Neutral Citation Number: **[2021] EWHC 2246 (Pat)**

Case No: HP-2021-000026

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 6th August 2021

Before :

THE HON MR JUSTICE MELLOR

- -

Between :

ABBOTT LABORATORIES LIMITED	**Claimant**
- and -	
DEXCOM INCORPORATED	**Defendant**

- -
- -

Mr Thomas Mitcheson QC, Mr Tim Austen and Ms Georgina Messenger (instructed by **Taylor Wessing LLP** for the Claimant
Mr Iain Purvis QC and Mr Christopher Hall (instructed by Bird & Bird LLP) for the **Defendant**

Hearing date: 28th July 2021 (with brief mentions on 29th & 30th July)

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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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on Friday 6th August 2021.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

1. This is yet another application to expedite a patent trial in the UK. Although the Claimant (**Abbott**) puts forward a number of reasons for seeking expedition including achieving commercial certainty in the UK for a new product, a primary reason was Abbott's desire to obtain a decision on the validity of four European Patents here in order to influence a German Court considering infringement of the German equivalents. In particular, expedition is sought to avoid the problems caused by the so-called injunction gap (as it is known) which often arises in patent proceedings in Germany.

2. I will have to explain more about the procedures in Germany which give rise to the injunction gap, but first I must outline the application, the legal principles I have to apply and more of the commercial and legal background.

3. This application came before me in a very busy last week of term stint as Chancery Interim Applications Judge, which was not ideal. I heard the principal argument on 28th July but a suggestion which I put to the parties shortly before the hearing required instructions to be taken and further discussions, so the matter was mentioned to me on 29th and 30th July, at which point I originally intended to give judgment. Unfortunately, other urgent applications prevented that.

4. This application was launched by notice dated 14 July 2021 the action having commenced by claim form dated 12 July. The application is supported by the witness statement of Mr Stoate of Abbott's solicitors and responded to in the witness statement of Ms Macdonald from the solicitors for the Defendant (**Dexcom**). Some disputes arise on the witness statements, but few of them have any real relevance to or impact on what I have to decide. In other words, apart from differences in emphasis, the facts are not really in dispute.

5. Abbott's application is for an expedited trial of their action to revoke four European Patents owned by Dexcom, seeking a listing of an 8-9 day trial floating from 28.2.22.

Applicable legal principles

6. These are not in dispute. The leading case on expedition is *Gore v Geox* [2008] EWCA 622 at [25], in which the CA identified four factors. I was also referred to the slightly wider discussion in *James Petter v EMC Europe* [2015] EWCA Civ 480 at [10]-[14] and these paragraphs which include an endorsement of the *Gore* factors:

> 16. … The correct principles have been debated between the parties but do not seem to me to be much in doubt. The court exercises its discretion to expedite proceedings against the backdrop that the courts are busy and that expediting once case will often slow the progress of others. For that reason, the overriding objective requires that there should be a good reason for expedition. But the categories of case in which expedition is appropriate are not closed. There may be many and varying situations in which expedition will be held to be just and appropriate, taking into account all aspects of the overriding objective and the court's resources, and the interests of other court users in particular.

> 17. Thus, as the judge was well aware from the authorities that had been placed before him, expedition will only be justified on the basis of real, objectively viewed, urgency. It is against that background that Neuberger LJ's four factors from W.L. Gore supra are to be considered, namely (1) whether the applicants have shown good reason for expedition; (2) whether expedition would interfere with the good administration of justice; (3) whether expedition would cause prejudice to the party; and (4) whether there are any other special factors.

7. At [22] of *James Petter*, Vos LJ (as he then was) emphasised that "the need for commercial certainty needs to be evaluated in its proper context" in each case.

8. Expedition of a patent claim to avoid the injunction gap in Germany has been considered many times, most recently by Birss J (as he then was) in *Nicoventures Trading Limited v Philip Morris & or* [2020] EWHC 1594 (Pat). To the *Gore* factors, Birss J added three particular points:

   i) First, in [11] he noted that "*There are likely to be a large number of litigants in the Business and Property Courts who would like their cases to be tried earlier, therefore granting expedition involves an inevitable degree of queue-jumping and therefore there has to be a good reason for it*," such that the Court decides applications for expedition "*according to the relevant principles and not simply by approaching them on the basis that someone who happens to come to court wishing for their case to be speeded up will get it*."

   ii) Second, in [12] he emphasised that "*a mere wish for commercial certainty is not enough to justify expedition."* Rather, he said, there needs to be a "*good reason*" which must be "*established in evidence*."

   iii) Third, in [13] he considered reliance on the German 'injunction gap' as a basis for expedition. He concluded (in [21]) that *"the courts will take this factor into account as a factor, but it is never enough on its own"*.

