



Neutral Citation Number: [2008] EWHC 56 (Pat)

Case No: HC 07 C01084
HC 07 C01487
HC 07 C01488

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2008

Before:

MR. JUSTICE FLOYD

Between:

SCHLUMBERGER HOLDINGS LIMITED
(a company incorporated in the British Virgin Islands

Claimant

- and -

ELECTROMAGNETIC GEOSERVICES AS
(a company incorporated in Norway)

Defendant

MR. MICHAEL SILVERLEAF QC (instructed by **Messrs. Freshfields**) for the **Claimant**
MR. GUY BURKILL QC and **MR. GEOFFREY PRITCHARD** (instructed by **Messrs. Lovells**) for the **Defendant**

Approved Judgment

Digital Transcription of Marten Walsh Cherer Ltd.,
6th Floor, 12-14 New Fetter Lane, London EC4A 1AG.
Telephone No: 020 7936 6000. Fax No: 020 7427 0093
DX 410 LDE info@martenwalshcherer.com

MR. JUSTICE FLOYD :

Introduction

1. I have before me a disclosure application in an action to revoke a number of patents in the name of the Defendant (“EMGS”) in the field of controlled source electromagnetic surveying (“CSEM”).
2. In his witness statement prepared for the purposes of this application, Mr. Bennett, who is a solicitor instructed by EMGS, says this:

“The Patents relate to the use of CSEM for determining the nature of a subterranean reservoir, i.e. whether the reservoir contains hydrocarbons or water. Prior to EMGS, the prior art surveying method that was commonly used in subsea hydrocarbon exploration was seismic surveying (i.e. using sound waves to detect subterranean structures). However, as the 019 Patent explains, seismic surveying suffers from a serious flaw in that it is not able to distinguish between water and oil filled reservoirs. This meant that if a subterranean reservoir was detected using seismic surveying that was hoped to contain hydrocarbons, it was still necessary to drill a well to determine the nature of the reservoir. The success rate of finding oil in such reservoirs using seismics is stated in the 019 patent at 1 in 10. The 019 Patent puts the associated loss of US\$25million for each of the 9 in 10 reservoirs that is drilled and found to contain water. This is a very costly exercise and meant that there was plainly a strong incentive to improve on the prior art seismic techniques.”

3. EMGS’s case, underlying to some extent all three patents, is that the use of CSEM to discriminate between oil and water in subsea reservoirs involved invention. They say that prior to the inventions of the patent in suit the use of CSEM for this purpose was limited to academic surveys. Its applicability to oil was not or not commonly appreciated.
4. Schlumberger’s case is that each of the patents is either not new or lacks an inventive step. The claimants are a holding company only. The Schlumberger group is, as explained by Mr. Bennett again, a large multinational group of companies that was founded in 1927 and describes itself as “the world’s leading oilfield services company supplying technology, information solutions and integrated project management that optimise reservoir performance for customers working in the oil and gas industry”. It includes a number of subsidiaries, including companies called WesternGeco and AGO (formerly AOA).
5. I shall come to the specific categories of documents sought, but, broadly speaking, the defendant seeks disclosure of documents recording attempts by companies within the Schlumberger group to develop or evaluate electromagnetic methods of exploring subsea reservoirs and reactions of relevant persons within the Schlumberger group to

the announcement of the invention. This material is what is generally referred to as secondary evidence on the issue of obviousness. It is well settled that such material must be “kept in its place”.

Approach to disclosure of internal documents relevant to obviousness

6. The approach to this type of disclosure in a patent case has recently been examined in *Nichia v Argos* [2007] EWCA Civ 741; [2007] FSR 38. In that case, a case concerning a patent for Christmas tree lights, the judge had refused to make any order for disclosure at all. The majority of the Court of Appeal considered that such a blanket approach was wrong. They held that a blanket refusal of this type of disclosure could lead to unmeritorious claims being advanced: see, in particular, Pill LJ at [85] to [88]. The Court of Appeal held that such disclosure should be granted but that the scope of the relevant search should be proportionate to what was at stake and what might result from the search: see, for example, Rix LJ at [72] to [74]. They did not exclude the possibility that such disclosure could be refused altogether. Ways should be explored of making a search, if any, fit the requirements of the individual case. I approach this application with those principles in mind.
7. There is no dispute that this is a very big case in which there is a lot of money at stake. The size of the market is touched on in paragraphs 13 to 16 of Mr. Bennett’s witness statement. Mr. Florida (an officer of WesternGeco, a Schlumberger company) has said on a previous application that he believes CSEM is a key part of the future of surveying. Industry projections in 2004 suggested that CSEM revenues would approach \$1 billion in three to four years.

