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Claim Nos. HP-2017-000085 /HP 2019-000019

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

The Rolls Building
Fetter Lane
London EC4A 1NL

12 May 2023

Before:

DOUGLAS CAMPBELL KC
(Sitting as a Judge of the Chancery Division

Between:

Claim no: HP-2017-000085

LUFTHANSA TECHNIK AG

Claimant

**(a company incorporated under the laws of the
Federal Republic of Germany)**

- and -

**(1) ASTRONICS ADVANCED ELECTRONIC
SYSTEMS**

Respondent

**(a company incorporated under the laws of the state of
Washington, USA)**

(2) SAFRAN SEATS GB LIMITED

And between:

Claim No: HP-2019-000019

LUFTHANSA TECHNIK AG

Claimant

**(a company incorporated under the laws of the
Federal Republic of Germany)**

- and -

PANASONIC AVIONICS CORPORATION

Defendant

**(a company incorporated under the laws of the state of
Delaware, USA)**

MR. HUGO CUDDIGAN KC (instructed by **Jones Day**) on behalf of the **Claimant**.

MR. PIERS ACLAND KC, MR. MILES COPELAND and **MS. ALICE HART** (instructed
by **Hogan Lovells International LLP**) appeared on behalf of **Astronics and Panasonic** and
(instructed by **Pinsent Masons LLP**) on behalf of **Safran**.

Hearing date: 27 April 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Friday 12 May 2023 by circulation to
the parties or their representatives by email and release to the National Archives.

RECORDER DOUGLAS CAMPBELL KC:

Introduction

1. This application arises as follows. At the liability trial which was heard before Morgan J, the Claimant (“Lufthansa”) won against each Defendant on at least one act of patent infringement with respect to claims 1 to 3 of the Claimant’s European Patent (UK) no. 0 881 145. All such acts related in one way or another to a product known as the EmPower In-Seat Power Supply System. Lufthansa had also pleaded certain additional ways in which it said that infringement of the same patent was established by other acts done by the same Defendants in relation to the same product, but it was not considered necessary by Lufthansa or the Court to consider those additional ways for purposes of the liability trial.
2. Lufthansa subsequently elected for an account of profits and served Points of Claim in relation thereto. However, in their Points of Defence the Defendants have taken the position that no, or very little, profit was made on the particular acts of infringement on which Lufthansa succeeded at trial. Lufthansa says these arguments are wrong in principle but wishes to deploy the additional routes to infringement which were raised in its pleadings for the liability trial (plus one more route to infringement, which was not raised at that trial) in order to combat them. This is resisted by the Defendants on the grounds that Lufthansa should be held to the particular acts of infringement on which it succeeded at the liability trial.
3. Lufthansa complains that the Defendants’ argument is an unmeritorious one whereby the Defendants would wrongly and unfairly escape liability for millions, perhaps tens of millions, of pounds for what are in fact acts of infringement. Conversely the Defendants submits that the additional routes to infringement are all unavailable to Lufthansa for one good reason or another, as I will explain below.
4. There are two key questions to decide in relation to this application. The first question is the general one of whether Lufthansa can rely on additional ways of putting its case on infringement in the quantum stage which were not decided in the judgment on liability. The second question is whether Lufthansa is specifically prevented from advancing certain issues (“the adjourned issues”) by reason of the Order made by Morgan J following trial. The parties advanced a substantial number of arguments on these two questions, but I will only deal with those which seem to me the most important.
5. That summary omits much of the detail. I was supplied with coloured charts by both sides in which the precise legal status of various allegations of infringement was set out. I have found that prepared by the Defendants to be more helpful than that prepared by Lufthansa since the Defendants’ table sets out the complete list of 12 issues upon which Lufthansa seeks to rely at the account. I annex that table to this judgment.
6. As will be seen the allegations made fall into a number of categories. No issue arises as to the 3 routes to infringement which were established before the Judge. These are called “determined issues” and it is not disputed that Lufthansa can rely on all of these, as it has already done. There are 3 further categories which are more controversial.
 - 1) The first category is called “abandoned issues” by the Defendants and “unresolved issues” by Lufthansa. I prefer to use Lufthansa’s term since (although chosen by

Lufthansa) it is neutral and factually correct. Whether these issues were positively “abandoned” – which the Defendants interpret as meaning “abandoned for all time and all purposes” – is one of the very things which I have to decide.