9. He explained this third point in these paragraphs:

> '14. A party who has sued for infringement in Germany often seeks to schedule the UK validity action or, rather, to be accurate the UK action which will involve both validity and infringement, in such a way that the outcome relating to validity is likely to be available and public before the German infringement court decides the matter.
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> 15. There have been different words used by different judges of the Patents Court over the years relating to the emphasis that this factor bears in the context of listing decisions and expedition. In a number of decisions between 2011 and 2017, and I refer in particular to *HTC v Europe Ltd v Apple Inc* [2011] EWHC 2396 (Pat), *ZTE (UK) Limited v Telegnaktiebolaget LM Ericsson* [2011] EWHC 2709 (Pat), and *Garmin (Europe) Limited v Koninklijke Philips N.V.* [2017] EWHC 8165 (Pat), Arnold J consistently expressed the view that it was a factor to take into account, however as he put it, it is not a strong factor and will never be sufficient on its own, but it is a factor.

16. In *Takeda UK Ltd v F Hoffmann-La Roche AG* [2018] EWHC 2155, Henry Carr J said at paragraphs 11 and 12:

> "In my view, it is important to give Takeda at least the opportunity of obtaining a judgment from the UK court, which may have some influence on the Düsseldorf court hearing the infringement action. By a decision of the Bundesgerichtshof, dated 15th April 2010, Xa ZB 10/09, Roll-Forming Machine, the Federal Supreme Court held that:
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> > 'The German courts are required to consider decisions rendered by organs of the European Patent Office and courts in other EPC contracting states and pertaining to a largely similar issue and, where appropriate, address the reasons leading to a diverging result in the earlier decision. Insofar as points of law are concerned, this also applies, for instance, to the question of whether the subject-matter of a property right was obvious in the light of prior art.'
>
> The UK courts are always very interested to see decisions of our German colleagues and judges of other EPC Contracting States pertaining in particular to equivalent patents. If I were hearing an infringement case in the UK, I would be very interested to see what decision the German courts had reached."

17. An important point of detail is that the decision of Henry Carr J was not about expedition as such but with the decision to list the case within the listing window, but nevertheless, in my judgment, he was making an important point that is generally relevant.

18. Despite what was suggested in argument, albeit it was never put quite as starkly as this, there is no conflict between the various statements by these judges. I agree with what was said by Henry Carr J and I also agree with what Arnold J said. As Arnold J said, this factor on its own is not enough. If a party did simply come to court and raised that as the only reason, no doubt they would get short shrift.

19. A party should, if it wishes to seek expedition, put forward evidence of the commercial context in which the dispute arises in order to establish why there is a good reason in commercial terms, if true, that the UK validity trial should be timetabled in the way that is sought. In other words, and I am probably repeating myself, if a party seeks expedition it will always need to support its application with evidence of a commercial context to explain why, in the words of *James Petter* and *Gore v Geox*, there is a good reason for expedition.

Commercial background

10. The evidence established the following. The Abbott group of companies and the Dexcom group of companies compete in the sale of glucose monitoring devices for the management of diabetes. The majority of UK diabetes patients monitor their glucose

levels using the traditional 'fingerprick' method, but for around 30% of patients (~120,000) a more sophisticated 'continuous glucose monitoring' ("**CGM**") method is appropriate. Abbott has CGM devices on the market (Freestyle Libre 1 and the more recent Freestyle Libre 2, launched in October 2020) which since around 2017 have been supplied through the NHS. Abbott has secured a significant majority of the UK CGM market and also has a significant number of users of its CGM devices in Germany. Indeed, Abbott claim that its Freestyle Libre range is the top selling CGM product in the world, used by more than 3 million people in 50 countries. Dexcom also has a CGM system on the market called the G6. Dexcom has a much smaller UK market share. The Dexcom product is more expensive than the Abbott systems. Although there was discussion in the evidence about other differences between the respective products, none of them seem to me to be material to the matters I have to decide.

