



10 August 2012

PATENTS ACT 1977

BETWEEN

Tek-Dek Ltd

Claimant

and

Flexiteek International A/S

Defendant

PROCEEDINGS

Application under section 71(1) of the Patents Act 1977 in
respect of European patent (UK) number 1 196 672

HEARING OFFICER

J E Porter

The patent attorneys Wilson Gunn represented the Claimant

The patent attorneys Marks & Clerk LLP represented the Defendant

PRELIMINARY DECISION

Introduction

- 1 The substantive proceedings concern an application (“the application”) under section 71(1) of the Patents Act 1977 (“the Act”) for a declaration of non-infringement in respect of European patent (UK) 1196 672 (“the patent”).
- 2 The claimant (hereafter “Tek-Dek”) is in the business in the UK of marketing composite decking material and has been supplying material under licence from the defendant (hereafter “Flexiteek”), who is a Norwegian company and the proprietor of the patent.
- 3 Proceedings between the parties have taken place in Norway in relation to an alleged breach of the licence. More of this below.

Background

- 4 On 20 January 2012, Tek-Dek made an application for a declaration of non-infringement in respect of the patent. An official letter dated 30 January 2012 outlined the Office's preliminary view that the application did not meet the requirements of section 71(1), because no evidence had been filed to show that Tek-Dek had applied in writing to Flexiteek for a written acknowledgment as required by section 71(1)(a), and because it had not been made clear what acts the applicant was carrying out or intending to carry out for which a declaration was sought.
- 5 On 9 February 2012, Tek-Dek filed an amended statement of case along with further evidence aiming to satisfy the requirements of section 71(1). The papers were served on Flexiteek, who were invited to file a counterstatement by 30 March 2012.
- 6 In a letter from their representatives dated 22 March 2012, Flexiteek requested that substantive proceedings be stayed pending outcome of Norwegian proceedings concerning an alleged breach of a licence under the patent. Separately, they requested that the application be, in their words, "rejected" for non-compliance with the requirements of section 71. In the alternative, they requested that the application be limited in scope. They also requested an extension to the period for filing a counterstatement, at least until the comptroller issues a preliminary decision on these other matters.
- 7 An official letter dated 28 March 2012 confirmed that the period for filing Flexiteek's counterstatement was stayed pending resolution of the two preliminary matters, and requested Tek-Dek to file comments by 30 April 2012 in response to the issues raised by Flexiteek.
- 8 In a letter from their representatives dated 27 April 2012, Tek-Dek sought refusal of Flexiteek's requests for a stay of proceedings and for rejection or amendment of the application, providing supporting reasons.
- 9 In response to an official letter dated 3 May 2012, both parties indicated that they were content for these preliminary matters to be decided on the basis of the papers on file.
- 10 In a further development, on 17 July 2012 Flexiteek's representatives filed a copy of the judgment of the Oslo District Court concerning the Norwegian proceedings, and an English translation of it.
- 11 I shall deal first with Flexiteek's request that the application be rejected or amended (which is understood to be them seeking either strike out or amendment of the statement of case). I shall then turn to the question of a stay.

The law in relation to striking out or amendment of a statement of case

- 12 The procedural rules governing these proceedings are set out in Part 7 of the Patents Rules 2007 (as amended) ("the Rules").

13 In particular, paragraphs (1) and (2) of rule 83 concern striking out, and read:

(1) A party may apply to the comptroller for him to strike out a statement of case or to give summary judgment.

(2) If it appears to the comptroller that –

(a) the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) the statement of case is an abuse of process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) there has been a failure to comply with a section, a rule or a previous direction given by the comptroller,

he may strike out the statement of case.

14 Furthermore, section 71(1) of the Act states:

Without prejudice to the court's jurisdiction to make a declaration or declarator apart from this section, a declaration or declarator that an act does not, or a proposed act would not, constitute an infringement of a patent may be made by the court or the comptroller in proceedings between the person doing or proposing to do the act and the proprietor of the patent, notwithstanding that no assertion to the contrary has been made by the proprietor, if it is shown -

(a) that that person has applied in writing to the proprietor for a written acknowledgment to the effect of the declaration or declarator claimed, and has furnished him with full particulars in writing of the act in question; and

(b) that the proprietor has refused or failed to give any such acknowledgment.

