



Neutral Citation Number: [2020] EWHC 1907 (Ch)

Claim No: IL-2020-000047

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

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

Date: 17 July 2020

Before :

MR JUSTICE NUGEE

Between :

**GFS FLEX LTD
- and -
BRYMEC LTD**

Claimant

Defendant

Andrew Norris QC (instructed by **J A Kemp LLP**) for the **Claimant**
Martin Howe QC (instructed by **Haddletons LLP**) for the **Defendant**

Hearing date: 30 June 2020

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 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 9.30 am on Friday 17 July 2020.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This is the hearing of the Claimant's application for an interlocutory injunction pending trial in a passing off action.
2. The Claimant, GFS Flex Ltd, ("**GFS**") markets and sells gas pipes and fittings in the UK. Its fittings are sold incorporating a yellow plastic clip. It claims that this clip has become distinctive of its fittings.
3. In February of this year the Defendant, Brymec Ltd, ("**Brymec**") started selling similar gas fittings with a very similar yellow plastic clip. GFS claims that the supply of similar fittings with the similar clip is likely to deceive the relevant members of the trade into thinking that there is a commercial connection between the parties' products or businesses.
4. GFS issued proceedings on 9 April 2020 alleging passing off and claiming an injunction and damages or an account of profits, and applied for an interim injunction. On 23 April 2020 Birss J made an order by consent adjourning the application to a return date, with directions for further evidence, on the basis of certain undertakings given by Brymec pending the return date.
5. This is the hearing on the return date. Brymec has not offered to renew those undertakings in the same form (it has offered some limited undertakings) and I am now asked to grant an injunction pending trial. GFS does not seek to prevent Brymec from selling its fittings, or from selling them with a plastic clip of a different colour, but only to prevent them selling them with the yellow plastic clip.
6. The parties are agreed that the case is suitable for trial in the Intellectual Property Enterprise Court ("**IPEC**") and should be transferred to IPEC as soon as the present application has been disposed of. Enquiries made by the parties suggest that trial of the action in IPEC can be expected to take place between January and March next year. What is in issue therefore is an interim regime for the next 9 months or so pending trial (or more precisely judgment after trial). That requires applying the familiar structured approach set out by Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396 ("**American Cyanamid**").

Facts

7. There are some factual matters which are heavily disputed and which I naturally cannot resolve at this stage, but much of the background is not significantly in dispute and I can take it as it appears to be from the witness statements on both sides, principally those of the Managing Directors for GFS and Brymec respectively, Mr Murat Senyer and Mr Luke Reiner.
8. The traditional material used for gas pipes is copper tube, and this is still the main product used. But there are other types of gas pipes such as plastic, pressed steel and corrugated stainless steel tubing ("**CSST**"). The present action concerns CSST products. Mr Senyer's evidence is that the UK market for CSST is growing year by year and had reached around £13m a year by 2018.