11. Both Abbott and Dexcom have new higher spec products in the pipeline for the UK (Freestyle Libre 3 and G7 respectively) and both are hoping to capture market share from the other. Information about the launch of the Freestyle Libre 3 is said to be confidential, but Dexcom has made public announcements indicating it is due to launch its newer lower cost real-time CGM product, i.e. the G7, in autumn 2021.

12. Both sides agreed that once a consumer has got used to a particular CGM system, they are likely to continue using that system or an upgrade of it. Hence, the 'stickiness' of customers is an important feature in this market.

13. Much of the information about the German market for CGM devices is alleged to be confidential, but Abbott has a very significant share of that market, which is growing significantly year on year. Abbott has already launched the Freestyle Libre 3 in Germany. Another significant feature so far as Abbott are concerned is that they have a major distribution hub for their Freestyle Libre products located in Germany, which serves the whole of Europe (including the UK), Middle East and Asia Pacific. Many millions of Freestyle Libre units will pass through that hub in 2021 and the figures are likely to increase with time.

Litigation between the parties

14. Naturally both sides have a number of patents covering various features of CGM devices, which have given rise to international litigation between them. This action is but one of a welter of actions which have been started recently by the two sides.

15. There was an earlier spate of litigation between the parties which resulted in a worldwide settlement agreement which included a period of mutual covenants not to sue. This period ended on 31 March 2021 but peaceful coexistence did not last.

16. The first shot came from Dexcom, suing Abbott for infringement in the USA on 30 June 2021. The next day, Dexcom filed infringement claims in Germany and Abbott retaliated in the USA with its infringement claim. On 12 July 2021, Abbott filed its own infringement claims in Germany (so far on 4 Abbott EPs), filed parallel infringement claims (on 8 Abbott EPs) and this revocation claim in the UK (on 4 Dexcom EPs). Here in the UK, Dexcom have given instructions to counterclaim for infringement of its 4 EPs and to counterclaim for invalidity of all 8 Abbott EPs.

17. The interrelationship between the German and UK claims is important and I need to explain that in more detail. There are no claims for preliminary injunctions in either Germany or the UK and Ms Macdonald confirmed, on behalf of Dexcom, that Dexcom has never had and does not have, any intention to seek interim injunctive relief in these actions.

The consequences of the injunction gap in Germany on Abbott

18. Dexcom's infringement claims in Germany were brought in the Landgericht Mannheim, known to be quick to decide infringement. There are two cases, each of which now includes counterclaims from Abbott:

    i) In case 7 O 79/21, Dexcom sue on EP(DE)866 and EP(DE)224; Abbott counterclaim for infringement of EP(DE)625 and EP(DE)627;

    ii) In case 7 O 81/21, Dexcom sue on EP(DE)159 and EP(DE)539; Abbott counterclaim for infringement of EP(DE)223 and EP(DE)636;

19. The scheduling of the trials is ongoing, but the following trial dates have been set:

    i) EP(DE)866: 4.3.22;

    ii) EP(DE)224: 25.3.22;

    iii) EP(DE)625: 8.4.22;

    iv) EP(DE)627 is also likely to be tried in April 2022.

20. As is well known, the German courts operate a bifurcated system. It is not possible to raise invalidity of an EP(DE) directly as a defence in the infringement proceedings. If the infringement claim succeeds, there are then the following possibilities:

    i) First, a defendant may request in his Defence that the infringement proceedings are stayed on the ground that the patent in suit is likely to be found invalid in pending nullity proceedings either before the German Federal Patent Court or in EPO Opposition proceedings. Abbott assures me that each of its defences will include a request for a stay.

    ii) If there is no stay, then an order for an injunction usually follows.

    iii) In order to enforce an injunction the successful claimant must serve the judgment and put in place financial security as ordered by the Court, typically a bank guarantee, which is designed to cover the defendant's losses in the event the injunction is later lifted and usually amounts to the profits the defendant makes on the injuncted product for a period of 18 months going forward.

21. Against this backdrop, Mr Stoate estimates (and Ms MacDonald does not demur) that it is possible that there could be an injunction in Germany as early as the second half of April 2022, around 6 weeks after the first hearing date of 4.3.22.

