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A little knowledge can be a useful thing

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by Nicholas Round

On 19 April 2016 Birss J handed down a short but notable judgment in the matter of *EMGS v PGS*. Following a three-week trial in March 2016 the parties had decided to settle the matter before receiving judgment. However, the purpose of Birss J's judgment was not particularly to comment on this, or the substantive issues of the case, but instead to note the benefit he had received from a teach-in session with a neutral scientific adviser before the trial started.

The patent in issue was previously litigated in *Schlumberger v EMGS*. In those proceedings it was invalidated at first instance before being restored on appeal. The patent concerns, as Birss J set out in his judgment, "the use of controlled-source electromagnetism, CSEM, in searching for oil reservoirs under the sea" and involves difficult issues of physics and geophysics. Indeed Birss J noted that the issues of the case were so complex that in "order to explain and address them, it was going to be necessary to deliver a judgment which delved into Maxwell's equations, 3D vector calculus and imaginary numbers".

Under the technical rating system used by the English Patents court for allocating cases to the appropriate type of judge it had been rated as the top end of Category 5 and at first instance in *Schlumberger*, Mann J, who is not a specialist Patents Court judge, had had the benefit of an expert adviser throughout the trial. PGS had therefore submitted, at an earlier application hearing, that it would be appropriate for a scientific adviser to be appointed to assist the court with the difficult science. EMGS resisted this but Birss J found a middle-ground and ordered that a non-controversial introductory course delivered by a suitably qualified scientific expert would give him a good start in the field and make it easier to understand the materials and issues raised at trial.

As is clear from his judgment, the judge indeed found the teach-in session to be of great benefit. In particular Birss J noted that it "allowed the speeches and cross-examination to proceed more briskly than would have been possible without it. So time and therefore cost has been saved and the court's comprehension of the issues was significantly improved." Birss J also considered the importance of ensuring the court adequately understands the difficult technical issues in patent trials and stated "in order to be able to decide the case, the court therefore needs to be able to understand not only the experts' opinions but also the material on which those opinions are based and the reasons for them. That is why the task of educating the judge is of such significance and time spent on it is rarely wasted."

The praise given by the judge suggests that where a similarly technical patent is in issue it may be

worth considering applying for a pre-trial teach-in for future English cases. Looking forward to the inauguration of the UPC it may not be necessary to request this since a “technically qualified” judge, who must have a university degree and proven expertise in a field of technology, may sit alongside the legally qualified judges. The use of technical judges will be mandatory in the central division and available upon application of either party or the court in the local division. The success of this system may of course depend on the aptness of the qualifications held by the technical judge but it could provide some of the benefits Birss J noted in the present case.

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