Mr Blatchford had access to Focus software for half a day. Mr Blatchford's role was important. He was the technical architect of the Acuo software. There was no basis on which the letter of claim could say that his knowledge was "none".

103. The letter of claim refers to Mr Green's own knowledge of the Focus software as "one year's experience of using Goal: Builder to build PACs for use on the Focus Thick Client Renderer gained whilst on contract for Norwich Union (January 2000 - January 2001). Two month's experience using Goal:builder to amend a PAC for Norwich Union so that it would run on the Focus server renderer." However, the letter makes no mention of other work which he did for Focus themselves. For example, Mr Green had written a document dated 11 June 2001, while working for Focus under the April 2001 outsourcing agreement in which he reviewed the Focus Goal: Builder Version 2.1. That document states as follows:

"Introduction

The purpose of this document is to state the findings of a review of the Focus 'Goal:Builder V2.1' software carried out by Point Solutions.

The aim of the review was to give a user perspective on the software covering:

- General Usability
- Impact on productivity
- Ease of binding data to a New Business message
- An overall impression of the software, and suggestions for improvements.”

Summary

The overall impression of Goal:Builder V2.1 is that it is a well tested, professional development tool which has had the bugs present in V2.0 ironed out.”

104. It is clear that Mr Green’s knowledge of Focus’ software was sufficiently detailed for him to have written that document recording his appraisal of their software. His explanation as to why the letter of claim made no reference to that part of his knowledge of Focus’ software namely that Focus already knew of it so there was no need to mention it, was unconvincing.

105. One element of Mr Blatchford’s evidence raises concerns as to both his evidence and that of Mr Green relates to their access to Focus code through a web site. In his statement Mr Blatchford said that he opened and thus gained access to a public demonstration of Focus’ web site. He said that he entered simple data to observe the overall user experience. He was surprised to see how much Javascript was clearly viewable within the browser. He said he could read individual lines of code, but said that he would not have been able to translate from Javascript and would have needed weeks to piece it together. When challenged on how he had been able to open the site to the extent of seeing this information, he backtracked quickly and suggested that it may have been Mr Green who accessed the site and that Mr Green and Mr Blatchford had looked at it together. Focus’ evidence is that normal access to their web site does not reveal any of the information which Mr Blatchford said he saw. He can have seen that information only if he had unauthorised access to what is a secure site. Focus’ evidence on that was not challenged. Mr Fernando produced a printed sheet from a web site for Towry Law, a customer of Focus and user of the Goal software, somehow suggesting that this explained how Mr Blatchford and Mr Green might have gained access to the Focus Goal code. There was no evidence to support this and it was not clear to me how normal access to a Towry Law web site would have enabled a user to view lines of code.

106. I am not persuaded by Mr Blatchford's account. It is not clear to me how he or Mr Green could properly have had such access to Focus' software. That episode is one of the factors which results in my not having full confidence in the evidence which either Mr Green or Mr Blatchford gave.

107. Focus criticise Point for not having referred in their letter of claim to all those who had worked on the Acuo software and for not having called to give evidence all those who had worked on that software, even those who are based in India. In their letter of claim of 12 July 2004, Point summarise the projects they undertook, the key dates in the history of the development of the Acuo and a list of members of the project team. The names of nine members of Point staff are given. The letter states that a team of seven developers in India, employed by Elansoft, supported those nine. The letter also stated that Acuo SDK had initially been developed by Vyosoft, a software house based in India and co-owned by Messrs Green, Hillicks and Sidhu. It is the case that Point's letter of claim did not identify all those who had worked on the Acuo products. This is illustrated by the time sheets which Point have disclosed for those working on Acuo software. A time sheet for Mr Sharp for the week beginning 9 July 2001 shows that he was working on CMIE-Applications namely PAC Build. Mr Sharp was not listed in either the letter of claim or the Part 18 response. A time sheet for Mr Corp indicates that, in mid November and early December 2001, he did some work in relation to analysis and design of the Acuo software. As Point acknowledge, Mr Sidhu did some work on the Acuo software. The time sheets show that he worked on Point's full blown renderer. He is not mentioned in the letter of claim as a member of the project team. Point's evidence was that Mr Sidhu's work had been of little use and for that reason had not been referred to. That, however, is not the point. He had worked on the project and should have been included in a list which was presumably intended to be comprehensive.

