IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1998-A-No.458

Royal Courts of Justice
Thursday, 28th October 1999

Before:

MR. JUSTICE BURTON

B E T W E E N:

A. & Ors. — Claimants

- and -

THE NATIONAL BLOOD AUTHORITY — Defendants

Re: HEPATITIS LITIGATION

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MR. M. BROOKE, Q.C., MR. I. FORRESTER, Q.C., and MR. J. ASIF (instructed by Messrs. Deas Mallen Souter, Newcastle upon Tyne) appeared on behalf of the Claimants.

MR. N. UNDERHILL, Q.C., MR. P. BROOK SMITH (instructed by Messrs. Davies Arnold Cooper) and MR. S. PEARL (Solicitor, Messrs. Davies Arnold Cooper) appeared on behalf of the Defendants.

JUDGMENT
(As approved by the Judge)

MR. JUSTICE BURTON: In this multi-party action in which I have, since February 1999, been the assigned judge, multiple claimants, now numbering something over 130, for whom Mr. Brooke, Q.C., has appeared with Mr. Forrester, Q.C., of the Scots Bar, and Mr. Asif, instructed for the purposes of all generic issues by Deas Mallen Souter, are suing the defendants, the English & Welsh Blood Authorities, for whom Mr. Underhill, Q.C., has appeared with Mr. Brook Smith, instructed by Davies Arnold Cooper, based on allegations that they contracted hepatitis C as a result of blood transfusions.

Their cases are put in a number of ways, but for the purpose of the presently planned generic trial, which has been fixed, ever since I was appointed as assigned judge, for October 2000, the only live issue is whether there is liability under the Consumer Products Act 1987 ("the CPA") which enacted the provisions of the Council Directive 85/374/EEC of 25th July 1985 ("the Directive"). As I am the assigned judge and the parties well know the facts of the case, I shall not summarise them for the purposes of this judgment. Similarly, I shall not need, for the purposes of this judgment, to set out in great detail the arguments of the parties in this application by the claimants for a preliminary reference to the European Court in advance of the generic trial pursuant to Article 374/EEC. The reason for that is that there has been, as in all interlocutory proceedings before me and before Master Eyre, a transcript of those arguments and of the exchanges between me and counsel, so much of the thinking behind the submissions and indeed my

conclusions will be patent from a reading of the transcript of the hearing which lasted some five hours.

Suffice it for me to set out first the two articles of the Directive which, because it is the wording of the Directive and not of the CPA which is decisive, have been most closely concentrated on in the course of the hearing and for the purpose of this application.

The Directive was issued to introduce something close to strict liability into the manufacture and supply of consumer products, and the two articles in issue in this application were as follows. First of all, Article 6, which reads:

> "1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
>
> "(a) the presentation of the product;
>
> "(b) the use to which it could reasonably be expected that the product would be put;
>
> "(c) the time when the product was put into circulation."

Article 7 which reads:

> "The producer shall not be liable as a result of this Directive if he proves...
>
> "(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered..."

The relevant pleadings read as follows as to Article 6 at paragraph 10 of the defence:

> "It is expressly denied that the infection of blood or blood products with HCV [that is hepatitis C virus] constitutes a defect within the meaning of the Act. By virtue of s.3 of the Act [and that is a reference to the section which enacts Article 6], a product is defective for the purposes of the Act if '[its] safety ... is not such as persons generally are entitled to expect' having regard to all the circumstances. It is the Defendants' case (without prejudice to the burden of proof) that at all material times blood or blood products so infected were safe as persons generally were entitled to expect. The circumstances on which the Defendants will in particular rely can be summarised as follows..."

Then the circumstances are set out in four sub-paragraphs including at 10.3 the words:

> "It is the Defendants' case that the expectation which patients are entitled to have as to the safety of products supplied by way of medical treatment (or in any event products of the type which are the subject-matter of this litigation) is not that they will be free of the risk of injurious effect but (at most) that any such risks are of a kind which are generally known to doctors who may use them."

The response to that is at paragraph 4 of the reply, which reads:

> "With regard to paragraph 10 of the Main Defence:
>
> a. At all material times Blood or Blood products infected with HCV have not provided the safety which a person is entitled to expect."