- 2) The second category has been called “adjourned issues”, this being a term which was originally adopted during the liability phase. These are issues which, as I will explain later, were adjourned by orders of Nugee J and Marcus Smith J.
- 3) Finally there is another issue (“not previously alleged”) which is entirely new to the account and was not raised on the pleadings at all. It does however relate to the same patent, the same Defendants and to the same commercial activity as the other infringement issues. I was not told how significant this issue actually was, but both parties treated it as such and it was the subject of several rounds of written submissions after I had given the parties a draft judgment. I will treat this as the third question.

7. I will now address the two key questions.

Can Lufthansa rely on additional ways of putting its case on infringement in the quantum stage which were not decided in the judgment on liability?

Legal context

8. This is not a new issue in the context of split trials and has been considered in a number of intellectual property cases. In **Unilin Beheer BV v Berry Floor NV** [2007] EWCA Civ 364; [2007] F.S.R. 25, Jacob LJ said this:

*“Now it is true that in an inquiry as to damages or account of profits the patentee is allowed to claim relief for types of alleged infringement not ruled on by the trial court. This saves the formal issuance of fresh proceedings in respect of these and is permitted as a matter of convenience, see **General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd (No.2)** [1974] F.S.R. 122 at 207. And of course if, in the inquiry or account, the patentee alleges a type of infringement not considered by the trial court, the court conducting the inquiry or account will have to rule on whether it falls within the scope of the patent.”*

9. In **AP Racing v Alcon** [2016] EWHC 815 (Ch), [2016] Bus. L.R. 838, Henry Carr J cited the above passage and added as follows:

*23 Mr Cuddigan QC, who appeared for AP Racing, emphasises that this is a well established practice in patent litigation in the High Court which saves time and costs. He points out that a liability trial almost invariably involves a challenge to validity. If the challenge to validity is successful and the patent is invalidated, then time and money spent on infringement allegations is wasted. Accordingly, he submits that whilst some infringements must be brought forward in order to establish a right to relief, others may be left for subsequent consideration, which is indeed what happened in the **General Tire** case [1975] RPC 203.*

24 I would add that it is in accordance with the modern approach to intellectual property cases in general that the rights-holder should not be required to produce evidence of every possible infringement in the liability hearing but merely to bring forward sufficient examples so that the case of infringement can be dealt with in a

cost effective and expeditious way. To require the claimant to specify all infringements and to introduce them into the liability trial would be wasteful, time consuming and a recipe for delay.

*25 It follows that I consider that the practice to which Jacob LJ referred in the **Unilin** case of allowing further infringements, once infringement is established, to be considered at the damages inquiry is entirely in accordance with the aims of the IPEC, in particular in accordance with the aims of simplifying trials of infringement, shortening proceedings and rendering them cost effective.*

10. **AP Racing** was an appeal from the IPEC, hence Henry Carr J's reference in paragraph [25] of the above. However Henry Carr J was clear that the rules in IPEC were no exception to the general law: see paragraph [28] of his judgment. I also note that the result in that case was that Henry Carr J permitted 7 new products into the damages inquiry which had not been considered at the liability stage.

11. I should mention two other cases in this context. The first is **Fabio Perini v LPC**, Norris J, [2012] EWHC 911 (Ch). In that case the Claimant sought to raise two issues at the quantum phase which had not been resolved at the liability phase. Norris J held that the first issue (an allegation that an offer was made in the UK to supply in the UK) was *res judicata* between the Claimant and a company called PCMC, which had been a party to the liability action, and could not be so raised: see [11], [20]-[25]. The other issue was whether a similar allegation could be made about a supply, or offer to supply, made in the UK to a company called Georgia-Pacific which had not been a party to the liability action. It was accepted by the Defendants that a different allegation based on a common design between Georgia-Pacific and PCMC could be pursued on the inquiry, but it was not accepted that the new allegations relating to supply could be so pursued.

12. As regards the new allegations relating to supply, Norris J said this (at [47]):

"The question before me is whether, although in some circumstances the claimant is allowed as a matter of convenience to claim relief for types of alleged infringement not ruled on by the trial court, he is entitled (in the teeth of opposition) to do so in respect of a type of infringement (a supply case) on which he failed at trial as regards the selected defendant, but now seeks to assert in respect of a third party."

