Neutral Citation Number: **[2021] EWHC 1996 (Pat)**

Case No: HP-2018-000003 and HP-2020-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A INL

Date: 16/07/2021

Before :

SIR ANTHONY MANN

- -

Between:

FIBERWEB GEOSYNTHETICS LIMITED	**Claimant**
-and-	
GEOFABRICS LIMITED	**Defendant**

And between:

GEOFABRICS LIMITED	**Defendant**
-and-	
FIBERWEB GEOSYNTHETICS LIMITED	**Claimant**

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Geoffrey Pritchard and **Alice Hart** (instructed by **Withers & Rogers LLP**) for Fiberweb
Michael Hicks (instructed by **Womble Bond Dickinson (UK) LLP**) for Geofabrics

Hearing date: 5th July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANTHONY MANN

Sir Anthony Mann :

1. This is an application relating to a final injunction granted by Mr David Stone, sitting as a deputy judge of this Division on 9th April 2020. In his judgment leading to that order Mr Stone found that a patent of which the claimant ("Geofabrics") was a patentee was valid and infringed. His conclusions were in due course upheld by the Court of Appeal on June 11th 2021.

2. The patent relates to a trackbed liner for railways and the like. It is laid on to the soil under the ballast and its purpose is to prevent the squeezing of underlying clay up into the trackbed when a train passes over the track. The liner is to act as a filter to prevent passage of clay and silt particles, in order to prevent settlement of the track. It is permeable to water, under pressure, but not to solid particles. The key integer in the case (at least up until now) has been one expressing lack of permeability of the liner under normal conditions (the absence of a train) (claim 1.4).

3. Geofabrics manufacture and sell a product which has the attributes of the patent. The defendant ("Fiberweb") started to manufacture and sell a competing product – Hydrotex 2 - back in 2013. It is this activity which eventually prompted the present litigation in which Geofabrics claimed infringement and Fiberweb challenged the validity of the patent. Hydrotex 2 was found to infringe, because (so far as impermeability is concerned) it fulfilled the criteria of the impermeability test when certain tests were carried out on it involving assessing the head of water which it could withstand.

4. Mr Stone's judgment is at [2020] EWHC 444 (Pat). The order made by him was a standard order which restrained Fiberweb from infringing Geofabrics' patent. Its effect was stayed by order pending appeal. Geofabrics agreed to that stay, in the light of an offer by Fiberweb's parent to guarantee the payment of damages. Now that the appeal has been dismissed it has taken its full effect. There had been no interim injunction in place (or, as I understand it, applied for) to restrain exploitation of Hydrotex 2 pending the trial.

5. In 2019, unknown to Geofabrics, Fiberweb started developing a varied product. It is known in this action as Hydrotex 4, and is said to be 5 times more permeable than Hydrotex 2. That is said to mean that it does not fall within the scope of the impermeability integer referred to above.

6. Fiberweb started separate proceedings for a declaration of non-infringement in relation to Hydrotex 4. They were launched on 3rd April 2020 – the "DNI proceedings". That

was after Mr Stone had handed down his judgment on 5th March 2020, but before the debate on the form of relief on 9th April 2020. As far as I know, there was no debate at the consequentials hearing about what effect, if any, the DNI proceedings and their substance should have on the relief granted though there is a reference to it in paragraph 13 of a witness statement of Mr Carroll, for Fiberweb, provided in support of the application for a stay pending appeal. As appears above, there was a stay of the judgment pending appeal, but the stay did not relate to the DNI proceedings. The DNI trial is scheduled for January 2022.

7. Fiberweb stopped supplying Hydrotex 2 in April 2021 but with deliveries to continue until June. It has been offering to supply Hydrotex 4 since April 2021. The present application relates to its continued ability to do so. Fiberweb maintains that Hydrotex 4 does not infringe, but apparently is not sufficiently confident about the non-infringement that it is prepared to indulge in a supply which would, if it is indeed an infringing product, be a breach of the injunction and therefore a contempt of court unless it is protected from that consequence. Unless an express exception from the injunction is granted, Fiberweb will feel itself unable safely to sell or even offer Hydrotex 4 in the market. In those circumstances it seeks various alternative forms of relief which are designed to ensure that, pending the trial of the DNI proceedings, it can offer and supply Hydrotex 4 without the risk of its being in contempt even if it turns out that Hydrotex 4 infringes. Various mechanisms are proposed for achieving that.