Then:

"e. It is denied that the circumstances pleaded under paragraph 10 in the Main Defence either singly or cumulatively negative the entitlement of a person to expect not to be HCV-infected at any material time by blood or blood products."

A number of other specific matters are put in response to the pleading in paragraph 10 relying on the defendants' interpretation of the effect of Article 6.

Then as to Article 7(e), the relevant paragraph of the defence is paragraph 13 which reads as follows:

"Further, in relation to all Plaintiffs infected by whole blood or blood components, the Defendants will if necessary rely on the provisions of s.4(1)(e) of the Act."

I interpolate that that is the UK enactment of Article 7(e).

"In the state of scientific and technical knowledge at the time that the blood and blood products were supplied the Regions could not be expected to have discovered any contamination with the HCV virus. They could only be expected to have discovered such contamination when (a) the virus had been scientifically identified; (b) a reliable method of testing donated blood for the virus had become readily available; (c) practical systems were in place for the administration of such tests. The Defendants will say that those conditions were not satisfied until 1st September 1991. The relevant sequence of events can be summarised as follows..."

There are then eight sub-paragraphs in which those events are so summarised.

The response to that is at paragraph 5 of the reply which joins issue on paragraph 13 and then carries on:

> "Without prejudice to the generality of the foregoing, the Plaintiffs plead as follows:
>
> "a. At all material times the existence of the defect was known to the defendants in that they knew that blood and blood products were infected on occasion with a hepatitis virus later called HCV. The risk of such infection was not a development risk, but a production risk to which Article 7(e) of the Directive and section 4(1)(e) of the Act has no application."

Then in 5b there are set out alternative answers to the case of the defendants pleaded in paragraph 13, and I read them as follows:

> "b. If, contrary to the Plaintiffs' contention in paragraph 5a., it is open to the Defendant to rely upon section 4(1)(e) of The Act (construed in accordance with Article 7e of the Directive) then it is the Plaintiffs' case (without prejudice to the burden of proof) that at all material times the state of scientific and technical knowledge was such as to enable the existence of the defect to be discovered:
>
> "i) by the practice of surrogate testing, to wit:
>
> (1) testing donors for anti-HBc;
>
> (2) testing donors for serum ALT levels;
>
> (3) acting upon the results of such testing."

This was described by Mr. Brooke in the course of his submissions as his first fall-back. Then:

"ii) by anti-HCV testing (from either 1st March 1988 or from such other date as may be revealed on discovery and/or in answer to interrogatories when such testing could first have been devised)..."

This is described by Mr. Brooke as his second fall-back.

There are then in sub-clauses (iii), (iv) and (v) what I assume are further fall-backs, perhaps a third, fourth and fifth fall-back, which have not been the subject matter of any argument before me today or in this application.

The application by the claimants for a preliminary reference is based upon draft questions which have been formulated in three different ways. The interrogatory style, the list of issues style and then in the form of six questions which are actually incorporated into the notice of application. These questions have been refined, or at any rate summarised, yet further in the course of argument during the hearing. The defendants submit that the very difficulty of, and variations in, the formulation emphasise the inappropriateness of the questions being put to the European Court at this stage before the facts are found and the issues crystallised; but the claimants say that the principle should be established that there should be a preliminary reference and then the precise formulation of the questions can be carried out subsequently, by agreement if possible, but in any event involving input from the defendants and, if necessary, after a further hearing to settle any outstanding disputes or uncertainties about their final form.

As to the respective positions of the parties on the question of a preliminary reference, the claimants say that the advantages of it are:

(1) that if the European Court resolves the dispute between the parties about the construction, ambit and effect of Articles 6 and 7(e) entirely in their favour then the trial will be shorter, possibly much shorter, and that, at worst, even if the issues are not entirely resolved in their favour the European Court may give guidance which would be valuable;

(2) that the making of such reference is inevitable at some stage, and making it now rather than later will save time and may save costs.

The respondents say that there are no advantages, or at any rate no sufficient or clear advantages, to be gained.

1. The issues are not yet sufficiently clear. The facts are uncertain or not even capable of being categorised as assumed facts, given the existence of disputes not only about their accuracy but also their effect and their relevance, and that a preliminary reference is consequently inappropriate.