13. In that context, Norris J concluded as follows as regards the Court's approach to new allegations generally (at [49]):

"... There are occasions in which a new cause of action can be raised and adjudicated upon in the inquiry. The question is always one of fairness and convenience. The question of introducing new causes of action into the inquiry should be specifically raised and adjudicated upon by the Court at the outset of the inquiry (either upon a focused application or at the first directions hearing). That was not done in the present case. I hold that this inquiry is limited to PCMC's liability as joint tortfeasor in respect of Georgia-Pacific's user of the process specified in patent 929"

14. See also [50], where Norris J applied this approach to the facts of the case before him as follows:

“... It is just and convenient to extend the inquiry to other cases of infringement by use for which PCMC is jointly liable (even if technically this involves introducing new causes of action) because these involve the same type of infringement as that on which the Court has ruled. Perini pleaded but failed to prove a cause of action for infringement by supply against PCMC. Having pleaded and failed to prove that type of infringement (which involved findings about the place of supply) against PCMC in respect of the supply to LPC it is not in my judgment convenient or just to permit Perini to go outside the terms of the inquiry which it sought and obtained, and to introduce a substantively new cause of action, reopening by reference to a different customer (who is not a party) the supply case which failed in respect of LPC.”

15. The other case is **Warner Music and Sony Music Entertainment v Tunein Inc** [2019] EWHC 3374 (Ch) where Birss J, as he then was, said at [11]:

“In terms of the inquiry as to damages, it is a commonplace in intellectual property disputes that liability is decided by reference to particular instances of the activity alleged to infringe (i.e. samples) but that the scope of the damages inquiry is general. Now if, on the inquiry, instances emerge which raise issues which the main trial has not determined, then there are various ways forward. Experience shows that these problems are usually readily resolved by case management in the inquiry. It is not the law that detailed issues of liability not decided at the liability trial cannot be decided in the inquiry; the test is one of justice and convenience (see Norris J in **Fabio Perini v LPC** [2012] EWHC 911 (Ch) at paragraphs 44-51). If it is really necessary, then a distinct second liability trial could be conducted. In the present case I can see no justification at all for limiting the inquiry to the sample stations.”

16. The significance of the above analysis is that before me there was a dispute between the parties as to what the relevant legal test should be when considering whether to allow allegations which for one reason or another were not resolved at the liability trial to be raised at the quantum stage of the same case. Lufthansa submitted that a party which was successful on liability could rely on anything which was not prevented as being either *res judicata* or an abuse of process. The Defendants agreed that such a party could not rely on anything which could be prevented under one or other of these grounds, but submitted that otherwise the test was whether it was “*just and convenient*” to extend the account to cover new issues.

17. I agree with the Defendants, since this is the test applied by Norris J in **Fabio Perini** and cited with approval by Birss J in **Warner Music**. However, I accept that what is “*just and convenient*” will be sensitive to the facts of any given case. In **Fabio Perini** itself, it was not just or convenient to introduce the new supply case.

18. Counsel for Lufthansa had another point about what was “*just and convenient*” based on what Pumfrey J, as he then was, said in **Spring Form v Toy Brokers** [2002] FSR 17. In that case one issue related to the position of successive infringers in a distribution chain relating to a single infringing article: see [29]-[33]. Pumfrey J pointed out that in an inquiry as to damages, it may not make any difference which Defendant is being sued since the damages will be the same in each case (see [31]) whereas on an account of profits each Defendant will be liable for his own profits (see [33]).

19. The present case is not one involving a chain of successive infringers but it does involve a situation where each Defendant plays a different role. Counsel for Lufthansa submitted that it would not be “just and convenient” if, in a case such as the present, Claimants were routinely (a) required to establish precisely which acts of infringement had been carried out by which Defendant at a trial of liability, and (b) could not raise such matters at the quantum hearing. First, this would add considerably to the volume of work required at the relevant liability trial whilst being itself irrelevant to liability. Secondly, this volume of work would all be wasted if the Claimant subsequently elected for damages, since it would only matter to accounts of profits (which he submitted were relatively rare), and even there only where Defendants raised the sort of points which the present Defendants have raised here. Counsel for the Defendants had no convincing answer to this other than to say that the facts of this case were in his view very unusual. I accept Lufthansa’s submission.