9. CSST is a flexible stainless steel pipe used in residential, commercial and industrial buildings. When used for gas it is covered in a yellow coating or sheath (as required by the relevant British Standard). CSST products are sold as a system under which pipes and fittings are sold together. Although the nominal diameters of CSST pipes come in four standard sizes, the precise dimensions of each pipe differ between different manufacturers, and the pipes and fittings of each manufacturer are tested together for safety purposes. No installer would therefore attempt to use fittings from one manufacturer with pipes from another.
10. The market leaders in the UK are TracPipe and Gastite. TracPipe brought to market a fitting for CSST pipes called a split ring assembly in 2002. This type of fitting has dominated the UK market for CSST since 2002, and until it switched suppliers Brymec sold Gastite CSST products which also used a split ring fitting.
11. More recently however an alternative CSST fitting called a pushfit fitting has become available. This is both faster and easier for the installer. To install the split ring fitting requires the installer to disassemble the fitting, assemble the split ring around the corrugated tubing and then reassemble it; whereas a pushfit mechanism simply requires the installer to push the fitting into the tubing to the right depth and then tighten it.
12. The parties to this action each sell CSST products with pushfit fittings. They are made by two rival Turkish manufacturers. GFS's fittings are made by a Turkish company called Bes Yapi Ürünleri Sanayi ve Ticaret Limited Sirkayi ("**Bes Yapi**"); Brymec's new fittings are made by a Turkish company called Paktermo Olcu Aletleri ve Boru San ve Tic. A.S. ("**Paktermo**")
13. Bes Yapi has been marketing its CSST products for some time under the brand name GFS (for Gas Flex System), and in December 2017 the Claimant company GFS was incorporated in England and Wales to act as Bes Yapi's UK operation.
14. Bes Yapi's CSST system (as supplied by GFS) includes pushfit fittings, which incorporate a yellow plastic clip which sits around the fitting. This is designed to be discarded in the installation process: the installer first fits the fitting into the end of the pipe, then removes and discards the yellow clip and then tightens the nut. It is common ground that the clip is not a regulatory requirement nor an essential part of the fitting (and Mr Senyer refers to a pushfit fitting marketed elsewhere in Europe without a clip), but the evidence is that it does perform a useful function. Mr Senyer says that it was originally included to prevent accidental tightening of the mechanism prior to assembly, (and indeed GFS's own 2018 brochure referred to it as "*a yellow plastic clip to prevent compression turns before inserting*"); Mr Reiner agrees that such a clip prevents overtightening before fitting (which would mean that the fitting would not fully insert into the pipe), and also says that because it has to be removed before the fitting is tightened, it acts as a visual indicator that the nut has not been tightened. In these ways it helps to reduce user error.
15. There is a dispute in the evidence as to when Bes Yapi first started producing its pushfit fittings and yellow clips, but it does not appear to be disputed that it was doing so from at the latest February 2015. Mr Senyer's evidence is to the effect that all GFS CSST products sold or marketed in the UK have had the yellow clip; that the design has not changed since it was first introduced into the UK market in 2015; and that

until Brymec's recent actions, GFS was the only supplier of CSST products incorporating a yellow clip, or a plastic clip at all, to the UK market. GFS's direct customers are distributors and some merchants but its end customers are gas engineers.

16. Brymec was incorporated in 2013, although the business was founded over 40 years ago. It supplies a range of products used in construction, mainly to end users such as contractors and installers. Until recently it sold CSST pipe and fittings from the Gastite range but in 2014 Mr Reiner started looking at systems with alternative fittings. He decided on the CSST system manufactured by Paktermo. This also includes pushfit fittings with an identical or very similar yellow plastic clip. In March 2018 Brymec started working with Paktermo to get its CSST products ready for the UK Market. This included getting a BSI kitemark, which took some time, but Brymec was able to launch the product on 1 February 2020. It is branded as a Brymec product – the evidence is that about half Brymec's products (about 4,000 out of about 8,000) are sold under Brymec's own brand.
17. There is a considerable dispute in the evidence as to whose idea the yellow clip originally was. Mr Senyer in his initial evidence said, among other things, that Bes Yapi was the "*innovator and patentee*"; that it was GFS's idea (by which I assume he meant Bes Yapi rather than the UK company) to attach a yellow clip to the assembly; and that it was clear to him that Brymec had "*made a deliberate choice to ape the colour, design and presence of the yellow clip on the GFS product*". That led to Brymec adducing evidence from Ms Sena Kahraman of Paktermo to the effect that all of this was untrue; that it was Paktermo that had come up with the idea of the pushfit fitting; that the fitting had always incorporated a yellow removable clip to prevent it being overtightened before installation; that Paktermo launched its product in June 2014; and that it was Bes Yapi, which first marketed a similar product in February 2015, which had copied Paktermo's design, not the other way round. Mr Senyer responded in his reply evidence that it was extraordinary for Ms Kahraman to suggest that Bes Yapi had copied Paktermo; that Bes Yapi had promoted its product to the public in September 2013; and that it had started manufacturing it in November 2013. That led to a yet further round of evidence on behalf of Brymec casting doubt on this account. Mr Andrew Norris QC, who appeared for GFS, initially objected to this latest round of evidence, for which no directions had been given. But having read it on a provisional basis I made it clear that I proposed to pay little attention to these matters, which I cannot possibly resolve on this application, and the objection was not persisted in.
18. As I have already indicated, I cannot reach any firm conclusions on this evidence, apart from the conclusion that there is a significant dispute as to which of Paktermo or Bes Yapi came up with the idea of the yellow clip and which copied it from the other. What does appear from the evidence however is that there would seem to be nothing in the suggestion that *Brymec* deliberately copied the yellow clip from GFS. Mr Senyer says nothing to cast doubt on Mr Reiner's explanation that Brymec's products have the yellow clip because that is what Paktermo supply, and were supplying long before they supplied Brymec.
19. GFS's case is that in the UK market the yellow clip has become distinctive of its products. Mr Norris made the point that for passing off what GFS needed to show was that goodwill had been generated by virtue of the clip in the UK, and that was a