2. That it is not inevitable that there will be a reference at some stage, for example if the defendants' legal submissions were to succeed at trial but the claimants were nevertheless to win on the facts, or if the claimants' legal submissions were to succeed at trial and the defendants did not seek a reference, and that there would be little or no saving in time or cost in any event, particularly as the case would have to continue to be prepared for trial in the

meanwhile on the full-blown basis, given the claimants' understandable and correct stance that they are not seeking a stay.

I turn then to the questions that are recited in the notice of application as being those which the claimants want referred. They are as follows:

> "(1) In circumstances where a patient has received a transfusion of blood or blood products or the transplantation of a body part and has contracted hepatitis C, a serious illness, due to the presence of viral matter in the transfusion or body part, are the blood products so transfused or the body parts so transplanted to be regarded as 'defective product' within the meaning of Article 6 of Directive 85/374?
>
> "(2) Would the answer to (1) differ depending on the circumstances of the patient so that different levels of expectation of safety would apply to an unconscious patient needing an emergency transfusion, a patient undergoing elective surgery whose needs could have been met by autonomous transfusion, and the patient accustomed to being treated with blood products?
>
> "(3) Would the answer to (1) differ if the producers of the blood product or body part in question were able to show that contaminating viral material was difficult to detect?
>
> "(4) Is the state of scientific knowledge defence provided for in Article 7(e) and implemented in national law open to the defendants at all if it is proved that at all material times it has been known that blood, blood products and body parts were at risk of being infected with the hepatitis virus in due course identified as HCV and on occasion were so infected?

"(5) If the answer to (1) is affirmative, is Article 7(e) of the Directive to be interpreted as making this defence available to producers of hepatitis C contaminated blood products and body parts in respect of the period before HCV was identified by science even though at all material times the state of knowledge has been such that producers of blood products and body parts were capable of reducing, albeit not eliminating, the risk of infection by rejecting some of the blood products or body parts which might be infectious?

"(6) May the producer of such blood products or body parts also validly invoke the state of scientific and technical knowledge defence if it is proved that the then available technology which could have allowed the detection of the presence of hepatitis C virus in these products, albeit at a cost of false positives, was not used by the producer in question, is the answer to this question affected by the fact that in other countries such technology was used to reduce the risk of the transfusion of contaminated blood of a transplantation of contaminated body parts."

These are summarised by the claimants at paragraph 16 of their skeleton argument as follows:

"(a) Are blood, blood components, blood products or body parts 'products' within the meaning of the CPA?

"(b) If so, are blood, blood components, blood products or body parts infected with HCV defective within the meaning of the CPA?

"(c) If so, is it open to the defendants to rely on the state of scientific and technical knowledge defence at all?

"(d) If so, until what date is it open to the defendants to rely on the state of scientific and technical knowledge defence?"

This summary reveals the following about those questions:

1. That the first question is, in fact, an amalgam of two questions, one summarised as (a) relating to the definition of "products" in which the only disputed issue, though one that is vigorously contested, is whether body parts are products, an issue which is only, in fact, live in one out of the 130-plus actions, and the other summarised as (b) relates to the definition of "defective."

2. That the second and third questions are alternatives to and sub-categories of the first question, directed towards a consideration of what circumstances might be relevant if, contrary to the claimants' primary case, any circumstances were relevant at all. They are both subsumed within (b).

3. That the fifth and sixth questions are alternatives to and sub-categories of the fourth question directed towards a consideration of whether certain dates or events might be relevant if, contrary to the claimants' primary case, any events or dates were relevant at all, and they are both contained within (d).

I turn then to the principles lying behind the decision I must make as to whether there should be a preliminary reference to the European Court. The first principle is that it is a matter entirely for my discretion,

that is as judge of the national court. The question is whether I am satisfied that it would be advantageous for me, as proposed trial judge, to have the questions decided in advance. I refer to my recorded discussion with Mr. Forrester, Q.C., when I summarised one of the relevant questions as being:

> "Do I want these questions answered now? Am I helped by that?"

To which Mr. Forrester answered:

> "Yes.

Then I carried on:

> "Or would I feel that it would be more helpful from my point of view to have the facts found and my own mind cleared up as to precisely what questions I wanted answered?

Mr. Forrester responded:

> "My Lord, indeed, that is the right question to ask."