15 In relation to amendment of a statement of case, paragraph (1) of rule 82 states:

Except where the Act or these Rules otherwise provide, the comptroller may give such directions as to the management of the proceedings as he thinks fit, and in particular he may –

[...]

(e) allow a statement of case to be amended;

[...]

Arguments concerning the application to strike out or amend

16 Tek-Dek seek a “declaration that marketing in the UK of the products within [their] Flexible and Professional ranges of composite decking material as detailed herein does not infringe [the patent]”. The application is accompanied by a witness statement by Mr Andrew Oats, Managing Director of Tek-Dek, detailing the Flexible and Professional ranges of decking material. The witness statement is supplemented by three exhibits (AO1, AO2, AO3), providing specific details about the ranges of decking material, including exact measurements and how they are to be laid.

- 17 Flexiteek argue that the application does not comply with the requirements of section 71. In particular, they argue that an application for a declaration of non-infringement must relate to “an act”. Flexiteek point out that Tek-Dek’s “Flexible” range comprises nine alternative plank sections, which may be taken alone or in combination with either of two alternative spacers, and that their “Professional” range comprises eight alternative plank sections, which may be taken alone or in combination with either a specific spacer or “Gunnel Section”.
- 18 Flexiteek argue that the term “act” in section 71 should be construed narrowly, and cannot be construed as referring to an unlimited number of products. They do not cite any authority to support this view; however, they submit that the application relates to an unreasonably large number of disparate possible products or combinations of products, and therefore places undue burden both on Flexiteek and on the comptroller to assess possible infringement of each individual product or combination of products.
- 19 For these reasons, Flexiteek argue that the application should be rejected, or alternatively should be limited to a specific product or combination of products corresponding to “an act”.
- 20 Tek-Dek argue that it is erroneous to suggest that the wording of section 71 should be interpreted narrowly, so as to permit an applicant to seek a declaration of non-infringement only in respect of a single “act”. They say that the purpose of section 71 is to allow a person to seek legal certainty with respect to actual or proposed commercial activities and, in the real world, commercial activities will often comprise more than one product and/or more than one act. Tek-Dek argue that to limit an applicant to seeking a declaration in respect of a single “act” would undermine the purpose of section 71. To support their view, Tek-Dek cite two cases in which they say an applicant has sought a declaration of non-infringement in respect of more than one product: *Abbott v Evysio*¹ and *Gore v Geox (EWCA)*².
- 21 Tek-Dek further submit that the declaration being sought is commensurate with the scope of the patent. They say that the patent is directed to a surface covering which can be produced from plank strips and caulking strips, in which some of the plank strips may be of differing section. Tek-Dek argue that each of their Flexible and Professional ranges is a modular system of extruded planks that can be assembled into a surface covering, each range including a variety of extruded sections which include plank sections of differing widths and plank sections having a curved edge along one side. They submit that it would be entirely wrong to prevent them seeking a declaration of non-infringement for the type of product range to which, they say, the patent is clearly directed.

¹ *Abbott Laboratories Ltd v Evysio Medical Devices ULC* [2008] EWHC 800 (Pat)

² *W L Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 794

22 Tek-Dek also deny that the application places an undue burden on Flexiteek or the comptroller to assess infringement, arguing that the products in question are modular in nature, the various sections sharing many common features, and submitting that the underlying technology is very simple.

Analysis of the arguments concerning striking out and amendment

23 There is no dispute that Tek-Dek have applied in writing to Flexiteek for a written acknowledgement as required by section 71(1)(a), and that Flexiteek have not given such an acknowledgement as set out in section 71(1)(b). What is in dispute as far as section 71(1) is concerned is the scope of the term “act”, as outlined above.

24 In *Abbott v Evysio*, the claimant sought a declaration of non-infringement in respect of three related patents concerning coronary stents. The court allowed consideration of whether the patents were infringed by a particular stent, in its two sizes, together with corresponding modified stents.