Jurisdictional matters

8. Mr Pritchard for Fiberweb relies on 1 or more of 4 jurisdictional gateways to his relief. They are (in his preferred order of application) the following:

(a) CPR 3.1(2)(f):

> "3.1(2) Except where these Rules provide otherwise, the court may –
>
> … (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event."

(b) CPR 40.8A:

> "40.8A Without prejudice to rule 83.7(1), a party against whom a judgment has been given or an order made may apply to the court for—
>
> (a) a stay of execution of the judgment or order; or
>
> (b) other relief,

> on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just.

(c) The court's jurisdiction to grant declaratory relief under section 19 of the Senior Courts Act 1981 and CPR 25.1 and 40.20. He seeks a (somewhat peculiar, to my eyes) interim declaration that the infringement issue be reserved exclusively for the DNI action and that acts performed in relation to Hydrotex 4 shall not be deemed to be a breach of Mr Stone's order.

(d) CPR 3.1(7) which provides:

"(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."

9. In addition, so far as may be necessary, he also relies on the court's inherent power to stay its proceedings – see eg *China Expert & Credit Insurance Corporation v Emerald Energy Resources Ltd* [2018] EWHC 1503.

10. Mr Hicks for Geofabrics does not dispute that, one way or another, the court has a power to modify the injunction or its effect, but says that all routes have to be looked in the light of CPR 3.1(7). He points out that the circumstances in which an order can be varied under that provision have been held to be limited, and generally speaking the discretion under that provision is limited by the decision of the Court of Appeal in *Tibbles v SIG plc* [2012] 1 WLR 2591. In that case Rix LJ cited with apparent approval the decision of Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch):

> "It seems to me that the only power available to me on this application is that contained in CPR r 3.1(7), which enables the court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR r 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to reargue that application by relying

> on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to deploy."

Rix LJ went on to say:

> "39. In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

….

> (vi) Edwards v Golding [2007] EWCA Civ 416 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

> (vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

11. Mr Hicks relies heavily on those passages. He submits that bearing in mind what is being sought here would fall within CPR 3.1(7), it would be strange if some lesser test applied under the other jurisdictions (whichever might be applicable as well). So what applies is a strict test and Fiberweb cannot bring themselves within it.

The jurisdiction and the relevant test

12. It is therefore appropriate to consider what jurisdiction the court is entitled to exercise and whether the restrictive nature of CPR 3.1(7) casts its shadow into other jurisdictions which might be available.

13. I can despatch the declaration route quickly. This is not available to Mr Pritchard. What he is seeking is not a declaration, properly so called, at all. A declaration is a declaration as to what rights are, or what a state of facts is (or is not). It relates to an existing state of affairs. If the dispute were as to whether the terms of the order on their true construction prevented exploitation of Hydrotex 4, then a declaration might be an appropriate mechanism for ruling on the point. But that is not what is happening here. The declaration of non-infringement, if granted, would determine that point. Mr Pritchard is seeking some sort of declaration that pro tem the injunction should not be treated as catching Hydrotex 4 without a legal determination on infringement, and that the question of infringement should be dealt with only in the DNI proceedings. That is not proper declaratory relief at all. It is a disguised claim to a variation and a disguised case management claim.

14. CPR 40.8A may be open to Mr Pritchard. The development and appearance of Hydrotex 4 is not new since the date of the order – it was sufficiently developed as a marketable product to justify the DNI proceedings being commenced. What is new is the determination of the appeal. When the matter was before Mr Stone the parties agreed a stay pending the appeal. That made it unnecessary to create a carve-out for Hydrotex 4 for the time being, since the stay allowed its exploitation. The determination of the appeal removes that protection for Hydrotex 4 at a time when its infringing nature has not yet been determined. That would seem to me (just) to qualify as a subsequent event.