108. In his second witness statement, Mr Murray conducted an analysis of the timesheets which Point disclosed. He calculated that the total time recorded between July 2001 and end October 2002 as spent on the Acuo software, in broad terms, is 9,910 hours. (He has probably included some work not strictly associated with the development of Acuo components). This equates to about 5.46 man years. Of the 9,910 hours, 3,126 are attributable to Vyosoft and 331 to Elansoft. Point acknowledge that personnel at Elansoft and Vyosoft worked on the Acuo project. Mr Green had considered the Vyosoft personnel CVs and had noted that they had no knowledge or previous experience of Focus software. Point say that they did not provide any Focus software to Elansoft or Vyosoft. They sent only Point's code. They sent that code so that the Indian developers could create utilities for Point. Mr

Townsend spent a week in India supervising the work of the Indian project team. He and Mr Blatchford scrutinised the work which the Indian team had undertaken. Point used very little of the Indian code; Mr Townsend estimated that only 2% remained in the Acuo suite of products.

109. Mr Colley's study of Point's Part 18 Response Schedule leads him to submit that of the total of 832 'author' entries, at least 70 are attributable to authors within the Indian team. On that basis alone, he submits, the contribution from the Indian team may amount to over 8%. It may well be the case that the entries for members of the India development team amount to 8% of the total entries in that schedule, but that does not assist. I do not know from that figure whether the work undertaken by the Indian team was material. Mr Murray's analysis (to which I have referred) suggests that the Indian developers were responsible for a substantial part – possibly as much as one third - of the total time spent on developing the Acuo products.
110. Focus criticise Point for not having called to give evidence all those who had worked on the Acuo software. This applies, for example, to Mr Parker. He is listed in the letter of claim as a member of the Point project team. I accept Mrs Horn's evidence that, at material times, Mr Parker was a trainee at Point and had little or no experience of IT of this sort before joining Point. It may well be the case, as Point contends that Mr Parker could have had no knowledge of the Focus software. It seems to me that Focus' approach to witnesses is ambivalent. They complain that Point have not called all witnesses, even those based in India, yet it is unlikely that they would have cross examined them as to whether or not they had copied Focus' software if those witnesses had come to court. There must, however, be some concern that relevant Indian developers, whose work appears to have been material, were not called. I am troubled by the omissions from the letter of claim and answer to the Part 18 request of those who had worked on the Acuo software. It may well be that the contributions of Messrs Parker and Sidhu, for example, were minor, but their omission raises doubts as to the claimants' approach. Point ask for a declaration in circumstances where the court has no opportunity to consider whether or not in fact there has been copying. I am therefore in effect in a position where I must take much of Point's evidence on trust. Any real doubts create difficulties. The lack of transparency in Point's evidence is a matter of concern.
111. Mr Blatchford's evidence was to the effect that the Acuo code is written in a different language and has a different structure from those in the Focus' software. Mr Murray's second witness statement contains comments which challenge Mr Blatchford's comparisons of Focus' and Point's software functionality. He deals with the question whether Focus' software can be viewed and textually copied, contending

that “a vast amount of Focus” software delivered to Point pursuant to the outsourcing agreement fell into that category and he sets out the details of that. That evidence was not challenged. Notwithstanding, Mr Fernando relied on Mr Blatchford’s evidence for the proposition that non-textual copying of source code could not amount to infringement of any copyright in the source code. That submission led to debate in closing submissions. Point’s case is simply that, given that the Acuo software is written in different language and has a different structure, it could not be said that they had copied Focus code. Mr Colley relies on sections 16 (1) and 21 CDPA. Section 21 deals with infringement by making adaptation or an act done in relation to adaptation. Section 21(3) (ab) defines adaptation in relation to a computer program as an arrangement or altered version of the program or a translation of it. Section 21(3) (ac) defines adaptation in relation to a database as an arrangement or altered version of the database or a translation of it. Mr Colley submits that those sub clauses must refer to translation or adaptation in the context of computer software. Mr Colley and Mr Fernando disagreed as to the way in which **Navitaire**, a decision of Pumfrey J, might assist. They finally agreed that it would not be necessary to draw that authority to my attention. It seems to me that detailed questions as to translation or adaptation might well be relevant to a case concerning copying. However, I am not trying a case where copying is alleged. I am not in the position where I can make any comparison between Point’s and Focus’ software. It is not, therefore, necessary for me to look at the detail of whether any element of Point’s software could be said to be a translation or adaptation of Focus’ software within the meaning of sections 16 and 21 CPDA. It is, therefore, not necessary to consider the **Navitaire** judgment. I have not had the opportunity to see tested any evidence relating to what each of Point and Focus actually did in relation to creation and development of software. I cannot know whether or not Point’s work was a translation or adaptation of Focus’ work.