matter of looking solely at trade in the UK.

20. He relied on evidence of actual confusion from GFS's customers. Since he placed considerable reliance on this I should briefly describe what the evidence consists of. The following have given witness statements:

(1) Mr David Brown, a Supply Chain Director for Smith Brothers Stores Ltd (an independent merchant). He noted a post on Brymec's LinkedIn site on 4 February and sent an e-mail to Mr Senyer saying the fitting "*looks a lot like your product*" and asking:

"...are you doing a private label product for Brymec?"

He says that he has bought GFS's CSST products since October 2018; that they are distinctive because of "*the ease of jointing method*" and "*yellow visual indicator on fittings*"; and that he thought the Brymec product was a GFS one because of the yellow indicator and generally similar appearance to the GFS product.

(2) Mr James Kibblewhite, a Key Account Manager for Tec Supplies (a wholesaler). He says that he has bought GFS products since early 2019 and they are distinctive because of the yellow clip. He visited a customer in late December 2019, who told him he was getting GFS products from Brymec at a cheaper price and showed him a brochure; they noted the fittings with yellow clips and assumed they were GFS products. He spoke to his contact at GFS, and at her request sent her an e-mail. This asked:

"I have seen your pipe on [Brymec's] website? Are you supplying Brymec now?"

(3) Mr Richard Birch, a National Sales Manager for Barco Sales Ltd (a distributor). He has bought GFS products since 2018. He noticed when he first saw them that they had a very distinctive look with the yellow clip. He saw them at various times subsequently and the yellow clip stuck in his mind as indicating GFS's CSST products. He came across the Brymec products on his website on 19 February 2020. He says that he was pretty angry because he thought that GFS must have been dishonest with him: they had given him a list of other companies they were planning to supply, which did not include Brymec, and he thought that GFS were supplying product for Brymec to re-brand as its own. He too sent an e-mail to GFS saying that they had come across the website showing a fitting that was very similar to GFS and asking:

"...is this something you are supplying...?"

Is there a serious issue to be tried?

21. The first question in the *American Cyanamid* calculus is whether there is a serious issue to be tried. Mr Norris says there is; indeed he says that the merits of the claim are strong and that this should be taken into account.

22. The ingredients of the tort of passing off are well established and were not in dispute. The claimant needs to establish the "*classical trinity*" of (1) goodwill of the claimant,

(2) misrepresentation by the defendant and (3) consequent damage: *Reckitt & Colman (Products) Ltd v Borden Inc* [1990] 1 WLR 491 (“**the Jif case**”) at 499 per Lord Oliver, *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1995] FSR 169 (“**Hodgkinson**”) at 177 per Jacob J.