22. Absent a stay, an injunction would remain in force until the relevant EP(DE) is held to be invalid, either in a nullity action before the German Federal Patent Court or in EPO

opposition proceedings. If there is such a finding of invalidity, the Higher Regional Court or Oberlandesgericht will usually suspend the injunction if there is an appeal against the first instance decision pending.

23. All four Dexcom EPs were only granted recently, so all four are still in the EPO nine-month opposition period. As for the Abbott EPs, 625 and 627 were not opposed, EP223 is still in the opposition period and EP636 is under opposition, including by third parties. The significance of this is that a German nullity action cannot be filed until either the opposition deadline has passed without any opposition being filed or, if oppositions are filed, the conclusion of the opposition proceedings (including appeals).

24. However, in order to be able to request a stay, Abbott will have to file oppositions in the EPO to each of the four Dexcom EPs (in August or September this year). An EPO opposition normally takes around 18 months from the end of the nine-month opposition period until a first instance decision is made. Acceleration of opposition proceedings is possible where an infringement action on the patent involved is pending before a national court, but even accelerated proceedings normally take around 13 months, instead of 18.

25. The consequence is that if an injunction is granted in Mannheim, then, absent a stay, Abbott would be unable to sell its Freestyle Libre 2 and 3 products in Germany for at least several months. Mr Stoate provided a table to show the *earliest* date when an injunction might be suspended (assuming acceleration):

Patent	EPO opposition deadline	*Earliest* date injunction in Germany may be suspended
EP866	18.08.21	18.09.22
EP224	31.12.21	31.01.23
EP159	14.01.22	14.02.23
EP539	09.03.22	09.04.23

26. These dates indicate that Abbott's CGM business in Germany could be very severely affected if Abbott are not able to persuade the Mannheim court that each of the Dexcom patents is likely to be found invalid. I am unable to assess the likelihood of success in this regard, but I am of the view that the effect on Abbott's business in Germany (i.e. selling to German customers) is a matter for the German courts and not for me.

27. Clearly, in view of Abbott's current distribution arrangements, injunctions in Germany would 'interfere' (as Mr Stoate put it) with Abbott's ability to distribute their Freestyle products to UK and many other countries. Mr Stoate did not say 'prevent', no doubt because Abbott would implement contingency plans to move its distribution hub (at least of the Freestyle products) outside Germany. Although the evidence did not deal with this, I am prepared to assume that the cost of moving a sophisticated modern distribution hub (even just for Abbott's Freestyle products) outside Germany would be significant. However, faced with the threat of injunctions, any responsible business would make suitable contingency plans so that injunctions in Germany would only affect supplies in Germany.

28. In spite of the available procedures in Germany (summarised in paragraph 20 above), in theory the injunction gap problem in Germany is capable of producing some very unfair results. If a patent is pretty clearly invalid, there is no problem because the infringement court grants a stay. If a patent is weak but no stay is granted (because invalidity is not clear enough) and ultimately is declared invalid, it may suit a competitor to put up the required security. As I understand matters, the security does not amount to a cross-undertaking in damages. The competitor may calculate that he can inflict far more damage on his rival through an injunction than the value of the security he will lose. Whether such unfairness can occur in practice lies in the hands of the German courts, who I am sure are aware of the scourge of weak patents which turn out to be invalid when scrutinised.

The consequences of the injunction gap in Germany on Dexcom

29. So far, Abbott have counterclaimed in Germany for infringement of four of its EPs. However, in its infringement action in the UK, Abbott have sued Dexcom on the UK designations of those four EPs, plus another four EPs, and it is to be expected that in due course, Abbott will have infringement actions in Germany on all 8 of its EPs. Of those 8 EPs, 2 are still in the EPO opposition period and 2 are already opposed.

30. The consequence is that Dexcom face the same injunction gap problem in Germany albeit there is no evidence that Dexcom has a major distribution hub in Germany. Accordingly, one possible outcome is that both leading CGM products are injuncted and kept off the German market for a considerable period. This, like much of the injunction gap problem is really a matter for the German courts to address and, at the overall level, for the German legislature.

31. Finally, although this was not covered in the evidence, Mr Purvis QC mentioned that reform to ameliorate the injunction gap is under way in Germany. I am aware that certain legislation has been passed but also that there is debate as to whether it makes any difference in practice. I cannot take any of this into account.