112. Mr Colley criticised the lack of supporting evidence for the letter of claim. It was not supported by witness statements or sworn affidavits. I am not aware of any rule requiring such supporting evidence and CPR Part C1, of itself, it is not significant. But the lack of supporting evidence can be viewed in the context of the evidence which Point have chosen to adduce at trial and their approach to the evidence.

113. I am not confident that Mr Green and Mr Blatchford have presented a full and accurate picture. I cannot be confident that Point’s approach has been sufficiently transparent and accurate to enable me to conclude, on the basis of largely untested evidence, that Point are entitled to the declaration they seek. Focus have succeeded in casting doubt on Point’s claim to have created their Acuo software by

independent design to the extent that Point have not discharged the burden of persuading me, on balance of probabilities, that they did achieve the design independently. Point have not proved, on balance of probabilities, that all of the individual literary works comprising the Acuo software, whether written by Point, Vyosoft or Elansoft, were created without copying or adaptation from any corresponding part of Focus' code.

114. That is sufficient to refuse Point's claim. However, in case it assists, I deal with the other issues.

Utility

115. Point say they need the declaration, that there is a purpose to it. Their case is that they have been prevented from securing necessary venture capital funding, and that this has compounded cash flow difficulties and led to redundancies. Focus have damaged Point's ability to secure new business. Their business is not attractive to prospective purchasers. Point ask the court to lift the cloud hanging over them for three years. Mr Fernando relies on the judgment of Lightman J in **L'Oreal** which indicates that the policy is to lift clouds to dispel uncertainty. I note that that the context of that case was threats in respect of which there is statutory provision, whereas here there is no such statutory provision. Focus' case is that this is a stale claim. Point does not have a real interest in raising the question.

116. Focus had taken advice from their solicitors at the end of December 2002 and obtained confirmatory advice from them at the beginning of January 2003. Mr Fernando submitted that, as a consequence, Point concluded that they would not be in a position to claim malicious falsehood: Point would find it difficult to prove malice in circumstances where Focus had taken advice - whether or not the advice given was correct. That, he explained, left Point in the position where it had no alternative but to pursue the claim now before the court. I do not accept that submission. As is clear, Point did have an alternative, and a sensible one, namely independent and confidential expert scrutiny which would have assisted the parties to know whether there had been copying coupled with the comfort given by Focus' solicitors in their letter of 4 June 2004.

117. The target market, namely financial services institutions, is risk averse. Mr Thelwell and Mr Loosmore acknowledged, fairly, that the existence of a dispute or the raising of concerns as to the provenance of software might well reduce the chances of such customers purchasing a product which had been called into question. Accordingly, Point contend, Focus' actions put them into a position where their ability to make sales was and remains adversely affected. However, Point have adduced very little evidence that they have, in fact, suffered any loss or damage. The

only evidence is found in the episode concerning The Exchange. It is suggested that The Exchange did not wish to proceed until after the expert scrutiny. There is, however, very little evidence in relation to this and I am not persuaded that Point have lost any sale to The Exchange. Swiss Life proceeded with their purchase from Point notwithstanding the question mark which had been raised with respect to Point's product.

118. As Mr Thelwell of Focus acknowledged, the existence of a dispute between Point and Focus would have to be disclosed to venture capitalists and in the event that Point wished to proceed with a flotation. There is no evidence that Point are seeking a flotation. So far as venture capital funding is concerned, it would appear that Focus knew, before they sent their letter of 9 October 2002, that Point were seeking venture capital funding. It is likely that Mr Loosmore had learned this at a trade fair before early October 2002. Further, that Point were seeking venture capital funding was referred to in the presentation made to the Focus sales force in February 2003. I have explained already Mr Green's involvement with a venture capitalist in 2003. Even though the venture capitalist told Mr Green that he would not be satisfied with a non determinative expert determination, Mr Green nevertheless, for a time, proceeded with what Point and Focus had agreed.

119. Point have not pleaded a case of general "bad mouthing all over the trade to third parties". Had there been an on-going problem of Focus "bad mouthing" Point in the market place, one would expect this to have come to Point's attention. However, the only evidence of actual knowledge by customers or potential customers is found in relation to the Swiss Life and The Exchange episodes. Point themselves told both of these customers of their dispute with Focus. That illustrates their willingness to tell others. It is impossible for me to understand whether any information actually disseminated to third parties damaged Point and whether such information had been disseminated by Point or by Focus. In short, there is no evidence as to sales actually lost. There is no evidence (except in broad-brush terms) that Point have been unable to secure venture capital funding. There is no evidence Point intend to proceed to flotation. There is no evidence that action by Focus has had any impact on Point's business.