20. Counsel for the Defendants suggested that when deciding what was just and convenient, I should bear in mind the power to strike out a case under CPR Part 3.4(2). It seems to me that the power to strike out is a distinct one which raises very different considerations, and I will not consider this comparison further.

Analysis

21. I will ignore the effect of Morgan J’s Order following trial for the moment, since that is the next issue. The relevant facts are as follows.

22. First, it should be noted that the reason why the infringement allegations are complicated generally is because the product is a system consisting of 3 main components (the in seat power supply, the socket, and the cabling) and the different Defendants do different things with respect to that system. Morgan J’s findings are at [275]- [286] of the judgment. At the risk of oversimplification, and in brief: Astronics manufactures the components (and supplies some of them); Panasonic supplies components of the system with the knowledge and intent that they will be assembled into the system in the UK; and Safran is a seat manufacturer which installs the components into seats for an aircraft.

23. Secondly there is no suggestion that any of the infringement allegations which Lufthansa seeks to introduce are unarguable. Indeed, all of them except one were addressed in pleadings for the liability trial and there was no application for strike out or summary judgment then.

24. Thirdly, the way in which the infringement allegations were treated both before and during the trial needs explanation.

- a) At the first PTR, before Nugee J on 14 January 2020, it was ordered that certain allegations, including one of joint tortfeasance between Astronics and Panasonic, be adjourned with liberty to apply: see paragraph 7(b) of that order.
- b) At a second PTR, before Marcus Smith J on 22 May 2020, a List of Issues for trial was determined: see Schedule B of the resulting PTR Order. The background to this order was that the trial was proceeding during the Covid pandemic and the parties wished to streamline matters accordingly. Paragraph [5] related to direct infringement by Astronics or Panasonic on (a) a “kit of parts” and (b) “equivalence” basis. Paragraph 6 related to indirect infringement by Safran and Panasonic on the basis of certain

knowledge (“PPD knowledge”). All other issues in the case, including all other allegations of infringement then live on the pleadings, were adjourned with liberty to apply: see paragraph [7] of the main order.

- c) I was also shown a number of letters between the parties showing how these orders came to be made. I do not think that correspondence adds much to the orders.
- d) During the trial, Lufthansa pursued the three allegations of infringement on which it eventually succeeded (one of which applied to each Defendant) with vigour. It did not pursue its additional allegations with the same degree of vigour. For instance Lufthansa described issues 5(a) and (b) as “*somewhat moot*” with respect to Astronics and dropped issue 6(a) with respect to Safran in opening. However Lufthansa did pursue issues 5(a), (b), and 6(b) against Panasonic, both by adducing expert evidence of its own and cross-examining the Defendants’ expert on equivalence.

25. In the final judgment, the Judge dealt with each of the 3 allegations of infringement upon which Lufthansa succeeded (see again [272]-[286]) and concluded as follows:

“286. Accordingly, I conclude that Panasonic is liable by reason of its common design to do acts which amount to an infringement within section 60(1)(a). This conclusion means that it is not necessary in this case to consider the further arguments which the Claimant has put forward. In his closing submissions, Mr Cuddigan invited me to decide the case against Panasonic on this basis and not to deal with the other arguments. I agree that I ought not to deal with the other arguments. A decision on those points is not necessary in this case. Some of the points raised are not straightforward and are better left for decision in a case where they need to be addressed.

...

The overall result

289. I have held that the Patent was valid and was infringed by all three Defendants.”

26. Lufthansa did not complain to the Judge about this approach, either after final judgment or when receiving the earlier draft which contained a similar passage.

27. Fourthly there was a debate before me about how the unresolved infringement issues would be tried if I permitted them to be raised on the account. The main point is that there had been some evidence and cross-examination already, as I said above, and there was a dispute between the parties as to whether any of this material could be used or whether more evidence was required.

28. There was also a complaint by Lufthansa that the Defendants themselves wanted to introduce new infringement issues into the account for their own purposes.