I said:

> "Well, you pointed out to me that that is the question I should be asking myself.

Mr. Forrester responded:

> "Yes, that is right, without fear that the conclusion you come to might be criticised or doubted."

He meant, of course, by the European Court.

The corollary is that the European Court leaves the matter largely to the national court (see Bosman v. UEFA [1995] 1 ECR 4921 at 5059). There are circumstances in which

the European Court declines or refuses to reach a conclusion on a reference, but they normally try to assist at least to the extent of giving guidance, even if they do not feel able to answer the questions with a plain Yes or No.

Nevertheless, there are guidelines which the European Court has given, and the most relevant area to this case in which such guidance has been given in relation to a preliminary reference is whether, as it is put in Bosman at 5060:

> "...the Court ... [has] before it the factual or legal material necessary to give a useful answer to the questions submitted to it..."

If it concludes that it does not, that will be one of those circumstances in which a reference will be declined to be answered by the European Court.

Given that the decision is, therefore, for the national court, inevitably one looks for guidelines for the decisions of this court, and the defendants draw attention to the statements of Neill J. (as he then was) in An Bord Bainne (The Irish Dairy Board) v. Milk Marketing Board [1985] 1 C.M.L.R. 6 at page 10, which includes a reference to the often cited statement of Lord Denning, M.R. in Bulmer v. Bollinger [1974] Ch. 401 at 423, namely:

> "As a general rule a reference should not be made until the facts have been found by the English court and therefore a reference should not be made at an interlocutory stage: ..."

That statement by Lord Denning, although thus cited with approval and respect by Neill J. in the Commercial Court

in England, has been the subject of criticism by the Advocate-General in Pretore di Salo v. X [1987] E.C.R. 2545 at 2557; but the Advocate-General there does not in terms address the fact that Lord Denning was only talking "in general", and he makes his comment by reference to Irish Creamery Milk Suppliers' Association v. Government of Ireland & Ors. [1981] E.C.R. 735, which primarily concentrates on the fact that it is the national court which is in the best position to appreciate at what stage in the proceedings it requires a ruling. In any event, the full court in Pretore di Salo does not repeat the Advocate-General's words, but restricts itself in its judgment effectively to reiterating the gist of that passage in Irish Creamery when it says at 2568:

> "The decision at what stage in proceedings a question should be referred to the Court of Justice for a preliminary ruling is therefore dictated by considerations of procedural economy and efficiency to be weighed only by that national court and not by the Court of Justice."

I also note the caution not to be too hasty in resorting to a reference at page 24 of the Court of Justice's own 1999 paper. I shall therefore do my best to articulate the position from the point of view of the national court to which the European Court has therefore left the decision, taking into account all those guidelines, but in addition considering the principles by which our courts themselves consider questions of the appropriateness of preliminary issues or rulings of law of mixed law and fact. Before I do this, I should, however, add this. Not only is the national court, as the European Court has recognised, in the best

position to decide on the appropriateness of a preliminary ruling, but an assigned judge is in a better position than most interlocutory judges to understand the case before him and consider its appropriateness for a preliminary ruling. However, this case, and in particular my assignment to it, is still at a relatively early stage. My involvement to date in three or four interlocutory hearings gives me a better insight into the case than any other judge, but still I am infinitely less cognisant of the case and the issues than a trial judge would be or than it is to be hoped I will be when I am, as is presently proposed, the trial judge.

Subject to those matters, therefore, I attempt to indicate what I am looking for. Can issues be isolated in respect of which:

(1) facts can be agreed or assumed adequately or satisfactorily? Facts that are agreed or found are far more suitable than facts that are assumed, no doubt for certain purposes or subject to considerable caveats or hypotheses, and are certainly far better than having a determination argued against the background of each side putting in, as has been suggested, detailed factual submissions, particularly when there is a dispute not just as to the existence of some or all of the respective facts but in any event as to their effect and relevance;

(2) it can be sufficiently clear that a satisfactory and sufficient answer can be given by the European Court, for example, not just as in Rigsadvokaten v. Ryborg, [1991] E.C.R.

I-1943, an answer that the matter should be decided by the national court in accordance with all the relevant facts?