23. GFS’s case is that all three elements are supported by the evidence it has adduced. Mr Norris’s submissions were as follows. So far as (1) goodwill is concerned, it is a question of fact whether the yellow clip has become distinctive of GFS’s fittings. The evidence suggests that it has, and that trade purchasers recognise the yellow clip as denoting GFS’s fittings. It has become an indicium of origin. So far as (2) misrepresentation is concerned, the evidence from the purchasers shows that they thought, because of the yellow clip, that GFS were supplying Brymec. So far as (3) damage is concerned, there is a risk of lost sales (as exemplified by Mr Kibblewhite’s evidence), a risk of damage to GFS’s reputation (as exemplified by Mr Birch’s evidence), and the risk of GFS being blamed for a fitting not being installed safely. Mr Senyer suggested in his evidence that there were reports from other countries of problems with the Paktermo fitting, a suggestion which again unsurprisingly led to evidence in answer from Ms Kahraman, which was to the effect that they had received no complaints of that nature. Mr Norris said however that if there were a case where something had gone wrong with a fitting it would not matter whether this were actually due to a problem with the Brymec product or not: whatever the cause, if there were a problem, it would be apt to tarnish GFS’s brand.
24. Mr Martin Howe QC, who appeared for Brymec, said that there was no serious issue to be tried. He referred me to the judgment of Arnold LJ (sitting at first instance) in *Glaxo Wellcome UK Ltd v Sandoz Ltd* [2019] EWHC 2545 (Ch) (“**Glaxo**”) at [156]-[173] for a recent summary of the law, in particular in the context of an action for alleged passing off by get-up (in that case the purple colour of an inhaler). From this judgment I derive the following. Although it is clearly possible in law for a passing off action to succeed on the basis of get-up alone (as in the *Jif* case), such cases are rare: [164]-[167]. It is not enough for the claimant to prove that the public recognise the shape or colour of the claimant’s product and associate it with the claimant’s product, particularly where it is the only product of its kind: [170]. This is because there is a distinction, described by Kitchin LJ in *Société des Produits Nestlé SA v Cadbury UK Ltd* [2017] EWCA Civ 358 at [77] as rather elusive but important, between such recognition and association on the one hand and the perception that the get-up can be relied on as a badge of origin such that the public would rely upon it alone to identify the product as coming from a particular source: [172]. That, and the earlier case of *Unilever plc’s Trade Mark Applications* [2003] EWHC 2709 (Ch) (where Jacob J drew a similar distinction between a substantial proportion of the public recognising a particular shape of ice-cream as a Viennetta, and the public using the shape as a badge of trade origin) were trade mark cases, but in *Glaxo* Arnold LJ accepted a submission that the distinction was equally applicable to passing off claims based on get-up: [173].
25. Mr Howe also referred me to the judgment of Jacob J in *Hodgkinson*, which concerned the defendant selling a “lookalike” product to the plaintiffs’ ROHO cushion, for the propositions that there was no tort of copying, or taking a person’s market or customers, or of making use of another’s goodwill, or of competition (at 174-5); that at the heart of passing off lies deception or its likelihood (at 175); that

when a plaintiff is complaining about a copy of his product as such, the relevant question is whether the public is “*moved to buy by source*”, something which is difficult to prove (at 178); and that the case came down to two simple questions: had the plaintiffs proved that the shape of their cushion was the “*crucial point of reference*” for those who wanted a ROHO cushion? and had they proved that persons wishing to buy a ROHO cushion were likely to be misled into buying the defendant’s cushion? (at 179).