25 In *Gore v Geox (EWCA)*, the Court of Appeal considered declarations of non-infringement in respect of two patents, concerning two variants of shoe construction. The Claimant had provided a description of the product and process in respect of each of the two variants. It is sufficient for the present purposes to note that, in the lower court proceedings, Floyd J had said that “The court is being asked to declare that everything falling within the description is not an infringement of the patent”. In the Court of Appeal judgment, Jacob LJ confirmed and expanded on that point, saying:

7. In future it may be better to spell out in detail first a particular and specific product or process (possibly also by reference to a sample if one exists) and then to itemise separately and clearly each possible variant in respect of which the party concerned wants a declaration. If an individual variant has within it a range or range of possibilities their limits should be clearly spelt out. Use of a word such as “generally” is likely to add fuzziness and may result in a refusal of a declaration. Quite apart from anything else, if this manner of drafting is followed and it later turns out that a particular variant may infringe it may still be possible to grant a declaration of non-infringement in respect of the specific embodiment described and perhaps in respect of some other specified variations – in effect blue-pencilling the variant which might infringe.

8. I say this because it is clearly the law that, as the Judge put it at [93]:

The court is being asked to declare that everything falling within the description is not an infringement of the patent.

So if a description is framed with a series of clear alternatives, declarations can be sought or made in respect of each clear alternative.

26 In light of both of these authorities, I am satisfied that it is permissible for an applicant to seek a declaration in respect of a number of alternative products or combinations of products. I therefore do not accept Flexiteek’s contention that the term “act” in section 71(1) should be construed narrowly.

- 27 The witness statement of Mr Oats provides details of both the Professional and Flexible ranges of products, describing the features of all of the extruded sections and other parts included in each range, and explaining how they are laid using adhesive and liquid caulking solution to form a deck covering. The witness statement is supplemented by Exhibits AO1 and AO2 providing technical drawings and measurements of the various products in the Professional range and Flexible range respectively. There is also Exhibit AO3, which is a guide to laying a deck covering using products from the Flexible range.
- 28 While the witness statement and supplementary exhibits contain details of a number of alternative combinations of products, I am satisfied that each alternative is clear, such that the application is consistent with what is explicitly sanctioned in paragraph 8 of *Gore v Geox (EWCA)*. Given that each alternative is part of a range of products which are modular in nature and share common features, I am not persuaded that the application places undue burden on Flexiteek or the comptroller when it comes to assessing potential infringement.
- 29 I am satisfied that the application complies with section 71, and as a result I reject Flexiteek's request that the statement of case be struck out or amended. I now turn to the question of whether the proceedings should be stayed.

The law in relation to staying proceedings

- 30 Rule 74 refers to the overriding objective of dealing with cases justly. Paragraph (2) of rule 74 states:

Dealing with a case justly includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved,

(ii) to the importance of the case,

(iii) to the complexity of the issues, and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the resources available to the comptroller, while taking into account the need to allot resources to other cases.

- 31 Furthermore, in relation to staying, paragraph (1) of rule 82 of the Rules reads:

Except where the Act or these Rules otherwise provide, the comptroller may give such directions as to the management of the proceedings as he thinks fit, and in particular he may—

[...]

(f) stay the whole, or any part, of the proceedings either generally or until a specified date or event;

[...]

32 Separately, the Lugano Convention 2007 (“the Convention”) extends the principles of jurisdiction which are laid down in the Brussels Regulation³ for EU member states to certain countries of the European Free Trade Association (EFTA). The Convention was ratified by the EU on 18 May 2009 and by Norway on 1 July 2009, and it entered into force for EU member states and Norway on 1 January 2010⁴.

33 Flexiteek rely on Article 28 of the Convention, the relevant parts of which are reproduced below:

1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.

[...]

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

34 Also relevant is Article 22 of the Convention, cited by Tek-Dek, which states:

The following courts shall have exclusive jurisdiction, regardless of domicile:

[...]

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the State bound by this Convention in which the deposit or registration has been applied for, has taken place or is, under the terms of a Community instrument or an international convention, deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the grant of European patents, signed at Munich on 5 October 1973, the courts of each State bound by this Convention shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State irrespective of whether the issue is raised by way of an action or as a defence;

[...]

35 Article 63(1) of the Convention then states:

This Convention shall apply only to legal proceedings instituted [...] after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed.