(3) it can be sufficiently clear that material costs and time are likely to be saved for the risks inherent in the identifying and litigating of any preliminary issues to be taken? These risks have, of course, been discussed in the English cases on preliminary issues, but given that the making of a reference to the European Court inevitably leads to greater delay than the hearing of a preliminary issue in the national court, at any rate at first instance, there is even more to weigh in the balance.

I turn then to my conclusions. I sought to slim down or re-summarise the questions in the course of the hearing. Ignoring the separate and less immediately significant, although obviously important, issue of body parts, they are four, the first two of which I have referred to as "the big issues".

(A) revolves around Article 6. The claimants say that blood or blood products are contaminated and a claimant is entitled to expect that blood is not contaminated; consequently the products are defective. Nothing else is admissible or relevant.

(B) revolves around Article 7. The claimants say it is enough if there is a known risk of contamination in blood generally, i.e. in what Mr. Forrester, Q.C. called "the population of products", and it is not relevant whether there is a known risk as to the particular blood or product. As the claimants contend that it is not or cannot be in issue that

there was such a known risk by 1988 when the CPA came into force, nothing else is admissible or relevant.

(C) revolves around Mr. Brooke's first fall-back, as I described it by reference to the pleading. The alleged existence of surrogate testing allegedly forecloses thereafter any further argument about the availability of the Article 7(e) defence.

(D) consists of Mr. Brooke's second fall-back, as to the alleged existence of some limited HCV testing, similarly said to foreclose thereafter any further argument about the availability of the Article 7(e) defence.

As to (C) and (D), I am not at all satisfied that anything helpful would come out of a reference. There would need, it seems to me, to be detailed consideration of facts, events and dates, their status, inter-relationship and significance, not to speak of the significance of the other fall-backs pleaded by the claimants to which I have not made specific reference, and any other facts which the defendants assert to be relevant. Even if there were to be assumed facts, we might be into Mr. Forrester's suggestion of ten hypotheses, which is not only not enticing of itself but particularly so if the substratum of some or all of the hypotheses may disappear at trial.

I might only be persuaded of the advantage of referring (C) and (D) if the big issues were, in any event, being referred and it was thought sensible to seek some guidance from the European Court on as many other issues as possible. Of course, if there were a trial, these issues may

disappear into insignificance and others may assume significance.

I turn, therefore, to the big issues. As to those, it seems to me that there is a distinct possibility that no benefit will be gained from the reference.

1. The words in Article 6 which the claimants will be asking the European Court to decide should be ignored are:

> "...the safety which a person is entitled to expect, taking all circumstances into account..."

Mr. Forrester, Q.C., describes "all circumstances" as "somewhat mush words, puff words", to which he does not attach great importance. But:

(a) It is not simply those words "all circumstances" which seem to me at any rate arguably relevant, but also the words "a person is entitled to expect". It seems to me that that at least arguably imports an objective test.

(b) Mr. Underhill has pointed out, and indeed Mr. Forrester accepted, that there is a considerable drafting history to the introduction and insertion of those words into Article 6 which was previously in the draft Directive Article 4 and that there was quite a battle, what Mr. Forrester called "breast-beating", from many, many parties, such that what he called "a certain amount of reassurance" should be introduced into what would or might otherwise have been simply strict liability.

Thus "entitled to expect taking all circumstances into account" may mean exactly that, or they may be "mush and

puff", or they may lead to the inclusion, notwithstanding the wide language, of some circumstances and the exclusion of others. Similarly the identity of "a person", French "on" and German "man", may or may not be limited.

There is, it seems to me, at least a realistic risk that the first or third possibilities may arise rather than the second mush and puff one, and in the event of the third possibility at the very least it would be helpful if the circumstances in this case had been found so as to see which, if any, could be relevant.

2. As for article 7(e), the wording would appear to allow less room to the defendants for the consideration of background circumstances if the claimants established that "existence of the defect" means "existence of the defect in the population of products", although the word "such" might still perhaps allow or necessitate consideration of some evidence. But in any event, all the evidence which the defendants wish to adduce about detectability and the state of research, which would be excluded in respect of Article 7(e) if the claimants' interpretation of it were right, would in any event be led under Article 6, unless they were also able to exclude it there.

My state of mind accordingly is that I can see real risks of an unsatisfactory preliminary reference and am not satisfied, at least at this stage of my understanding of the case, that I would be much helped prior to trial by having the issues resolved by preliminary reference, but should I refer

it anyway and see what happens? I do not consider that is sensible in this case.