“Control”

8. The application requires the claimant to search the records of other companies within the Schlumberger group such as WesternGeco and AGO, who are not parties to the action. There is no application before me for disclosure directly against those third parties. Companies are not within the jurisdiction and it would appear, therefore, that there is no scope for applications for third party disclosure under the appropriate provision of Part 31.
9. CPR Part 31.8 provides as follows:

“31.8(1) A party’s duty to disclose documents is limited to documents which are or have been in his control.

(2) For this purpose a party has or has had a document in his control if –

 - (a) it is or was in his physical possession
 - (b) he has or has had a right to possession of it; or
 - (c) he has or has had a right to inspect or take copies of it.”
10. It is worth noting that a party has or has had a document in its control if it has or has had the right to inspect or take copies of it.

11. The way in which disclosure in this case has thus far proceeded is as follows: The parties exchanged disclosure lists on 24th September 2007. Schlumberger's list contained no documents at all, although they later disclosed a single document related to the publication of a pleaded citation. The claimant's disclosure statement states that searches were carried out at the "claimant's facilities" and that the searches were also conducted of files of "employees of the claimant". The search was limited to documents between 2nd February 1998 and 28th July 2005 on the usual basis.
12. The defendants asked for an explanation and they received a letter dated 4th October 2007 from Freshfields, who are the solicitors instructed by Schlumberger. In paragraph 2 of the letter they say this: "Our client carried out searches of its corporate files at the following facilities in Sugar Land and Houston, Texas", and it then sets out the addresses of four facilities in Texas. The letter continues:

"These facilities house our client's corporate patent files. No documents were found that are both relevant to the action and not protected by privilege

3. The personal files of the following individuals were also searched:

 - (a) Jeff Griffin (an attorney at Schlumberger WesternGeco);
 - (b) Charlotte Copperthite (an attorney at Schlumberger Ltd.);
 - (c) James Kurka (an attorney at Schlumberger Technology Corp.); and
 - (d) Jim Brady (a technical officer at Schlumberger WesternGeco)."
13. Later in the letter they say this:

"Finally, please note that although our client, Schlumberger Holdings Limited, prepared the list having taken into account all documents that may exist in the Schlumberger group and with the cooperation of other group companies in this instance, it does not accept that it was under any obligation to extend disclosure beyond documents in its own custody, power or control, and maintains that this does not extend to group documents as a whole."
14. Subject to the caveat in this last paragraph, it is clear that the search which had been conducted of what the disclosure statement had called "the claimant's facilities" and of the "files of the claimant's employees" had been done without reference to the specific group company. The files of three different companies were being examined, albeit limited at that stage to patent attorneys and a single technical officer. Plainly, that was being done with the consent of the companies concerned.
15. Paragraph 6 of Dr. Watts's second witness statement served with this application makes it plain that he decided, in conjunction with Mr. Griffin and Mr. Brady, on the

scope of the appropriate search. It is clear that the scope of the search to be performed was based on Dr. Watts's advice. Had a wider search been thought appropriate, then any relevant documents would have been copied and disclosed, all with the consent of the appropriate company. Moreover, the permission granted by those companies to permit the search for documents in their employees' files was not, on the evidence, terminated once the original disclosure was performed. On the contrary, in the evidence put in for this application Mr. Griffin says that he has requested a number of further searches of more specific categories of documents, which are ongoing and largely completed. Again, this must have been done with the consent of the relevant corporate entities.