32. With that overlong setting of the scene, I can finally turn to consider Abbott's application.

Abbott's application

33. As I indicated above, Abbott's application is for an expedited trial of their revocation action, seeking a listing of an 8-9 day trial starting no later than 28.2.22. Abbott's evidence was directed to securing a trial in January 2022, so that the judgment would be likely to be available in advance of the first trial date in Mannheim on 4.3.22. The estimate allows for 1.5 days PR, 6 hearing days and a day off for writing closing submissions.

34. Mr Mitcheson QC for Abbott gave me a brief introduction to the 4 patents in issue. The technology is not complex and the claims are expressed at a general level. In general terms, two of the patents are concerned with the way signals from the CGM device are transmitted from the user's on-skin device via inductive coupling and the other 2 are concerned with a CGM system where an alarm goes off if the user's blood glucose levels are above or below certain thresholds.

35. In terms of the scope of the Abbott's invalidity case, there are at least 3 pieces of prior art pleaded against each patent. By my count there were 13 different pieces of prior art pleaded, along with insufficiency attacks. Although I have not seen any of the prior art, as I have said, this art is not complex. There was a debate in the evidence as to whether this was a category 3 case (as Abbott contended) or possibly category 4 (as Ms Macdonald rather tentatively suggested), but I was entirely satisfied that this is a category 3 case. Whilst Abbott said that 2 experts each side were sufficient, Ms Macdonald suggested that a third expert might be required. This was not really explored in argument and I did not find this suggestion convincing.

36. Overall, I reached the conclusion that Abbott's estimate was realistic.

37. In support of their application, Abbott contend that the four Dexcom patents are plainly invalid. Abbott say that expedition is required to provide certainty that they can launch the Freestyle Libre 3 product in the UK and so that the UK invalidity decisions can be used to prevent Dexcom interfering with Abbott's European market

38. Dexcom's response is that there is no case for expedition here. In the alternative, Dexcom say that if any expedition is warranted, the trials of all 12 patents (4 Dexcom, 8 Abbott) should be expedited, so that Dexcom is not disadvantaged. Thus, Dexcom argues that granting expedition only of Abbott's revocation claim would create an asymmetry with the position of Dexcom in the UK. That, it seems to me, was a very valid point which perhaps I should explain.

39. Let me assume that with expedition here Abbott manage to invalidate all four patents in early 2022. Abbott would then be able to influence the Mannheim Court with the UK judgment on invalidity. Yet at the same time, Abbott's UK action for infringement of its 8 patents, with Dexcom counterclaiming for invalidity, and with no expedition, would be likely to be split into two or more trials, with those trials coming on for hearing probably late 2022/early to mid 2023. Yet in the meantime, Abbott would be likely to have infringement judgments in its favour from the Mannheim Court in about May or June 2022. So it appeared to me that Dexcom had a valid point on asymmetry.

40. In my pre-reading I was struck by the need to reach what I might call a symmetric solution i.e. a solution which did not disadvantage either side unduly but which solved or at least ameliorated the injunction gap problem. It seemed to me that both sides faced the problem of the injunction gap in Germany, so shortly before the hearing, I asked my clerk to circulate a message to the parties outlining a possible solution. I asked each side to consider whether they would be prepared to give an undertaking (the precise wording to be considered) along the following lines, namely, not to seek or enforce injunctive relief in Germany (or elsewhere in Europe, including the UK) on any EP until after validity of that EP (in whatever designation) had been considered and determined by a first instance court.

41. When the hearing started, Mr Mitcheson QC was able to state Abbott's position on my proposed undertaking. Abbott was prepared to give the undertaking on condition that Dexcom reciprocated and that remains Abbott's position.

42. Mr Purvis QC for Dexcom was not in a position to respond immediately, since Dexcom are based in California and instructions were required from his clients. I was anxious to give him the opportunity to consider this as a possible solution with his clients, so at

the conclusion of argument I indicated I would not give judgment until 2pm the next day and invited Mr Purvis to identify his client's position as and when he could.

43. During the morning of the next day, I first received a fairly lengthy note from Mr Purvis indicating his client's position, to which there was a short response from Mr Mitcheson and a further short reply from Mr Purvis. As happens in adversarial litigation, there were some crossed wires in these communications, so when the hearing resumed at 2pm on the 29th July, I asked the parties to sit down and see if they could resolve some of the perfectly valid practical points raised in Mr Purvis' note, a process which would require both sides to obtain a certain amount of information from their clients and their respective German lawyers. This they agreed to do and I am grateful for their efforts.