36 As noted above, the Convention entered into force for EU member states and Norway on 1 January 2010. While the Norwegian proceedings were initially instigated by Flexiteek through a complaint to the Conciliation Board on 12 February 2009, the substantive proceedings have taken place before the District

³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

⁴ www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/misc/conlug2.Par.0007.File.tmp/mt_110302_lug2part_f.pdf

Court. The Writ of Summons to the District Court was submitted on 16 February 2010. Therefore, the Norwegian proceedings were instituted after the entry into force of the Convention.

Arguments concerning a stay

- 37 The arguments concerning a stay were submitted before the judgment of the Oslo District Court was issued on 7 June 2012. Before going on to consider those arguments further, I will clarify where I think the Norwegian judgment leaves matters.
- 38 There would now seem to be two possibilities. One is that the judgment will be appealed, in which case the Norwegian proceedings remain pending and the final outcome is uncertain. The other possibility is that the Norwegian judgment will not be appealed, in which case the Norwegian proceedings are concluded. I have not had any indication from the parties as to which of these possibilities has, or will, occur.
- 39 Since it is possible that the Norwegian proceedings have, in fact, not concluded, I shall go on and consider the arguments in relation to a stay.
- 40 Flexiteek argue that the substantive proceedings should be stayed on the basis of Article 28 of the Convention, which gives a court or tribunal discretion to stay its proceedings where a related action is pending in a court of a different State bound by the Convention. They say that the Norwegian proceedings are related to the application because they concern an alleged breach of licence in respect of the same patent, and if the final result of the Norwegian proceedings goes in Flexiteek's favour, Tek-Dek will have a licence in the UK to market and sell the products in question, rendering the application unnecessary.
- 41 To further support their request for a stay, Flexiteek say that the products resulting in a possible infringement of the patent are no longer offered for sale by Tek-Dek. They argue, therefore, that Tek-Dek would not be adversely affected by a stay.
- 42 Flexiteek also argue that, since the Norwegian proceedings have been pending for several years, Tek-Dek had an opportunity to apply for a declaration of non-infringement in the UK at an earlier stage. They note that the Norwegian court proceedings ended on 1 March 2012, whereas in their view the initiation of the application in the UK was delayed and so should be stayed until a final decision is issued by the Norwegian court.
- 43 Tek-Dek point out that, in accordance with Article 22(4) of the Convention, the courts of the country in which a patent is registered have exclusive jurisdiction in proceedings concerned with the validity of the patent. Since validity can be raised in proceedings for a declaration of non-infringement, they submit that proceedings in the UK cannot be stayed in favour of the proceedings in Norway.

- 44 They also argue that the application here and the Norwegian proceedings are not “related actions” in the sense of Article 28 of the Convention, since the Norwegian court has not been asked – and has no jurisdiction – to give a formal decision relating to infringement or validity in respect of the patent. Therefore, they say there can be no risk of irreconcilable judgments so the requirements of Article 28(3) of the Convention are not met.
- 45 Tek-Dek argue that staying the UK proceedings would unfairly prevent them obtaining a decision regarding the scope of the patent in relation to its products. They also point out that, due to the availability of appeal, a final decision in the Norwegian proceedings may not be available for some time.
- 46 Tek-Dek do not dispute Flexiteek’s submission that potentially infringing products are no longer being offered for sale by Tek-Dek, but they point out that they have sold these products within the last six years. In accordance with the Limitation Act 1980 (as amended), these previous sales may be the subject of infringement proceedings and Tek-Dek argue, therefore, that they should be entitled to seek a declaration of non-infringement in respect of those sales. Furthermore, noting that section 71 provides that an applicant may seek a declaration of non-infringement in respect of a proposed act, Tek-Dek state that they may wish to resume sales of the products in question if their application succeeds.
- 47 With regard to Flexiteek’s submission regarding a delay in initiating proceedings in the UK, Tek-Dek argue that there is no legal basis for a stay on these grounds. In particular, Tek-Dek reiterate their view that the Norwegian proceedings and UK proceedings are not related actions in the sense of Article 28(3) of the Convention, and note that section 71 does not define any time limits within which an applicant must make a request.
- 48 Tek-Dek argue, therefore, that they would be adversely affected by a stay of proceedings and so it cannot be justified.