16. Mr. Silverleaf QC, who appeared for Schlumberger, relies on the speech of Lord Diplock in *Lonrho v Shell* [1980] 1 WLR 627. In that case it was sought to obtain disclosure from the foreign subsidiaries of a party. The case concerned the old Rules of the Supreme Court, Ord. 24, but nothing turns on that. In order for the documents to be obtained, it was suggested that the party as a shareholder of the relevant company could procure the board of another company to exercise its power to alter the articles of association of each of the subsidiaries so as to entitle the shareholders to take copies and inspect the documents.
17. Lord Diplock said at 635 at G that the word "power" in the then Ord. 24 "looks to the present and the past, not to the future". He said this:

".... the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else."
18. At 636 F he said this:

"For the reasons already indicated Shell Mocambique's documents are not in my opinion within the 'power' of either Shell or BP within the meaning of RSC, Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association or (2) by obtaining the voluntary consent of the board of Shell Mocambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and BP are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."
19. In *Lonrho v Shell*, therefore, there had been no prior consent to the inspection and copying of documents. What was suggested was that, by taking certain steps, those documents would be brought within the power of the party.
20. Mr. Silverleaf emphasises the words "without the need to ask for the consent of anyone else". He says that in this case Schlumberger Holdings need to ask the

subsidiaries for permission to search for documents. He relies on some evidence of Mr. Griffin, who is the managing intellectual property counsel at WesternGeco, described as an affiliate of the claimant. In paragraph 4 he says this:

“In general I expect group companies will provide documents requested by the Claimant, except where the documents are especially sensitive or the requests are onerous, but the Claimant has no power to force those companies to comply with its requests. In particular I would not expect group companies to allow a disclosure search of their records for due diligence documents arising in the context of corporate acquisitions because of the extremely commercially sensitive and highly confidential nature of those documents, unless there is a court order binding the company concerned.”

21. I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr. Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests.

The Disclosure Application

22. There can be little doubt that the Schlumberger group has been heavily involved in research into undersea surveying methods for oil. Mr. Bennett says in paragraph 10 of his witness statement:

“Schlumberger has been active in the field of searching for undersea oil drilling sites for many years before the priority date of the patents in suit According to its website, Schlumberger spends hundreds of millions of dollars per year on research and development. On its website, Schlumberger describes its commitment to research and development and states that it has consistently invested significant time and money on research and development as a long-term strategy *'to support and grow their technology leadership'*. In 2004, for example, Schlumberger states that it invested US\$467 million in research and development for their oilfield activities, this represented 5% of revenue. Schlumberger claims that it

invests more each year in research and development than all other oilfield services companies combined.”

23. These facts, coupled with the statement by Mr. Florida on an earlier application that the patents “*lay claim to products and processes already well established by the time the patents were filed,*” has led EMGS to seek disclosure of documents relating to the categories to which I now turn.
24. The request as modified by the defendants and produced for the purposes of the hearing before me reads as follows:

“1. The Claimant, by [on or before 4.00 pm on [7 February] 2008] do carry out a reasonable and proportionate search for documents falling within the classes described below and disclose any documents located as a result of that search.

Categories of Documents

2. Documents that are or have been in the control of those businesses that are in common ownership with the Claimant (including WesternGeco LLC and AOA Geomarine Operations Inc) together, the ‘Schlumberger Group’) and which businesses have been concerned with developing or evaluating methods to identify the nature of sub-sea reservoirs by any means including seismic or electromagnetic methods, being documents coming into existence in the period 2 February 1998 to 28 July 2005 recording:

2.1 the attempts by the members of the Schlumberger Group named in paragraph 2 above to develop or evaluate methods to identify the nature of sub-sea reservoirs using electromagnetic methods; and

2.2 the reactions of the staff of the members of the Schlumberger Group named in paragraph 2 above to:

(a) The Angola Papers:

(i) ‘*Sea Bed Logging (SBL), a new method for remote and direct identification of hydrocarbon filled layers in deepwater areas*’ Eidesmo et al, First Break volume 20.3 March 2002;

(ii) ‘*Remote detection of hydrocarbon filled layers using marine controlled source electromagnetic sounding*’ Eidesmo et al, EAGE 64th Conference, Florence, 27-30 May 2002,;

(iii) ‘*Remote sensing of hydrocarbon layers by seabed logging (SBL): Results from a cruise*

offshore Angola' Ellingsrud et al, The Leading Edge, October 2002;

- (b) their participation in the study giving rise to that paper;
- (c) Publication of the Defendant's inventions in published applications for EP 1256019, EP 1309887 and GB 2399640 (and their equivalents in other jurisdictions).