120. The dilatory nature of Point's approach to resolution of this dispute is a relevant factor in considering whether there is utility to the declaration sought. A period of 18 months (ie from mid October 2002 until 15 April 2004) elapsed before Mr Green informed Focus that he was no longer willing to proceed down the route of independent expert scrutiny. It is understandable, as Mr Green explained, that he was obliged to continue with his work for customers. I understand the pressures

experienced in a small, start-up company. Nevertheless, it is, in my judgement, telling that Mr Green did not press on diligently. It suggests that he had no real need to seek this declaration. Even after the letter of claim was sent, Mr Green did not proceed diligently with commencing proceedings or, once proceedings were commenced, in progressing these.

121. I am not persuaded that Point need the declaration.

Discretion

122. Is it appropriate to make the declaration sought? How should the court weigh the respective positions of Point and Focus?

123. As I set out earlier, the letter of 9 October 2002 was sufficient to trigger the right to claim declaratory relief, as was the implicit assertion to Swiss Life. However, much has occurred since those episodes. I take into account all the circumstances including the way in which Point reacted to the letter and their subsequent actions. Mr Green's letter of 15 October 2002 shows that Point was not at that stage unduly concerned by Focus' letter. Point agreed readily to Focus' suggestion for expert scrutiny but did little between October 2002 and June 2004 to take matters forward. Whilst Point participated in the discussions and proposals for arrangements for independent expert scrutiny, they were by no means the driving force. Point have not pursued matters with any expedition. As well as Point's delays in progressing the independent expert scrutiny proposals, they delayed some five months between their letter of claim and their issue of proceedings. They did not progress these proceedings with urgency. Indeed, Focus was obliged to apply to the court for an unless order to secure service of Point's witness statements: these had been due for service in June but were not served until October 2005.

124. Mr Colley submits that, if a person writes a reasonable letter of concern but that letter is distorted enough through the eyes of the recipient, who pleads no damage as a basis for activation of the inherent jurisdiction, what will follow? If such a letter, although not properly formulating a claim, is read as a threat of copyright infringement proceedings and that is all it takes to activate the inherent jurisdiction, it will be or become impossible for parties with a genuine but incomplete concern to raise that with the potential infringer in an attempt to resolve the dispute without recourse to litigation for fear that they will find themselves where Focus are now. In short, relying on the court's inherent jurisdiction in the way that Point are seeking to do, will become the new "gagging writ". It seems to me that it is a question of fact in each case whether wording is sufficient to trigger an entitlement to claim a declaration.

125. Mr Colley submits that Focus is not "a proper contradictor". Focus does not

allege copying. It has no positive case. Following **Wyko**, the court should not grant a declaration where Focus has been dragged to court without ever formulating a positive claim; Focus should not be made to defend bringing a claim they have not brought. Again relying on **Wyko**, Mr Colley submits that in this case there is no properly formulated claim. Focus do not know and have not been put in possession of sufficient information and evidence to assess whether or not to acknowledge what is requested.

126. Point have never put Focus in possession of the facts. Point's case is that Focus' have rejected out of hand Point's offers to show their software. That, in my judgment, is an unfair characterisation of what has gone on between these parties. Point contend that they offered their source code to Focus, on a confidential basis, for inspection and analysis by an expert appointed by Focus, such offer having been made on various occasions, including orally through Mr Fernando at the CMC on 24 February 2005 and by Mr Fernando's letter to Master Bragge dated 25 February 2005. In fact, by that letter, Point had indicated that they had asked Focus to provide a confidential schedule of similarities to show how it was alleged that Point's software infringed Focus' software. But, as Focus were not running a case alleging copying, it was pointless to suggest they begin by producing a schedule of similarities. The offer made through Mr Fernando did not help take matters forward. In correspondence in June 2005, Point's solicitors suggested mutual disclosure of software to a jointly-appointed expert, as well as to respective lawyers. Focus' solicitors replied to say they had no objection to a Confidentiality Club concerning source code and related documentation. They would agree to it if such were required. Point's solicitors by letter dated 2 November 2005 stated that Point would willingly provide their code on a confidential basis to an expert nominated by Focus to enable Focus to analyse their code. They were willing to consider instruction of Mr Turner.