Analysis of the arguments concerning a stay

- 49 What follows is my analysis of the arguments, based on the possibility that the Norwegian proceedings have not been finally concluded.
- 50 I will consider first Tek-Dek’s submission with regard to Article 22(4) of the Convention. They argue that, since validity can be raised in proceedings for a declaration of non-infringement, proceedings in the UK cannot be stayed in favour of the proceedings in Norway.
- 51 It is clear from Article 22(4) that the UK courts have exclusive jurisdiction in relation to any proceedings concerned with validity of the patent. While it is possible for the validity of a patent to be put in issue during proceedings under section 71, validity of the patent in question has not at present been raised in these proceedings. Therefore, in my view, it cannot be said that that the present proceedings are “concerned with” the validity of the patent – even though they may have the potential to be so at a later stage. Article 22(4) is therefore not engaged.

- 52 Even if I am wrong on this point, there is a further angle. Article 22(4) does not appear to allow the court with exclusive jurisdiction to stay the validity proceedings simply in order for another court to determine the validity question. But that is not what Flexiteek are asking me to do, and Article 22(4) does not seem to rule out the possibility of a stay being granted in the proceedings concerning validity if the court with exclusive jurisdiction decides, taking into account all the circumstances, that one would be appropriate. I shall therefore go on to consider the wider arguments over whether these proceedings should be stayed.
- 53 Under Article 28, where actions in different jurisdictions are related there is discretion over whether to order a stay. So there are two points to consider – first, whether the actions are “related” and then, if they are, how the discretion to stay the UK proceedings should be exercised.
- 54 Article 28(3) sets out that proceedings are “related” where they are “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.
- 55 On the basis of the information before me, the Norwegian proceedings relate to a licence under a number of patents including the EP(UK) patent in suit in these proceedings. It is true that the Norwegian court does not appear to have been asked – and has no jurisdiction – to give a formal decision relating to the infringement or validity of the patent. Therefore, at first sight, there would seem to be no risk at all of irreconcilable judgments.
- 56 But Flexiteek say that there is nevertheless the possibility that the outcome of the Norwegian proceedings could render the application here unnecessary. This would be in the circumstances where the Norwegian courts conclude that Tek-Dek continue to have a licence, which allows them to market and sell the products in question in the UK.
- 57 I am not entirely persuaded that an outcome which would render the proceedings here unnecessary is the same as saying that irreconcilable judgments could occur. The closest that the situation would get to having irreconcilable judgments would be if the comptroller declined to give a declaration of non-infringement but the final conclusion of the Norwegian proceedings was that Tek-Dek continue to have a valid licence. I am unconvinced, on the basis of the submissions I have before me, that these are wholly irreconcilable positions. But even if they are, there would seem to be a much larger range of possible outcomes whereby the two proceedings end up being perfectly reconcilable.
- 58 It follows that I am not persuaded that the risk of irreconcilable judgments is significant. Thus I do not think that the proceedings are “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”, and so they cannot be said to be “related” with the meaning of Article 28(3).
- 59 This means I do not need to go and consider how to exercise discretion under Article 28 in relation to a stay. However, while that is true so far as Article 28 goes, it is not the end of the story entirely.