A. Further or alternatively to paragraph 2.1 above and without prejudice to the Defendant's right to make a further application for documents under that head, the Claimant shall by on or before 4.00 pm on [31 January 2008] serve on the Defendant:

- (i) a schedule setting out in relation to those companies identified in paragraph 2 above, which of those companies did in the period 2 February 1998 to 28 July 2005 inclusive, use, develop or evaluate any method for carrying out a survey using a CSEM to either (a) search for a hydrocarbon reservoir, or (b) determine the nature of a submarine or subterranean reservoir; and in each case identifying the relevant company and the method concerned.
- (ii) A schedule identifying all prior products and processes referred to in paragraph 2 of the first statement of Aaron Gatt Florida made herein on 12th July 2007 as being 'products and processes already well established by the time the patents were filed', and all documents which will be relied upon at trial as evidencing the same.

3. In relation to the paper '*Recent and future developments in marine acquisition technology: An unbiased opinion*' by Nick Moldoveanu of Schlumberger, in so far as they relate to the discussion in the final paragraph of page 12:

- 3.1 drafts of the paper;
- 3.2 internal communications discussing the comments in the final paragraph of page 12;
- 3.3 preparatory materials.

4. The following documents relating to Schlumberger Group's acquisition of WesternGeco LLC, and AOA Geomarine Operations Inc and attempted acquisition of the Defendant (together, the 'Targets') :

- (a) documents relating to the assessment of each Target's technology for identifying the nature of sub-sea reservoirs using electromagnetic methods;
- (b) information memoranda or similar documents prepared by AOA Geomarine Operations Inc or WesternGeco LLC or their respective owners or advisers in connection with their proposed disposal to Schlumberger Group and relating to each of those Targets' technology for identifying the nature of sub-sea reservoirs using electromagnetic methods; and
- (c) documents relating to the assessment of EMGS' patents and patent applications concerning technology for identifying the nature of sub-sea reservoirs;

5. Documents stating technical reasons relevant to the decision by Arnold Orange Associates to incorporate AOA Geomarine Operations Inc to commercialise controlled source electromagnetic techniques for identifying the nature of sub-sea reservoirs.”

Category 2.1

- 25. Mr. Burkill QC asked for the documents in this category or, alternatively, for a schedule in accordance with paragraph 2A.
- 26. Mr. Silverleaf says that his clients accept that they did not at any time before 14th August 2002, two years after the priority date of the second patent, use, develop or evaluate any method for carrying out a survey using CSEM.
- 27. The obviousness attacks on the first two patents all start from documents disclosing CSEM. Unusually, there is no attack pleaded based on common general knowledge alone. The issue at the trial on the basis of the pleadings as they stand will be whether it is obvious to go from such disclosures as there were in the pleaded prior art to methods which fall within the claims of those patents.
- 28. It seems to me that, if Schlumberger had been, within the four-year window provided under the rules, involved in considering CSEM and working out whether and, if so, how it might be applied to hydrocarbon detection, then documents of the kind sought would be of relevance and in a case of this magnitude ought to be disclosed. But, subject to proper confirmation from a responsible officer within the Schlumberger group of what Mr. Silverleaf has said, it appears that Schlumberger were not so involved. For what it is worth and I express no view about it at this stage, EMGS will be able to make such forensic use of that fact as they think appropriate at the trial.
- 29. The order in paragraph 2.1 goes wider, however, and seeks equivalent documents in respect of any electromagnetic method. It seems to me that, once one knows that

Schlumberger were not even evaluating CSEM, there is nothing of relevance to be gained from knowing precisely what else it was they were doing.

30. The third patent in suit has a later priority date and is the basis for inserting the later date of 28th July 2005 in this category. That patent relates to a combination of seismic and CSEM methods. One of the first two patents is prior art to it. The broad question is likely to be whether a method combining the two approaches was obvious. It seems to me that whether or not Schlumberger were evaluating or practising CSEM in that period is unlikely to assist on the determination of that question.
31. So I would order a schedule to be prepared as asked for by paragraph 2A(i) of the draft order, supported by a statement of truth by a proper officer but limited to the cut-off date of 14th August 2002.
32. Paragraph 2A(ii) asks for an order identifying the products and processes already “established” by the time the patents were filed to which Mr. Floridaia refers in the passage of evidence which I have already mentioned. It also asks for all documents which will be relied upon at trial to establish the proposition.
33. Mr. Silverleaf has explained that Mr. Floridaia’s statement was intended to mean no more than “documents relating to CSEM had been published, in particular the pleaded prior art”.
34. I must say, for my part, the innuendo of what was said seemed to me to go a little further than that, but in the light of the statement Mr. Silverleaf has made it seems pointless to make an order under this head. EMGS will know, when they receive the expert evidence in this case, exactly how far the claimants are able to prove that the claim to the products and processes was well established.