15. Similarly CPR 3.1(2) seems, on its face, to be open to Mr Pritchard. He is seeking a stay of part of the effect of an order until a specified event – the determination of the DNI proceedings.

16. Similarly, the application is capable of falling within CPR 3.1(7), on its terms, without for the moment considering the strictures of *Tibbles*.

17. So the question becomes: What are the criteria for exercising the jurisdiction, and in particular are the strictures apparently imposed on CPR 3.1(7) to be read into the other provisions so far as they apply?

18. I prefer to tackle the latter question by considering the application as though it were an application under CPR 3.1(7) without (for the moment) the other jurisdictions being brought into play. In my view the *Tibbles* restrictions set out in the judgment of Rix LJ, would not apply, or at least not in their full rigour. What *Tibbles*, and the cases it gathers together, are dealing with are attempts by litigants to revisit issues which had already been addressed in the proceedings leading up to the judgment, or if not addressed then they were still naturally the subject of the proceedings and would have fallen for decision. The cases all say that considerations of finality, and not having two bites of the cherry (which is finality in colloquial form) mean that CPR 3.1(7) does not have the broad operation which its terms would otherwise suggest. The strictures are all aimed at that factor, and the exceptions (which are examples, and not definitive) are exceptions which do not go to finality, or in which finality can be justifiably challenged.

19. The present application does not amount to a challenge to the finality of the decision of Mr Stone. There is no challenge to his validity findings, and no challenge to his infringement findings in relation to Hydrotex 2 (the only product in play in the proceedings). None of that is to be re-visited. What the application relates to is another product and whether that product infringes. So the prime target of the restrictions in *Tibbles* does not exist. It is true that the case does not fit within the suggested exceptions in *Tibbles*, but it is quite clear from the judgment that those exceptions are not intended to be exhaustively stated.

20. *Tibbles* might have been operative in this case if it could be said that the decision whether or not to except Hydrotex 4 from the injunction was the subject of an actual decision in relation to the form of relief such that Fiberweb can be seen to be seeking another bite at that cherry. However, that is not the case on the facts. Nor is it the case that the position in relation to Hydrotex 4 was necessarily and obviously part of what ought to have been raised at the time. I have not been given a full account of what happened at or in relation to the consequentials hearing, but it seems that what happened was that the parties agreed on the stay pending appeal and that that was all that was

considered in relation to stays. This was done in the knowledge of the existence of the Hydrotex 4 and the DNI proceedings but there does not seem to have been any debate about it which might lead one to conclude that in inviting the court to order the stay pending appeal the parties were dealing with all possible stays. It seems likely that the parties concluded (if they thought about it at all) that the stay pending appeal would be appropriate for the time being, acknowledging that Hydrotex 4 would benefit from it. If the appeal succeeded no further stay would be necessary. It is not apparent that anyone addressed (at least openly) the question of what would happen if the appeal failed (which it did), and they cannot be taken to have been impliedly dealing with such matters.

21. There is in fact one matter which suggests that the parties impliedly acknowledged that the stay would operate for the benefit of the development of Hydrotex 4. In paragraph 13 of a witness statement dated 3rd April 2020, provided in support of Fiberweb's application for a stay pending appeal, Mr Michael Carroll, commercial director of Fiberweb, set out how it was that at that time Hydrotex 4 could not be deployed in a Network Rail tender, for which Hydrotex 2 was proffered at the time, and he ended by saying (in something of a non-sequitur):

> "Moreover, with an injunction in place, we could not begin the NR [Network Rail] approval durability testing [of Hydrotex 4], which has to take place at the University of Birmingham, without the comfort of a declaration of non-infringement."

22. The appearance of this sentence, followed by the agreed stay pending appeal, is consistent with the parties considering that Hydrotex 4 was at least for the time being, an appropriate beneficiary of the stay because the injunction would otherwise be a practical bar to its exploitation, but it does not suggest that there was any view taken by anyone that the stay pending appeal was the equivalent of a final decision on all stay issues.