- 60 As noted above, rule 82(1)(f) of the Rules provides a general discretionary power to order a stay. In considering whether or not to exercise that power, factors such as the scope and timing of the related proceedings come into play, and I must also bear in mind the overriding objective set out in rule 74(2), which requires me to consider, *inter alia*, saving expense and dealing with cases fairly and expeditiously.
- 61 If the final outcome of the Norwegian proceedings is that Tek-Dek continues to have a licence and this renders these proceedings unnecessary, as Flexiteek say is a possibility, then clearly some expense will be saved by granting a stay. However, a final decision in Norway that Tek-Dek had no licence in force would appear not to render these proceedings unnecessary. So this point is equally weighted between the parties.
- 62 I must also consider the points made about Tek-Dek's products not currently being offered for sale. Flexiteek argue that Tek-Dek would thus not be adversely affected by a stay, but Tek-Dek have two points in this respect.
- 63 First, they say that previous sales made up to six years ago may be the subject of infringement proceedings, so they should be entitled to seek a declaration of non-infringement in respect of those sales. I think that is clearly right. Obtaining a declaration under section 71 allows a third party to remove uncertainty over being sued for infringement in respect of certain acts. It seems to me that Tek-Dek are adversely affected if that period of uncertainty is lengthened because their application to seek such a declaration is stayed.
- 64 Second, Tek-Dek say that they may wish to resume sales of the products in question if their application succeeds. In this respect they cite *Omnipharm v Meria*⁵ and in particular the discussion on standing to seek a declaration of non-infringement at paragraphs 154-158.
- 65 In *Omnipharm v Meria*, the claimant sought certain declarations of non-infringement in respect of products which they claimed to plan to sell. The defendant argued that only those who could show a settled, firm and realistic plan to do an act could seek a declaration. However, in his judgment, Floyd J stated at paragraph 156:
- I do not think that the requirement that an applicant should propose to do an act requires any investigation into how settled, firm or commercially realistic the proposal is. A requirement for an investigation into the seriousness of a proposal would detract from the underlying purpose of the section, not contribute to it. It is sufficient for the applicant to propose to do the act.*
- 66 I see no reason why the current case should be distinguished from *Omnipharm v Meria* in respect of standing to claim. It follows that Tek-Dek should be entitled to seek a declaration of non-infringement with a view to resuming sales of the products in question if successful. Since a stay in proceedings would delay any such declaration, it would in my view adversely affect Tek-Dek.

⁵ *Omnipharm Limited v Meria* [2011] EWHC 3393 (Pat)

- 67 Thus Flexiteek’s arguments that Tek-Dek is not currently making the disputed products does not succeed in advancing their case for a stay.
- 68 I now turn to Flexiteek’s point that initiation of proceedings in the UK was delayed. Their point is that the application by Tek-Dek was not made earlier in the Norwegian proceedings, which have been running for some time. In view of this delay, they say, and the “imminent and highly relevant decision to be issued by the Norwegian Court” (now of course issued), the current proceedings should be stayed.
- 69 Tek-Dek’s submission is that there appears to be no legal basis for requesting a stay on these grounds given that, in their view, the proceedings are not related. They also note that section 71 does not define any time limit within which a third party must seek a declaration.
- 70 It is plain that the present application was made relatively close to the end of the first instance Norwegian proceedings. However, I am not persuaded that the time which has elapsed between the beginning of those Norwegian proceedings and the making of the application is of major relevance, especially in view of my finding above that the proceedings are not “related” for Article 28 purposes, and also in view of the fact that section 71 does not define any time limits within which an applicant must make a request.
- 71 The point that Flexiteek makes about the imminence of the Norwegian judgment now falls away. The judgment at first instance has issued but, as Tek-Dek says, any appeal would mean that a final decision may not be available for some time.
- 72 To summarise: I am not persuaded there is a need to stay in order to avoid irreconcilable judgments. Also, it is at least as likely as not that the final decision in Norway will not render the current proceedings unnecessary. There are reasons why Tek-Dek would be adversely affected by a stay, in relation to previous sales and potential future sales. Whilst a stay might save some expense, if the Norwegian proceedings ultimately conclude in Flexiteek’s favour, I am not persuaded that the possibility of this outcome justifies prolonging the present proceedings now. In my view, the overriding objective to deal with the present case fairly and expeditiously would not be served by granting a stay.
- 73 As noted in paragraph 49, my analysis has been based on the possibility that the Norwegian proceedings have not been finally concluded. If in fact those proceedings have been finally concluded, then Flexiteek’s arguments for a stay – which are based on there being ongoing proceedings in Norway – must clearly fall away.
- 74 Either way, therefore, I reject Flexiteek’s request for a stay in these proceedings.

Conclusion and next steps

- 75 Flexiteek’s application for strike out or amendment of the statement of case is refused. Their request that the proceedings be stayed is also refused.

76 I hereby allow Flexiteek six weeks from the end of the appeal period (below) in which to file a counterstatement.

Costs

77 Neither side sought an award of costs at this early stage in the proceedings, so no award is made at the present time.

Appeal

78 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

Dr J E PORTER

Deputy Director acting for the Comptroller