Conclusion on the first question

29. I have set out the factual background in some detail since both sides spent considerable time on it. However it seems to me that the actual decision is relatively simple. Leaving the effect of the final Order to one side, I can see no reason why it would be either just or convenient to prevent Lufthansa from raising any of the further allegations of

infringement which it seeks to raise on the account. In fact reasons of justice and convenience point the other way.

- 1) The above account makes it clear that Lufthansa (and indeed the Defendants) were concerned to ensure that the liability trial was as efficient as possible having regard to the pandemic, and that included stripping out matters which did not need to be decided at that stage. That was a reasonable approach for both parties to adopt.
- 2) It was never suggested to Lufthansa that by streamlining the case it would be forever after prevented from raising such matters. Yet that is the result for which the Defendants contend.
- 3) It is true that Lufthansa did not complain to the Judge about his comments in paragraph [286] when receiving the judgment in draft. However I do not read the Judge as saying there that Lufthansa was prevented from raising the other arguments at the stage of quantum. The Judge was not dealing with quantum at all. It follows that Lufthansa had no reason to complain about that paragraph. Whether the Judge dealt with this topic separately later is a matter which I will consider below.
- 4) Furthermore Lufthansa actually won on all the infringement issues at the trial. This is not a case like **Fabio Perini** where a party lost on an issue (supply) then sought to raise it again.
- 5) I also agree that if Lufthansa is prevented from raising new allegations of infringement, the undesirable result is likely to be a significant and in my view pointless increase in costs for the liability phase of split trials, at least in patent cases. This would happen because Claimants would have to raise such allegations at the liability trial or forever be prevented from raising them in relation to quantum, even where such allegations did not matter to liability but at most might make a difference to quantum.
- 6) It is not as if the allegations relate to new parties or new products. They relate to the same parties and the same product (the EmPower System). In any event, new products were admitted into the inquiry in **AP Racing**.
- 7) I do not think that a fair trial will be impossible merely because some of the issues have been addressed in evidence already. In any event I was told by Counsel for Lufthansa that the amount of evidence was only a few pages of transcript. How the judge hearing the account deals with the existing evidence is a matter for him or her, but it seems to be primarily a matter of costs and practicality.
- 8) The fact that the Defendants wish to raise some infringement issues on the account also supports the view that Lufthansa should be allowed to raise other infringement issues, even though these are not the same issues.
- 9) I do not overlook the fact that Lufthansa has already been compensated in costs for the time spent on the unresolved issues: see further below. However I cannot see that anything turns on this. Those costs were incurred because the Defendants disputed infringement in the first place.

30. Hence I will permit all of the additional allegations to be raised on the account, subject to (1) the next point which only applies to the “adjourned issues”, (2) the point on the issue which was not previously alleged, which I will address at the end.

Is Lufthansa specifically prevented from advancing the Adjourned Issues by reason of the Order made by Morgan J following trial?

Legal context

31. The relevant principles relating to interpretation of a Court Order are not in dispute. They were summarised by Flaux LJ, as he then was, with whom Lewison and Gross LJJ agreed in **Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd & Ors** [2017] EWCA Civ 1525 at [41]-[42]. In these paragraphs Flaux LJ summarised the then recent Supreme Court judgment in **JSC BTA Bank v Ablyazov (No. 10)** [2015] UKSC 64; [2015] 1 WLR 475 (“JCT”).

- (1) “The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of [JCT]).
- (2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of [JCT], approving *inter alia* the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in **Federal Bank of the Middle East v Hadkinson** [2000] 1 WLR 1695).
- (3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]-[26] of [JCT], again citing with approval what Mummery LJ said in **Hadkinson**).”

32. Flaux LJ then went on as follows:

“As Mr Joseph QC correctly submitted, those principles confirm a consistent line of authority that Court Orders are to be construed objectively and in the context in which they are made, including the reasons given by the Court for making the Order at the time that it was made. That point was made clearly by Lord Sumption giving the judgment of the Privy Council in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 at [13]:

“...the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation

of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.”

33. Subsequent cases have added that caution should be exercised in using the parties’ submissions as a guide to interpretation of a Court Order: see **SDI Retail Services v Rangers Football Club** [2021] EWCA Civ 790, **Banca Generali spa v CFE (Suisse) SA** [2023] EWHC 323 (Ch).