23. In the circumstances, therefore, I do not consider that *Tibbles* provides the constraints on the exercise of any discretion to stay (or some other form of relief, whether by a variation of Mr Stone's order or not), as propounded by Mr Hicks. I consider that I can and should approach the question of the exercise of my discretion in a broader way. I do not think that the exercise of my discretion is going to differ depending on which of Mr Pritchard's three principal legitimate candidates is applied, so I do not propose to consider whether any of them might not be candidates. One of them is going to be.

Fiberweb's case on discretion

24. Fiberweb accepts that there is no direct authority derived from the same factual situation in previous cases which can be applied directly to this one to determine whether the injunction should be stayed. However, Mr Pritchard does point to analogous situations in which stays have been granted. In *Illumina v TDL Generics* [2019] EWHC 2405 (Pat) Arnold J declined to grant a general injunction which would have covered a new product which the defendant contended did not infringe. The point arose at the end of the trial, when Arnold J was considering the correct form of relief at that time. The patentee said it did not intend to bring committal proceedings in respect of the new process in respect of activities pending that decision. In those circumstances Arnold J held:

> "15. In circumstances where it is accepted by the patentee that there should be no enforcement of the injunction to stop the defendant from using a modified process, and furthermore it is accepted that there should be no sanction for breach of the injunction if it turns out subsequently that the modified process does infringe, then it seems to me to be contrary to principle to grant an injunction which potentially covers that modified process until such time as the question of infringement has been determined by the court. Rather, the correct way forward should be, as proposed by the Claimants in the present case, for a general injunction to be granted, but qualified in such a way as to make it clear that it does not prevent the defendant from using the modified process pending the determination of the court as to whether the modified process does or does not infringe."

25. Similarly in *Unilever v Chefaro* [1994] RPC 567 after trial the defendant sought a carve-out for its new product whose infringing qualities needed to be determined, and Jacob J ordered such a qualification. Mr Pritchard also sought to draw parallels between cases where infringement was found, but there was still a stay of enforcement pending appeal, and said that the present situation was even stronger in favour of a stay because in a stay pending appeal case there had at least been a finding of infringement which is not true at the moment of Hydrotex 4.

26. Turning to the facts, Mr Pritchard submitted that the DNI case is a relatively simple one, turning on one experiment in relation to one integer, that experiment being of the same nature as that relied on by Geofabrics at the trial and which demonstrated relevant impermeability and which, he says, now demonstrates that Hydrotex 4 is relevantly permeable. It is not yet known what Geofabrics' positive case against that is (if any), and he criticises Geofabrics for not yet putting one forward, but whatever it is it will, he says, have to be a narrow one and Geofabrics is going to be fighting an uphill battle. Fiberweb commenced its DNI proceedings as promptly as possible and has pursued them expeditiously, whereas Geofabrics has not properly engaged with the process. The maintenance of the status quo favours the grant of the modification he seeks. There was no interim injunction pending trial in relation to Hydrotex 2, and there was a stay

pending appeal (which benefited Hydrotex 4 as well as Hydrotex 2), and that status quo ought not to be disturbed in relation to Hydrotex 4.

27. Furthermore, Mr Pritchard says his client would suffer serious loss if his client were not able to continue to deal in Hydrotex 4. His client's position (made clear in a witness statement provided after the hearing but confirming instructions given during the hearing) was that with the injunction in place his client would definitely not exploit Hydrotex 4 lest it should turn out to be infringing, thereby breaching the injunction. However, there was exploitation to be had if the injunction were stayed. Hydrotex 4 was launched on the market in April 2021 and has already got orders from VolkerRail (£120k) and a 3 year project with Amey Rail was being considered. If those prospects cannot be fulfilled then not only will they be lost, but relationships with those two bodies will be irretrievably damaged. Two further rail infrastructure projects are expected to be announced soon (East-West rail and Transpennine) and if a stay is not ordered then Fiberweb runs the risk of not being able to offer Hydrotex 4 to those projects. He did not press the potential Network Rail tender, because that had stalled and it was not known what was going to happen to it. The damages from this are not easily quantifiable, because lost turnover cannot be accurately quantified, unlike losses to Geofabrics from Hydrotex 4 sales, which are easier to translate. There is no cross-undertaking in damages in place for any of this. If production and supply of Hydrotex 4 were ceased, the role of 2 significant employees would be rendered redundant and they would lost.