1. It may be that Articles 6 and 7(e) will be so construed by the European Court that the trial will be shortened or even avoided entirely, e.g. if the claimants were in a position to and did succeed entirely on both big issues. But on the other hand it may be that the result of the trial fixed for October 2000 would mean that a reference is entirely unnecessary. As I have indicated, if the claimants win the trial there may be no need for a reference at all. When I put this to Mr. Brooke he, not surprisingly, responded that it was "swings and roundabouts".

2. So on the basis that at best the position is finely balanced, what of the effect on time and cost? The claimants' skeleton argument identified what appeared to be a large difference in the respective situations of reference before the trial as opposed to reference after, but a large amount of that difference evaporated in the course of the hearing when it was accepted on all sides that if there were to be a reference other than a preliminary one the most likely time would be at the end of the trial with a reference by me after a finding of the facts and perhaps a provisional judgment not, as illustrated in the claimants' skeleton argument, by the House of Lords after hearings in the Court of Appeal and perhaps the House of Lords.

The rival timetables looked something like this by the end.

(A) Preliminary reference, made November 1999, back from European Court hopefully July 2001. The trial would have had to have been fixed anyway for the convenience not only of the court but all the parties and the experts, otherwise with a lengthy trial like this if one did not seek to fix the trial until the European Court result was in, there would be a much longer delay. In fixing the date for such trial a period would have to be left to allow for the assimilation of the effect of the judgment, particularly if it consisted of guidance as to what evidence should be adduced and what circumstances, if any, should be considered. January 2002 would be the earliest and might itself be at real risk if, as could be the case, the European Court's judgment were delayed longer than allowance has been made for. Assuming, however, a trial starting in January 2002 and a shorter trial than the three months presently planned, although that may not eventuate unless the claimants are at least partially successful in Europe, that could mean judgment in May 2002.

Alternatively:

(B) Leaving the trial at October 2000 without a preliminary reference, then provisional judgment and a reference February 2001; back from Europe, October 2002; judgment incorporating the results of the reference, November 2002.

The maximum gain between the two scenarios at the conclusion of the first instance decision taking into account the result of a reference would thus be six months. However:

(i) That may not eventuate and, leaving aside the risk of further delay, if the claimants were not wholly successful or not successful at all in Europe, then the trial may not be shortened at all.

(ii) We have at the moment a certainty of a trial date.

(iii) As discussed, the case may not go to Europe at all, in which case it would have been resolved in February 2001, 15 months earlier than on scenario 1.

(iv) As for cost saving, of course, if the case did not go to Europe at all then all the European costs would be saved if scenario 2 were followed. But leaving that aside, there is not a great saving in costs, even if the claimants were wholly successful in Europe, because the trial would have had to have been prepared meanwhile anyway to avoid the risk of any delay, as all accept, so that the maximum that could be saved would be the costs of that part of hearing which, if the claimants were substantially successful in Europe, would be rendered unnecessary, not a substantial amount in the overall picture.

In all those circumstances, therefore, I consider a preliminary reference, whether of the questions posed or of any similar questions, inappropriate and not beneficial to the expeditious, convenient and just disposal of these claims.

I think I have already indicated, I think to both of you, that in the likely event, so far as costs are concerned, that it would follow the event.

MR. ASIF: My Lord, quite so. I was going to say that I would not seek to say anything beyond what was said on the last occasion so far as costs are concerned.

MR. JUSTICE BURTON: Thank you very much indeed. I do not know whether it is a case in which either of you want to consider leave to appeal. It seems to me entirely a discretionary matter and, as I indicated, one that I am probably in the best position to judge, but if you are thinking of any question of leave to appeal I suppose you ought to deal with it now or, at any rate, if you do not want to deal with it now, perhaps in writing in the next few days, because one does not want to leave this open for very long.

MR. ASIF: I think the provisional view which those instructing me have formed is that because it is a prime example of an exercise of your Lordship's discretion, it is not something really which is suitable for any appeal from this court unless the parties were going to say that your Lordship had not taken into account particular matters which you ought to have done. Clearly your Lordship has given a very thorough consideration of the authorities and has heard full argument, so I do not think that any argument along those lines would get off the ground.