26. Mr Howe also referred me to *Numatic International Ltd v Qualtex Ltd* [2010] EWHC 1237 (Ch) where Floyd J reiterated similar points at [38]-[39], and at [51] referred to Numatic having deliberately, and successfully, educated the public into recognising the anthropomorphic character of their Henry vacuum cleaner. By contrast here, Mr Howe submitted, there was no evidence that GFS had done anything in the way of seeking to educate the public into the significance of the yellow clip as a trade mark or badge of origin. As far as the public were concerned, the clip was a functional feature of the pushfit fittings (and marketed as such – see the reference in GFS’s 2018 brochure referred to at paragraph 14 above), and the yellow colour would be unlikely to be associated with a particular origin as it was the standard colour for gas pipes.
27. Mr Howe also submitted that there was no real evidence of deception: there was nothing more than evidence of GFS’s customers seeing Brymec’s products and being caused to wonder whether they might be from the same origin. All the e-mails were simply asking questions. Mere confusion is not enough to establish deception: see *Phones 4U Ltd v Phone4U.co.uk Internet Ltd* [2006] EWCA Civ 244 at [16]-[19] per Jacob LJ. Moreover the two products were marketed together in other countries (Turkey, Belgium, France) without any evidence of confusion.
28. Mr Howe’s overall submission was that the suggestion that the yellow clip was regarded as an indicium of origin that people would rely on to buy was one that should be approached with considerable scepticism, and that the evidence was insufficient.
29. Mr Howe may well be right that at trial GFS will fail to prove its case for all the reasons that he has outlined. But I do not think that at this stage I can conclude that there is no serious issue to be tried. On the face of it there is evidence that GFS’s customers, including at least one end user, assumed that the CSST products being sold by Brymec were GFS products, and did so because of the yellow clip. If accepted at trial, that seems to me to be capable of falling within the principle that the get-up of a product can become an indicium of origin, and can give rise to deception which goes beyond mere wonder. Even though the authorities make it clear that such a case is difficult to establish, the threshold of whether there is a serious issue to be tried is not a high one (Lord Diplock referred in *American Cyanamid* at 407G to the Court being satisfied that the claim is not frivolous or vexatious) and I do not feel able to say that the claim has no real prospect of success.

Damage to claimant

30. The next *American Cyanamid* question is whether the claimant would be adequately compensated by an award of damages if the defendant is permitted to continue his activities pending trial but the claimant succeeds at trial.

31. There are two relevant heads of damage relied on: damage through lost sales, and damage to reputation. So far as damage caused by lost sales is concerned, this is financial loss that can in principle be satisfied by an award of damages; the difficulty is over the quantification of it. Mr Norris said that it is very difficult for a Court to say afterwards how many sales have been lost, and Mr Howe accepted that it is obvious that it would not be straightforward. On an assessment of damages at, or after, trial it would no doubt be easy enough to identify the actual sales by Brymec of CSST fittings (and associated CSST pipes as the evidence is that purchasers buy a CSST system as a whole), but it would be necessary to assess what percentage of these were sales diverted from GFS as a result of misrepresentation. I accept that that would pose real practical difficulties of proof, but the Court would no doubt do its best to assess a figure, aided perhaps by the principle that it is open to the Court to make presumptions against someone found to be a tortfeasor.
32. So far as damage to reputation is concerned, Mr Howe said however that there was no solid evidence of problems with the Paktermo fitting. And if there were a problem with a product at or after installation, it is unlikely that it would be held against GFS – purchasers would be likely to complain to Brymec who had supplied it.
33. This does not entirely answer the point as I accept that GFS's reputation could be adversely affected if a purchaser thought that what Brymec had supplied him with was a GFS fitting (indeed Mr Howe himself accepted that in general if the public believe that two businesses are connected, that is a good ground for apprehending damage because of what he called blowback to reputation); nor does it deal with the other matter relied on by Mr Norris which is the erosion of GFS's goodwill if its customers (the distributors who are in direct competition with Brymec) took the same view as Mr Birch and assumed that GFS was supplying Brymec. Assessing damages for loss of reputation of these types is bound to be a matter of difficulty and somewhat arbitrary.
34. I accept therefore that it has not been shown that damages would be an adequate remedy for GFS if an injunction is refused. However this should not be overstated. Mr Norris himself relied in a different context on evidence that Brymec's sales have so far been quite low (his estimate was 100 fittings in the February to April period) and that the market was not growing. That was put forward to show that the impact on Brymec of an injunction would not be significant but equally tends to demonstrate that the potential number of lost sales for a possible 9 months between now and trial would also not be that great. As to GFS's distributors thinking that GFS was supplying Brymec, Mr Howe said that it was for GFS to manage its relationship with its distributors. There seems to me some force in that: the likelihood is for example that distributors who thought GFS was giving Brymec a discounted price for the same products would contact GFS to ask for a similar discount, at which point the position could be explained.
35. I conclude that it has not been shown that damages would be an adequate remedy for GFS, but that the actual damage to GFS from any misrepresentation (as opposed to damage from the mere fact that it was no longer the sole supplier in the UK of a CSST system with pushfit fittings) is not likely to be extensive.