28. So far as Geofabrics' position is concerned, Mr Pritchard submitted that it could compensated in damages if Hydrotex 4 is released from the clutches of the injunction and exploited, in the same way as it will be compensated in damages in respect of activities during the stay pending appeal (and indeed prior to the appeal). It is only for another 7 months until the DNI case is heard and there is nothing special about that 7 months when compared with previous periods of stay or absence of injunctive relief.

Geofabrics' submissions on discretion

29. Mr Hicks submitted that the normal injunction on an infringement action is the general one such as was granted in this case. No suggestion was made by Fiberweb at the time that any other form of injunction should be granted and it is unlikely that Geofabrics would have agreed a stay going beyond an unsuccessful appeal. Where there is doubt the remedy of the potential infringer is to seek a DNI declaration, and although that has now been done in this case it has been done late. Fiberweb could and should have sought a ruling at the trial of the original action, or shortly thereafter (with expedition if necessary). If Geofabrics had been told a further stay was likely they would have sought to procure the DNI matter be brought on quicker, and if the judge had been told about that prospect it is likely he would have procured a quicker determination of the

DNI issues. There is no good reason now to vary the injunction to suit what Mr Hicks described as Fiberweb's business convenience.

30. So far as the authorities are concerned, Mr Hicks pointed out that they concerned debates about the final form of relief, at the time of trial. The present situation is different and different considerations apply. The final form of relief has been determined, and no sufficiently strong case within *Tibbles* had been put forward.

31. Mr Hicks further submitted that the potential losses relied on by Fiberweb were overstated. The delayed nature of its application for a DNI declaration suggested that Hydrotex 4 was not as critical to its business as it seeks to suggest. If it will lose sales in the period between now and the trial of the DNI proceedings (which is only 7 months, not allowing for the time to produce the judgment) then it only has itself to blame because it could have had the issue resolved earlier by starting its DNI proceedings earlier. The Network Rail tender (which was expressed to be a concern by Fiberweb back in 2020) seems to have stalled anyway, so it will be able to pick that up after the DNI trial, it seems. The evidence showed that the East-West rail link contract had gone to Geofabrics, and there was no suggestion that the Transpennine contract was for immediate delivery. The allegation of redundancies was challenged. While Fiberweb has suggested that damages would be an adequate remedy for Geofabrics if it turns out that Hydrotex 4 infringes, it does not seem to have accepted the simple (and correct) proposition that Geofabrics would lose sales on a one for one basis and would suffer price depression for its product, which tends to demonstrate that Fiberweb contemplates (or will make) difficulties in relation to damages. That demonstrates that damages were not a straightforward and adequate remedy, and in any event the normal remedy for patent infringement is an injunction and not damages in lieu. The assertion by Fiberweb that the issue in the DNI proceedings is simple and relatively easy to resolve is not correct when one looks at the evidence, and that is supported by Fiberweb's conduct in relation to its PPDs in the first action (the product development manager said he did not stand fully behind the amended version at trial) and its provision of samples.

Conclusions

32. I have already decided that questions of finality are not engaged in this matter, so the question becomes one to be decided on the basis of the overriding objective and what the balance of justice requires.

33. The present situation is in many ways not dissimilar to that presented in the two cases identified above –*Illumina* and *Unilever.* Both cases differ from the present in that the debate occurred at the end of the trial, when the court was being asked to determine the form of the final injunction and whether there should be a carve out for the infringer's

new product, whereas in the present case the matter has been made to arise some significant time after the trial. However, that of itself does not seem to me to affect the principles much. The underlying thesis is that in the situations applying in those cases it would be unfair in these sort of circumstances to bar a particular product or process where its infringing qualities are bona fide in dispute pending trial of those issues though I accept that the fact of delay, and the circumstances of the making of the first order in the present case may be of relevance in deciding how far that thesis should be extended to the present case.