My Lord, can I mention that the parties are looking to fix another hearing in your Lordship's diary some time in the middle of December. Perhaps, having thought about the terms of your Lordship's judgment, if the parties do think that a further report ought to be pursued, that might be the best time for any renewed application for leave to be made, if your Lordship were prepared to leave it for that long.

MR. JUSTICE BURTON: For leave to appeal. There are two points in answer to what you say.

First of all, as far as a date is concerned, I am starting a long case in the Queen's Bench division on 6th November, which will, unless it goes short in some way, take me through until Christmas, so I am therefore sitting every day. I am sure that I will be able to assist you by finding some time, perhaps a Friday, something of that kind, if you can find out when would be convenient and let my clerk or the clerk of the lists know. I have a pre-trial conference in that case next Wednesday morning and then, of course, I start, subject to reading days, the following Monday or Tuesday. I can raise it with them to find out when they think there will be a possibility of a break, so I will try and fit round you.

MR. ASIF: My Lord, I think certainly from the claimants' point of view we are looking, if possible, for a Friday and preferably 10th December, but obviously we have not yet had any input from the defendants' counsel. My Lord, I think my head of chambers is in the trial that your Lordship is hearing, so he will just have to make room for Mr. Brooke if your Lordship is prepared to take us on a Friday.

MR. JUSTICE BURTON: There we are. Obviously you will make inquiries and see if you can do anything by arrangement. That is fine.

As for the second matter, yes, particularly if Mr. Pearl does not object I am perfectly prepared to extend the time for seeking permission to appeal until December. On the other hand, if you are going to move for preliminary reference, another further month will have gone. More than a month, six weeks will have gone.

MR. ASIF: My Lord, of course, and I am sure that is something that those instructing me will bear in mind if they consider that they wish to make an application.

MR. JUSTICE BURTON: I have indicated that it might be better if you did decide, contrary to your present belief, that you wished to make an application for permission to appeal in writing serving it before -- it does not need to be a formal document but some kind of short written submissions in support of permission to appeal and serve it on the defendants, make sure that they have an opportunity to respond to it and then send the written submission and the written submission in answer to my clerk and I will deal with it in writing, but from what you are saying it looks unlikely that you will.

MR. ASIF: I think that is certainly the provisional view that those instructing me have formed.

MR. JUSTICE BURTON: Clearly there will be a transcript of this judgment. Certainly after the extremely helpful way in which such a speedy transcript was provided, which was very helpful indeed, to me last Monday, I am not going to ask for any kind of expedition, far from it, but I simply ask that on this occasion, as opposed to normally when you simply have the transcript for yourselves, if a transcript could be supplied to me it would be helpful. Of course, it may be that I will be given the opportunity of correcting it in case there are any typographical errors, but that obviously will be something we ought to have, and I would certainly need to have in front of me, before I considered any permission to appeal if we are not going to deal with it today.

MR. ASIF: My Lord, that is certainly right, and bearing in mind your Lordship's invitation for members of the press to attend the judgment, it is likely or certainly possible that your Lordship's judgment may be of some interest to the law reporters in which case, of course you would have the opportunity to correct it and make any amendments.

MR. JUSTICE BURTON: I do not know whether one needs to say in this day and age that I give leave for it to be treated as delivered in open court, but if I did I would certainly say that it should be.

MR. ASIF: I think one still does need to do that formerly, because chambers judgments, unless the court says that they

are to be treated as being delivered in open court, although the public are entitled to attend, parties do not tend or such matters do not tend to be reported as such.

MR. JUSTICE BURTON: It is a very self-contained point and unless either of you have anything further to say I would be happy to say that it should be deemed to be delivered in open court.

Thank you very much. There were no further problems arising out of drafting of the orders on the last occasion, I take it.

MR. ASIF: My Lord, no. In fact, apart from the orders in the individual cases there are not really any substantive orders to be made. Obviously I will deal with the drawing up of the order on this particular application which will deal with anything else that needs ----

MR. JUSTICE BURTON: Yes. I cannot remember whether we did anything vital except I think there were a few matters that may have gone by consent.

MR. ASIF: I think they were all on the individual cases.

MR. JUSTICE BURTON: Very well. Thank you.