Damage to defendant

36. The next question is whether damages under the cross-undertaking would be an adequate remedy for Brymec were an injunction to be granted but GFS fail to establish its entitlement to one at trial.
37. Mr Norris said that GFS were not trying to prevent sales of Brymec's fittings, or even sales of Brymec's fittings with a plastic clip. All that was needed was to replace the clip with a clip of a separate colour; GFS had offered to supply blue clips to Brymec at its own expense, and that had in fact almost been agreed at a early stage of the dispute. The cost involved would be minimal – in practice what would be required is either for Paktermo to do a separate production run for the UK, or for Brymec to open up the boxes, take the yellow clips off and put a different coloured clip on, something that would take seconds to do.
38. Mr Reiner's evidence was to the following effect. Brymec would not be willing to supply the fittings without a clip because of the functional advantages of having one; and there would be practical disadvantages in supplying it with a clip of a different colour. Brymec did not itself have the staff and facilities to substitute a different colour clip and then put the products through quality control again. If Paktermo were to supply a different colour clip they would have to do a separate run which might create supply problems. Moreover, selling the fittings with a different colour clip would create confusion in the marketplace: Brymec's customers are tradesmen fitting CSST products. They come from across Europe where Paktermo fittings are sold with a yellow clip, and would expect the clips to be yellow, not least because that is the recognised colour for gas. Moreover Brymec had spent over £30,000 on marketing and advertising its new range and it would be confusing to change the look of the product now; if they won at trial they would then have to change it back again, causing further confusion.
39. I accept that there are likely to be practical disadvantages to Brymec of not being able to market its fittings with the yellow clip pending trial. Mr Reiner's evidence does not leave it entirely clear what Brymec would in fact do if the injunction were granted. Mr Howe suggested that they would be likely to go back to supplying Gastite CSST systems, thereby losing the advantage of having a pushfit product, and wasting the cost and effort of the launch. Mr Reiner however does not in terms say that this is what Brymec would do, and I will assume that the least worst option for Brymec would be for Paktermo to do a separate production run for Brymec with a different colour clip (not necessarily blue as this is the standard colour for cold water fittings, but other colours could be found). I accept however that that would also be likely to cause some damage to Brymec in blunting the effect of their launch. And in the nature of things it would be very difficult to quantify or assess the effect.
40. In those circumstances I conclude that a right to recover damages under the cross-undertaking would not adequately protect Brymec against the disadvantages of having to stop supplying the fittings with the yellow clip pending trial.

Balance of convenience

41. The final stage of the *American Cyanamid* analysis is to assess where the so-called balance of convenience lies, or, as it is perhaps better expressed, the balance of the

risk of uncompensatable disadvantage (see *American Cyanamid* at 409A). Here many factors fall to be taken into account. The principles by which the Court should act are perhaps best summarised by Lord Hoffmann in *National Bank Jamaica v Olint Corp* [2009] UKPC 16 at [16]-[17] where he referred to the Court assessing whether granting or withholding the injunction would be more likely to produce a just result, the basic principle being that the Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. It is not appropriate to take into account the apparent merits unless it is apparent on facts as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other: *American Cyanamid v Ethicon* at 409B.