Analysis

34. Counsel for Lufthansa described this drafting of the Judge’s Order as “*slightly infelicitous ... done at double time without a hearing*”. Even so, the starting point is what it says. Whilst it is important to bear in mind the Order as a whole, including paragraphs [1]-[5] which make various findings about infringement of claims 1 to 3 of the patent, in practice the parties focussed on the following:

UPON the Orders of Nugee J dated 14 January 2020 and of Marcus Smith J dated 22 May 2020 adjourning certain issues of liability in both HP-2017- 000085 and HP-2019-000019 (the “Adjourned Issues”)

AND UPON the issues of liability other than the Adjourned Issues having been tried before Morgan J on 22-26 June and 1 July 2020

AND UPON the Court handing down Judgment on Wednesday 22 July 2020

AND UPON the Adjourned Issues no longer needing to be determined in the light of the Court’s Judgment

...

8. There shall be an inquiry in both HP-2017-000085 and HP-2019-000019 as to the damages suffered by the Claimant or, at the Claimant’s option, an account of the profits accruing to the Defendants and each of them, by reason of the Defendants’ acts of infringement of the Patent (“the Inquiry/Account”).

...

11. The parties have liberty to apply for further directions on the Inquiry/Account.

35. As noted above the Judge ordered that the Defendants should pay Lufthansa’s costs of the Adjourned Issues, which he took into account as regards paragraph [12] of his order. This was because Lufthansa had incurred some costs on the Adjourned Issues at the liability phase and they wanted these costs paid whatever happened thereafter.

36. Counsel for Lufthansa pointed out that there was no order refusing liberty to apply to raise the Adjourned Issues on an inquiry or account. That is literally correct, since paragraph [11] contains no such language. However the first recital identifies the Adjourned Issues and the fourth recital says in terms “*UPON the Adjourned Issues no longer needing to be determined in the light of the Court’s Judgment*”. To my mind this implies there is no such

liberty in paragraph [11], since none would be needed for issues which no longer needed to be determined. Paragraph [11] still makes sense, since it is merely setting up a liberty to apply for all other directions on the inquiry or account.

37. The Defendants submitted that the combination of paragraph [11] and the fourth recital discharged the liberty to apply which had been granted previously in respect of adjourned issues. It seems to me that this is no more than a different route to the same conclusion as I have just reached.

38. As noted above the Judge's reasons are admissible to construe the Order. The parties also agreed that I could properly consider the draft marked-up order before the Judge, which is what the Judge was considering in those reasons. The two main differences were as regards the fourth recital set out above and paragraph [11]. In the draft before the Judge, these were as follows:

[Lufthansa: AND UPON the Adjourned Issues having fallen away in light of the Court's Judgment

11. The parties have liberty to apply for further directions on the Inquiry/Account and [Lufthansa: (insofar as may be necessary following any appeal)] in relation to determination of the Adjourned Issues.

39. That is to say, Lufthansa wanted a recital saying that the Adjourned Issues had "fallen away". There was then agreed wording for paragraph [11], save for the words ""insofar as may be necessary following any appeal" which Lufthansa wanted inserted. Curiously it seems that the existence of a liberty to apply "in relation to determination of the Adjourned Issues" was at that stage not disputed as between the parties.

40. The Judge's judgment says as follows, my emphasis:

The form of the order

2. The form of the order is largely agreed and I will make an order as drafted in relation to agreed matters. The order I will make will also reflect the findings contained in this judgment on the issue as to costs and the application by the Defendants for permission to appeal. The only other matter which I need to refer to is that the Claimant wishes the order to provide for there to be permission to apply in relation to the determination of what are defined in the order as "the Adjourned Issues" if that should prove to be necessary following a successful appeal by the Defendants. It is not said by the Claimant that, absent a successful appeal, it might wish to seek a determination of the Adjourned Issues in order to allow it to argue for a wider remedy than the remedy it will be entitled to on the basis of the findings as to infringement in the first judgment.

3. I consider that it is not appropriate for the order to provide for permission to apply in relation to the Adjourned Issues following a successful appeal by the Defendants. The order I will make will record the position following my decision at first instance. In accordance with that decision the Adjourned Issues do not need to be determined. If there were to be a successful appeal against my order, then the Court of Appeal can

be asked to make whatever order is appropriate to give effect to the consequences of its judgment on appeal. It is not for me to include anything in the current order providing for what those consequences might be.