44. For completeness, the points raised by Dexcom concerned:

i) The 'seek or enforce' suggested wording might require a party to ask the Mannheim court to split the claim between injunctive and other relief and invite the court to delay hearing the injunction until after validity had been considered, probably elsewhere. Since the Mannheim court has a discretion when to deal with the claim for an injunction, it might not accede to the request. However, none of these points seemed to prevent a party undertaking not to enforce an injunction.

ii) Second, there was the need to ensure all necessary parties gave undertakings. I can see that if there were different exclusive licensees in different countries, that might take a bit of time to organise, assuming it could be done.

iii) Third, Dexcom pointed out that the undertakings would have to extend to actions brought for infringement against customers as opposed to the parties themselves (this being apparently common in Germany).

iv) Fourth, Dexcom pointed out that the universe of relevant patents would have to be defined.

v) Fifth, the undertakings assumed that validity of the EP has been challenged, but this did not seem to me to be a difficult or unrealistic assumption.

vi) Sixth, Dexcom raised a point that the claims litigated might differ between different designations of an EP.

vii) Seventh, Dexcom pointed out the undertakings would have to extend to any equivalent national patents.

45. As I said above, these were valid points for further consideration but it did not seem to me that any were insurmountable. However, it turned out that the parties could not agree mutual undertakings, as they informed me at 2pm on Friday 30th July 2021. This is unfortunate because this seemed to be an ideal opportunity by which both sides could avoid the problem of the injunction gap in Germany. Further correspondence has ensued, but with no agreement reached.

46. In their note however, Dexcom suggested a simpler undertaking which they were prepared to give if I considered there was merit in Abbott's point about the effect on

the German distribution centre. The undertaking was not to enforce any injunction in Germany against the distribution of products to the United Kingdom. Dexcom pointed out that this would not involve any procedural issues in Germany, being entirely within the control of the parties. Dexcom confirmed in correspondence that this undertaking was unconditional.

47. Notwithstanding the point I made in paragraph 27 above, there remains merit in Abbott's argument concerning its German distribution centre, because the cost and disruption of moving distribution of the Freestyle products to a different country could be significant.

The Gore factors

48. I will address the *Gore* factors in turn, albeit in a different order, because they effectively require a balancing exercise – the reasons in favour of expedition must be sufficiently powerful to outweigh any interference with the administration of justice, prejudice to others and any special factors against expedition.

Would expedition interfere with the good administration of justice

49. In the Hilary term 2022 (11.1.22 to 13.4.22, into which Abbott wish this trial to be inserted), the lists are already full, a situation contributed to by a number of patent trials already having been expedited. Accordingly, the initial indications from the listing officer (when it was uncertain whether this was a category 3 or 4 trial) were, if I were to grant expedition, this 8-9 day patent trial would have to float across the entire Hilary term and probably the short Easter term as well (26.4.22 to 27.5.22). However, a category 3 case could be assigned to a Deputy Judge and it *might* be possible to arrange for a Deputy to sit to hear this trial, in which case a much firmer listing could be given.

50. I keep in mind the point made by Birss J. in *Nicoventures* at [11]. Expedition of this category 3 trial would result in queue-jumping, but the interference with the administration of justice would not, in my view, be significant provided a Deputy Judge was free to hear this case.

Would expedition cause prejudice to Dexcom

51. On the first listing alternative, having this 8-9 day trial float over 4 ½ months would plainly cause immense prejudice to Dexcom. They would find it extremely difficult if not impossible to retain their chosen counsel over such an extended period. Likewise with expert witnesses. The whole exercise would be unduly expensive as well. Whilst Abbott could not complain, they would no doubt face the same difficulties. This point alone is so powerful as to rule out expedition altogether.