Category 2.2

35. This category seeks the reactions of staff of members of the Schlumberger group to:
(a) the papers which first announced the invention and which were published in March and October 2002; (b) their participation in the study relating to that paper; and (c) the publication of the applications for the patents in suit.
36. The basis for this application is the usual one. Those who say a patent is obvious in litigation should be faced with their own contemporaneous reaction: for it is obviousness in ignorance of the invention which is important and not obviousness with the benefit of hindsight. If they said at the time, “How on earth did they think of that?”, it can cut across the opinions of experts all expressed with the benefit of hindsight.
37. I accept, in principle, that material of this type is potentially relevant, but the scope of this request is, to put it mildly, rather broad. Mr. Silverleaf says that Schlumberger have over 76,000 employees and searching for material of this nature would be too burdensome, having regard to any potential value.
38. As presently drafted, it is, in my judgment, hopelessly wide, even with the preamble requiring only a proportionate search to be made. I would have reacted more favourably to a narrower order.

39. Dr. Watts, in paragraph 20 of his second witness statement, says that, if a search is to be ordered, it should be limited to a reasonable search of the records of AGO, limited to documents from and records of senior technical and managerial staff of AGO, including a particular employee Lisl Lewis, relating to their reaction to the publication of the '019 and '888 patents and containing their views as to the inventiveness of the alleged inventions in those patents coming into existence in the period 2nd February 1998 to 14th August 2002.
40. I think Dr. Watts's approach in suggesting a more limited category is a sensible one. It is exactly the approach which Rix LJ had in mind in *Nichia*. Subject to two points, I think this represents the type of order which I should make. First, as we are dealing with the reaction to the invention and not efforts to make it, I think the order should include not only documents of AGO (which include AOA) but WesternGeco as well. Secondly, I think the cut-off date in this case is too early for the same reason. The Angola Papers were published between March and October 2002. I think the cut-off date should be June 2003.
41. Finally, I should say that, by phrasing the order in the way suggested by Dr. Watts, I am not suggesting that reactions to the Angola Papers in so far as they embody the inventions of the patents in suit should be excluded from the search, nor the participation in the study giving rise to that paper. All reactions to the inventions embodied in those two patents seem to me to be of potential relevance.

Category 3

42. Category 3 is very narrow. The article in question was published in 2006. It records the advent of CSEM in one paragraph. EMGS want to know what lay behind that. In the end, I am persuaded that these materials might be of some marginal relevance. The search exercise is a very small one and I make an order in the terms of paragraph 3.

Categories 4 and 5

43. I can take these together. There was no acquisition of WesternGeco and so that stands deleted. As to AOA, Mr. Bennett explains what happened there in paragraphs 40 and 41 of his witness statement as follows:

“40. In 2002, one year after taking part in the Norway survey, AOA Geomarine Operations Inc. ('AGO') was formed in order to commemorate CSEM. Relevant pages of the AGO website form Exhibit SDB13. I believe that documents generated by AOA and subsequently AGO in relation to the contemporaneous reactions to EMGS' inventions and AOA's and AGO's attempts to solve the problems addressed by the patents in suit would assist in assessing the question of what was obvious to a person skilled in the art at the priority date. I also believe the decision to establish a new company to exploit a particular technology would have generated documents evaluating the technical merits of CSEM technology including whether it was an old and known or a significant new technology.

41. Schlumberger announced its acquisition of AGO at the annual meeting of the Society of Exploration Geophysicists ('SEG') on 12 October 2004. A press release detailing the acquisition is attached and marked Exhibit SDB14. AGO is described both in the press release and on the Schlumberger website as '*a pioneer in CSEM and MMT (marine magnetotelluric) technologies*'. As 'pioneers' in the CSEM field, I would expect those working at AGO would have been aware of the relevant art and common general knowledge in this field and that they would be considered to be persons skilled in the art. I believe that the documents recording the contemporaneous efforts and reactions of the AGO personnel would be of assistance in assessing the question of obviousness."