127. In August 2003 the parties had agreed a very detailed protocol for independent expert scrutiny. Point chose not to proceed with that. The offer made in the letter of 2 November was linked to issues as to Mr Turner's fees, which served to muddy the waters. The suggestion which Point made shortly before trial was predicated on the assumption that Focus were running a copying case. They were not.

128. Focus' suggestion, made in October 2002, that an independent expert scrutinise the codes on a confidential basis was clearly a sensible one. It would have been a cost-effective way for the parties to have achieved a degree of certainty. Much money and time might have been saved if that approach had been followed through. It is, in my judgment, understandable that Focus should have been unwilling to accept

Point's request that they agree binding expert determination. Questions of copyright and infringement are complex and I see no reason why Focus should have submitted to binding expert determination for such matters. Point sensibly suggested assistance through CEDR. Had the parties agreed to use CEDR's services they might well have found a way forward, but that suggestion was not pursued by either Point or Focus. It is simply not right for Point to blame Focus alone for the failure of these alternative approaches. Neither Focus nor Point pursued the alternative approaches vigorously. Neither brought any urgency to the process. Point dragged its feet at least as much as Focus, indeed probably more: at least Focus took the trouble to prepare its technical primer whereas Point did not even bother to do that. The evidence shows that it was Point who pulled out of the process. They have given no good reason for having done so but instead sought to lay the blame at Focus' door. In my judgment the refusal by Point to continue with the independent expert scrutiny process is a factor which weighs against them.

129. A consequence of granting the declaration which Point seek would be that Focus would be prevented from bringing a claim for infringement if Focus subsequently had reason to believe that there were grounds to make such a claim. That is a serious concern. In balancing fairness to Point and fairness to Focus, it seems to me that a factor which weighs heavily in Focus' favour is that to grant the declaratory relief would shut Focus out of any future claim. It would be unjust to do so in circumstances where the court had not examined the evidence which a court would normally expect to see to be able to determine, on all available evidence, whether or not there had been infringement.

130. I am conscious that a refusal to grant the declaration may leave Point in a worse position than that before proceedings began. That, however, is a consequence of the way in which they have pursued their claim. It is a factor which does not weigh heavily in favour of Point.

131. For all of these reasons, I should have concluded that, to do justice to Focus as well as to Point, the court should not grant the declaration.

Conclusion

132. This is an unusual case. I am being asked to make a declaration that software, which I have not seen, does not infringe any copyright in another software product which I have not seen and in respect of which copyright has not been demonstrated. In my judgment, the absence of tested evidence brings this case close to the category of cases where the court is asked to answer a theoretical question. The court should not grant a declaration which it is not satisfied is in respect of matters which are proven; which is necessary, which will be useful and which is

accurate and which is appropriate in the context of the case.

133. It seems to me that the court should proceed very cautiously if it has doubts about the evidence to support the case for independent design. The authorities to which I have been taken do not suggest otherwise. By this I do not suggest that I have considered that Point should do more than prove their case on balance of probabilities. Point have not persuaded me, on balance of probabilities that they achieved independent design of their Acuo software.

134. I have set out my reasons for concluding that Point have not demonstrated that they need the declaration.

135. When I balance Point's position as against Focus' position, as I have set out earlier, I conclude that potentially there may be greater injustice to Focus if the declaration is granted than to Point if it is not granted.

136. In all the circumstances, in my judgement the court should not exercise its discretion in favour in granting the declaratory relief for which Point seek. It is common ground that, if the court considers that a declaratory relief should not be granted, then the application for an injunction falls with it.

137. Point's claims therefore fail.

138. Prior to the letter of claim and issue of proceedings, the parties had agreed a process which would have made the litigation unnecessary. Focus had even gone so far as to offer to meet Mr Green's concern that the result of the independent expert scrutiny process would not be determinative by offering, in Hammond's letter of 4 June 2004, confirmation, in effect, that Focus would not be able to pursue an infringement claim if the expert found no copying. Mr Fernando seeks to minimise the effect of that offer, but in my judgment it cannot be ignored. Focus suggested a sensible and cost effective way which was likely to help the parties resolve matters without recourse to litigation. Point abandoned that process notwithstanding the comfort which Focus offered. Point's approach has had an impact on the substantive issues in this case. It may well also be relevant to questions of costs, on which I now invite submissions. The parties will no doubt bear in mind that the court is generally supportive of efforts made to attempt to resolve matters without litigation. Recourse to litigation should be a last resort.