34. Before applying that approach too readily, however, it is right to consider other points of distinction. In *Illumina* the patentee accepted that there should be no enforcement of the injunction to stop the modified process, and accepted that there would be should be no sanction for breach of a general injunction were the infringer to exploit the new product and were it to turn out that it infringed. In the present case the first of those factors seems to be present, but the latter is not. I asked Mr Hicks in terms whether his clients had an intention one way or another as to reliance on the injunction were it to remain in its present form and were exploitation of Hydrotex 4 to take place, and he said his clients had no present intentions one way or the other. It would seem to me that committal proceedings would be most unlikely, but there was still no disclaimer of an intention to claim contempt in the future, so that point differs from *Illumina*.

35. In *Unilever* Jacob J took into account the fact that the patentee was the author of its own misfortune because of the strung-out nature of the proceedings, and that feature is not present in the present case either (though, with all due respect, I do not follow what significance that particular point was thought to have on the decision about the form of the injunction).

36. Despite those differences, in this sort of case those cases do point clearly in the direction of having the relevant issues tried in DNI proceedings, with no injunction in place in the meanwhile, rather than on a committal application, a position endorsed by the House of Lords in *Multiform Displays Ld v Whitmarley Displays Ld* [1957] RPC 260 at p262 lines 25-29 per Viscount Simonds. If that is correct (and in my view it is) then no fair purpose is served by having a parallel injunction, of uncertain scope, in place for the time being. It is unlikely that it will be enforced pending the DNI decision, and if an application were made to commit then the underlying principle of the cases cited above would prevent the application's being advanced. If the injunction were left in place with a view to its enforcement by a committal application after, and in the light of a DNI finding favourable to Geofabrics, then that is not desirable either. On the facts of this case, where there is a bona fide dispute as to infringement and that dispute is decided in the DNI proceedings, it is not clear that any useful purpose would be achieved by a committal application. If the intended result is to cause Fiberweb not to risk committal, and therefore not to exploit Hydrotex 4 pending the DNI proceedings, then Geofabrics would have obtained an injunction to which it may turn out not to be entitled. That analysis, as well as providing a clear steer to the balance of justice favouring Fiberweb in this application, also leads into more familiar territory.

37. That familiar territory is that of an interim injunction application, which presents strong parallels. In the present matter the question will be whether Hydrotex 4 infringes. The case of the defendant is advanced bona fide, and does not seem to be a procedural device

to evade the injunction. There is, in interim injunction terms, a serious question to be tried. The question that arises is what restraint there should be in place pending the resolution of that question. That is the question that arises on an interim injunction application.

38. If there were no injunction in place at the moment, and were Geofabrics to be positively seeking one, Fiberweb would have one very powerful answer. Whether or not damages would be an adequate remedy (and in the light of the history of this case they may well be entirely adequate), Geofabrics would prima facie fail because it is not prepared to give a cross-undertaking in damages. That does not appear from the evidence, but Mr Hicks told me that that was Geofabrics' position in the present application – Geofabrics would not be prepared to provide a cross-undertaking as the price of maintaining the injunction in its present wide terms without a carve-out. Mr Hicks took various points to the effect that the damages which Fiberweb said it would suffer were over-inflated. For example, they relied on losses from the Transpennine contract which has already been awarded to Geofabrics, and he said that the claim to loss of commercial reputation was probably overstated. I agree with both of those points, but there is still a risk of significant loss to Fiberweb from its not being able to continue the exploitation of Hydrotex 4 which it had commenced during the period of the stay, and that loss would not be covered by Geofabrics without a cross-undertaking. Geofabrics sought to mitigate this effect by conceding that it would not seek to prevent "internal only" activities in relation to Hydrotex 4, but that does not mitigate by much. So there is a potential for significant damage to Fiberweb if it wins the DNI action, having not exploited Hydrotex 4 in the meanwhile, with no compensating mechanism in place.