44. As to Schlumberger's attempt at acquisition of EMGS, Mr. Bennett explains the position in paragraph 54 and 55 of his witness statement as follows:

"54. I am informed by Stale Johansen of EMGS that in 2004 Schlumberger was an unsuccessful bidder in the auction by Statoil of EMGS. I am aware from my involvement in bids made by clients of Lovells for other companies that the acquiring company will frequently carry out assessment of a target.

55. I would also expect there to be documents prepared by Schlumberger setting out the rationale for the purchase and commenting on the business need for the technology in question."

45. The rationale behind these applications is that Schlumberger, showing no interest in CSEM before the priority date, reacted enthusiastically to the commercialisation of CSEM by wanting to be part of it and trying to purchase companies involved in it. I am not persuaded that EMGS have much to gain from this point beyond the bare facts which they have already been able to point out. A decision to purchase or attempt to purchase companies is, as Mr. Silverleaf submits, likely to be a largely commercial one. In any case, it seems to me that these documents fall within the category of documents where the companies concerned would be likely, on Mr. Griffin's evidence, to withhold their consent. I, therefore, make no order under paragraphs 4 and 5.
46. There remains a question as to the appropriate order to make in the light of the proposed surrender of certain patents on which I anticipate counsel would have agreed a draft order.

MR. BURKILL: Can I pick up a couple of potential typos. I think there are two occasions when your Lordship referred to "Schlumberger" and meant "EMGS" or vice versa. The first one, looking back, was in categories 4 and 5. Your Lordship referred to the take-over of Schlumberger when I think your Lordship meant the take-over of EMGS. I may have got this wrong.

- MR. JUSTICE FLOYD: I think I said “as to Schlumberger”. I will make that clear.
- MR. BURKILL: There was one under the heading of “Disclosure Application”. Shortly into that section your Lordship referred to Schlumberger was led to seek certain disclosure and I think that would be EMGS.
- MR. SILVERLEAF: I spotted that one as well, my Lord. There is one more point. As a result of the earlier striking from your judgment of the quotation of Mr. Floridaia, there is a reference later to “evidence which I have already quoted”.
- MR. JUSTICE FLOYD: I did not say “quoted”. I think I said “referred to”. When I get the draft, I will put in Mr. Floridaia’s statement.
- MR. BURKILL: With regard to the timing of the schedule that has been ordered, we put in provisional dates in our draft in square brackets and I assume that, unless my friend has any particular comment on timing, those can stand. On 2A(i), I think we ask for the end of January. That is just the schedule and a statement of truth. For the disclosure, in so far as your Lordship has ordered it, we have added a further week to 7th February.
- MR. JUSTICE FLOYD: You are asking for 7th February?
- MR. BURKILL: I am asking for 7th February. My Lord, as far as detailed drafting is concerned, the juniors can sort it out behind the scenes. I do not think we have arrived at anything on paragraph 6 yet but I similarly hope we will not need to bother your Lordship.
- MR. SILVERLEAF: Would you like me to deal with dates first?
- MR. JUSTICE FLOYD: Yes. Can you deal with 7th February generally but suggesting 31st January for the schedule?
- MR. SILVERLEAF: Can I say this, my Lord. Yes, in principle. I am happy for them to go in. Mr. Joseph’s wife is about to have a baby and we may need an extra few days if he has to be off work. As long as the other side will understand that and do not regard it as an impediment, I am happy for those to go in.
- MR. JUSTICE FLOYD: You can always come back, but I will put those dates in the order.
- MR. BURKILL: I am sure we will be sensible about any application for further time. As far as the rest is concerned, shall we see if we can agree an order between us? The paragraph 6 one seems pointless to waste any time on.
- MR. JUSTICE FLOYD: Is anybody contending for any order for costs other than costs in the case?
- MR. BURKILL: My Lord, I do not think I can ask for anything else, but it would seem to be the right order given that we have both got something and lost something.
- MR. SILVERLEAF: In my submission, my learned friend is absolutely right. He certainly cannot ask for any order. I would respectfully suggest that it should be claimant’s costs in the cause because, although he came for a very wide order, he has got really

very little, most of which – if not all of which – he would have had if he had made a sensible request, as is clear from our evidence.

MR. JUSTICE FLOYD: I do regard this as part of the wear and tear of an action of this sort and the appropriate order, I think, is costs in the case. Thank you both very much indeed.