42. One of the relevant factors is that Mr Howe has offered, on behalf of Brymec, a limited form of undertakings pending trial. Two of the undertakings recited in the consent order made by Birss J were as follows:

“(a) any written quotes [Brymec] has provided as at 21 April 2020 in relation to CSST assemblies, which become orders from Brymec, shall be displayed with a prominently displayed sticker in legible font applied to the product box stating “This Brymec product is not manufactured by and has no connection with GFS Flex”;

...

(c) [Brymec] will add a notice on its website on or before 30 April 2020 stating that the CSST assemblies are not manufactured by and have no connection with GFS Flex, such notice to be displayed next to the images of the CSST assemblies....”

Brymec is willing to continue pending trial to put similar wording out with any products that it sells, and to keep the wording on its website (and add similar wording to any other form of marketing). Mr Howe said that was sufficient to hold the ring, and would either eliminate or reduce the risk of any misrepresentations occurring.

43. Mr Norris said that this offer was too little and too late, but it does seem to me to have some merit and be likely, if not to eliminate, at least significantly to reduce the risk of the public being deceived. Mr Senyer's evidence is that although GFS's direct customers are distributors, its target market is in the end the gas engineers; Mr Reiner's evidence is that gas engineers are professionals who are knowledgeable and interested in the technical specifications and details of the relevant products. That seems inherently credible, and suggests that the purchase of a CSST system by a professional gas engineer is likely to be a rather different type of process from a shopper in a supermarket, in something of a hurry, picking up a lemon-shaped container without reading the label, as was the case in the *Jif* case. In particular an engineer would want to be clear what system he was buying because it is common ground that no-one would want to mix the pipes and fittings from different sources. The labelling suggested by Brymec on its marketing and products seems to me to be likely to go a long way towards making the position clear.
44. In those circumstances I assess the balance of uncompensatable disadvantage to come down firmly on the side of withholding the injunction. If GFS is right, there may be some lost sales and damage to their goodwill, but I think the risk is slight, and the likely damage small. By contrast if the injunction is granted, there is to my mind little

doubt that it will potentially have a significant effect on further muddying the launch of Brymec's new CSST range. There is also the added advantage that if an injunction is not granted, the experience of the 9 months or so between now and trial will both provide firm evidence of Brymec's actual sales, and enable the parties (and the Court) to see to what extent parallel marketing and sales do appear to cause extensive confusion or whether, as appears to have been the experience in other countries, purchasers are able readily to distinguish between the products.

45. In those circumstances I propose not to grant an injunction pending trial. In reaching this conclusion I have not had recourse to an assessment of the merits, but I will just briefly say that the points made by Mr Howe were cogent, and to my mind give rise to a real doubt whether GFS will ultimately succeed. But it is unnecessary to explore this further.
46. Nor have I found it necessary to take any account of who is likely to be right about which of the Turkish companies was the true innovator, and which was the copier. On that I will simply record that the evidence is that Paktermo had included a fitting with a yellow clip in a brochure dated September 2013, and that an early form of the clip was depicted in a Turkish patent application filed by Paktermo on 1 April 2013; by contrast there is no clear and undisputed evidence that Bes Yapi was producing fittings with a yellow clip before early 2015, and even Mr Senyer's evidence only takes the date back to September 2013, some months after Paktermo's patent application. As matters stand therefore I have considerable doubts about GFS's assertions. Whether any of this makes any difference in the present action, which is based on GFS's goodwill in the UK, is another matter; this was only briefly touched on in argument and it is not necessary to consider it.

Conclusion

47. On the undertakings offered by Brymec through Mr Howe I propose to dismiss the application. I will transfer the action to IPEC as agreed by both parties and will hear from counsel whether any further directions are needed.