52. The second listing alternative is far more palatable because it is likely that, through discussion with the listing officer, a reasonably firm listing could be given, in which case Counsel and expert witnesses could be engaged with that listing in mind. Nonetheless, Dexcom protest that from a cold start, they would find it extremely difficult to be ready for a trial of validity and infringement of four patents in around 6 or 7 months. Of course, Ms Macdonald's evidence on this was responding to Mr Stoate's suggestion of a trial in January 2022, but I am here considering a trial listed at some point in February/March 2022. Certainly work would be required and under some

pressure, but I consider this complaint to be somewhat exaggerated. Dexcom have sued on these patents in Germany and probably on equivalents in the US as well. Even if the UK solicitors and counsel are coming fresh to them, the patents do not embody difficult concepts. I am quite certain that Dexcom's UK legal team could and would be ready for the expedited trial, were one to be ordered. So, overall, expedition of the category 3 trial would cause some prejudice to Dexcom, but I consider it would be minor, particularly in view of the extensive litigation on which Dexcom has decided to embark which they would have known was going to result in retaliatory action from Abbott.

Good reason for expedition and other special factors

53. I revert to the reasons put forward by Abbott for expedition. Their first reason was to achieve commercial certainty for the UK launch of the new Freestyle Libre 3 product. However, as Dexcom pointed out, the launch is planned to occur before the expedited trial. Abbott will, in this sense, launch 'at risk', although not at risk of a preliminary injunction.

54. Dexcom also point out that if Abbott had started this action immediately after 31 March 2021, they might have been able to secure a suitable trial date without or with relatively little expedition. Dexcom say that if Abbott wanted to remove risk, they should have brought the action for revocation then to 'clear the way' in advance of launch. To a degree, these points ignore the fact of the agreed covenants not to sue down to 31 March 2021. It is clear that both sides must have been preparing for battle soon after (or even before) 31 March 2021. This is clear from the very rapid escalation in litigation as soon as Dexcom fired the first shot with its US action.

55. In addition, from a UK perspective, Abbott's assessment of risk to its launch of the new product will have involved their assessment of the validity of the four Dexcom patents. Whilst risk remains, due to the natural uncertainty in litigation, Abbott might well have assessed the risk as low because of their view on validity. If so, this would tend to indicate that commercial certainty in the UK is not a particularly powerful reason for expedition. Attention is then focussed on the second reason – the risk due to the injunction gap in Germany.

56. This risk is much more significant than the risk faced in the UK, due to the procedural regime in Germany. Obtaining a stay of an injunction involves much more risk because of the high and somewhat uncertain bar which has to be overcome. If, via the simpler undertaking on offer from Dexcom, Abbott secure the continuation of supply to the UK, then it would seem that the remaining justification for expedition is (a) Abbott's desire to protect its market in Germany and (b) Abbott's desire to protect distribution from its German hub to countries other than Germany and the UK.

57. This brings me back to the point made consistently in the caselaw – a desire to schedule a UK action in such a way that the outcome relating to validity is likely to be available and public before the German infringement court decides the matter is a factor to be taken into account but is not a strong factor and cannot justify expedition on its own. The situation under consideration in this case is a good example as to why. The UK court is not here to police European patents across Europe which may be perceived to be weak and may ultimately be proved to be invalid.

58. There is a further special factor against expedition. This is the asymmetry which an order for expedition would create – thereby Abbott would secure protection against the injunction gap in Germany, but Dexcom would not. This is why I specifically asked Abbott if they would be prepared to offer the undertaking I suggested (assuming I was prepared to order expedition) but *without* a reciprocal undertaking from Dexcom, but they were not.

59. So, unfortunately for Abbott, I have reached the conclusion that the primary reasons for expedition in this case are (a) Abbott's desire to protect its significant market in Germany and, to a lesser extent (b) Abbott's desire to prevent interference with its distribution across Europe, the Middle East and Asia Pacific (excluding the UK). Whilst in the UK Abbott would gain comfort from the UK first instance court confirming their view as to the invalidity of the Dexcom patents, this together with the primary reasons just mentioned, does not provide a sufficiently good reason for expedition, particularly in view of the special factor which I have just mentioned. Therefore, on the basis of the simpler undertaking offered by Dexcom, I dismiss this application.

60. I have considered whether the simpler undertaking from Dexcom (i.e. not to enforce any injunction on the four EPs in Germany against supplies to the UK) should be reciprocated by Abbott but there is no evidence to suggest such an undertaking by Abbott is either required or would have any effect on Dexcom's distribution arrangements. Furthermore, as I said above, Dexcom did confirm its simpler undertaking was unconditional.

61. I reach this conclusion with some regret, but the authorities are clear and they do not allow me to assist Abbott in this instance. I ask the parties to seek to agree an Order giving effect to this judgment.