39. If an interim injunction application is a true parallel then that points quite clearly to the answer – there should be a carve-out pending the determination of the DNI issues. I therefore ask myself whether there are factors in the present situation which make that an inappropriate parallel to apply or which might otherwise work against Fiberweb now.

40. There are, of course, differences between the present situation and the familiar application for an interim injunction. The first and most obvious is that there is an injunction in place already and Geofabrics do not have to apply for one. However, that does not seem to me to be a strong factor in the present case. The real point, namely whether there should be a restraint pending determination of the issue, is the same irrespective of the starting point. I have not lost sight of the fact that in one sense there is no plain restraint because the injunction does not restrain Hydrotex 4 in terms. The restraint currently comes from Fiberweb's understandable disinclination to risk its product being found to have been exploited in breach of a court order and therefore its withdrawing it for the time being. Geofabrics can hardly make that a source of criticism because it is doubtless the position it wants Fiberweb to be in – hence its maintenance of the injunction in full force. So the underlying point is the same – Geofabrics are seeking to maintain a restriction, the entitlement to which has not yet been fully established. That establishes a strong parallel. In the absence of countervailing factors

that would lead to a refusal of interim relief in a traditional case, and the parallel with the present case is plain so that there should be a variation of the injunction to the effect sought by Fiberweb.

41. There is next the question of what might be called delay. This is not a case like *Illumina* and *Unilever*, where the point arose on considering the form of relief at the consequentials hearing after the trial. It arises when that relief has been established for some time. Mr Hicks takes the point that this is now being dealt with late. Not only is the application made when the form of relief from the trial has been in place for some considerable time, Fiberweb ought to have made its DNI application much earlier so that it could have been determined at the trial or shortly thereafter, and had Geofabric known the further stay was going to be proposed it would have tried to procure some acceleration of the DNI process.

42. There may be some justifiable criticism of Fiberweb for not making its DNI claim earlier than it did, but the point has not really been investigated in the evidence. If it took the view that it would wait and see if it was needed after the result of trial was known, then that is not a wholly culpable view, though bearing in mind what it says is the simplicity of its case one might have thought it would be possible to have it dealt with as part of the trial. However, I do not think that that shortcoming (if it is one) should weigh significantly against Fiberweb in the present application. So far as not raising the question of a stay specifically for Hydrotex 4 is concerned, I do not think that that is a significant matter to be held against Fiberweb either. It was agreed that there would be a stay pending appeal, and that covered Hydrotex 4. Any specific reference to Hydrotex 4 to deal with the situation after the appeal was heard (so far as necessary) would have required some more complex drafting, and although one cannot know what the court's view would have been at the time I rather suspect that the decision would have been to wait and see what the fate of the appeal required and deal with the matter then, which is what has in fact happened. So I do not think that a failure to deal with matters earlier amounts to the equivalent of delay which would disqualify Fiberweb from taking its present stance and seeking to be protected from committal applications in the event of an ultimate finding of infringement.

43. I can find no other factor which points against the result that the interim injunction equivalence requires. It follows that I find that the balance of justice requires that the present general injunction should be qualified to achieve the result that any Hydrotex 4 exploitation acts performed between now and the determination of the DNI action shall not be treated as a breach of the injunction (without prejudice, of course, to any arguments as to whether they are an infringement or not).

44. I should make it clear how far this goes. It extends only to acts actually performed in that period. It does not carry with it an exception in respect of anything actually done outside it. Thus, for example, if Fiberweb were to contract now for delivery in the future, any delivery after the end of the exception period would not fall within the exception. The best way of achieving all that seems to me to make an order in

Geofrabrics's proceedings (not the DNI proceedings, in which this application is brought) varying the effect of the present injunction, and the parties should be able to agree on some form of words to achieve that. It is not appropriate (as will appear from what I have said above) to achieve it by interim declaratory relief.