...

12. The Defendants say that the Claimant should not have its costs of the Adjourned Issues because those issues have not been decided. They are not issues on which the Claimant has succeeded and the Defendants have failed. The Defendants also say that the Claimant has not abandoned the Adjourned Issues so that they have not fallen away so that the Claimant wishes to keep the Adjourned Issues alive in case it needs to rely on them later.

13. I will deal first with the suggestion that the Claimant has not abandoned the Adjourned Issues but wishes to keep them alive. That is not my understanding of the Claimant's position. I will make an order to the effect that the Adjourned Issues do not need to be determined. Whatever the position might be following an appeal will not affect the order as to costs that it is appropriate to make following judgment at first instance. In any case, as I have already explained, I do not see how the Adjourned Issues will become material following an appeal in relation to the validity of the Patent, if they are no longer material at first instance.

41. By “a wider remedy than the remedy it will be entitled to on the basis of the findings as to infringement in the first judgment” the Judge must in my view have meant a wider remedy than those remedies referred to in his Order. Paragraphs [1]-[5] of that Order are the only paragraphs dealing with the scope of infringement and these are declaratory remedies which mirror the particular findings of infringement made at the trial. There was no injunction because the patent had by then expired.

42. In the above passage the Judge’s primary focus was plainly on the possibility of appeal by the Defendants. However the Judge still concluded that:

- a) absent a successful appeal Lufthansa did not want a determination of the Adjourned Issues in order to allow it to argue for a wider remedy than the Judge was prepared to (and did) grant, and
- b) Lufthansa did not want to keep the Adjourned Issues alive.

43. This is why the Judge ruled that the Adjourned Issues no longer needed to be determined and why he crossed out the words “*in relation to determination of the Adjourned Issues*”. In order words, my conclusion as to what the Judge’s Order implied is a correct one.

44. Counsel for Lufthansa submitted that Lufthansa is not in fact arguing for a “wider remedy” (see paragraph 2) because its existing remedy already allows it to raise the Adjourned Issues. In my judgment this is not just a circular argument but is contrary to the Judge’s Order and more particularly is contrary to his reasons for that Order.

45. In addition, Lufthansa at no point attempted to correct the Judge as to the above conclusions about Lufthansa’s position. I did not receive any evidence from Lufthansa saying why not. If the Judge’s conclusions about Lufthansa’s position were wrong, it is

difficult to see why Lufthansa did not simply say so. I accept that Lufthansa's leading counsel was not available at the time the order was made, but Lufthansa did not contact the Judge at any time.

46. Counsel for Lufthansa also accused the Defendants of opportunism. Whilst this may be so, if it is a point which they are entitled to take then the complaint lacks substance.

47. I was invited to go beyond the above materials into the evidence and submissions put before the Judge. Bearing in mind **SDI Retail Services v Rangers Football Club** I consider this material to be at best an uncertain guide to construction. As soon as I go beyond the Judge's own reasoning as set out above, it seems to me I have to start guessing as to what the Judge made of this or that submission. In any event I saw nothing in the parties' submissions which caused me to doubt the conclusions I reached from the materials set out above.

48. Counsel for Lufthansa also submitted that it would be very unfair on his clients if the Order was construed in the way proposed by the Defendants, hence I should not do so. It seems to me that this effectively invites me to consider whether the Order *should* have been granted. That approach is not open to me on the law and I decline to do so.

Conclusion on the second question

49. I now draw the above together.

- a) It seems to me, for the reasons I have given, that the Order does prevent Lufthansa raising the Adjoined Issues on the account. Furthermore the Order gives effect to the Judge's intention, as set out in his reasons.
- b) Therefore if Lufthansa wants to raise the Adjoined Issues, it needs to appeal against Morgan J's Order.

The issue which was not previously alleged

50. The way in which this arises is complicated.

51. Paragraph 3(e) of Lufthansa's Points of Claim refers to Morgan J's finding that Panasonic was liable for infringement of claim 1 of the patent pursuant to a common design with its (ie Panasonic's) customers. There is no problem with this.

52. As I have already mentioned above, an allegation of joint liability between Panasonic and Astronics was advanced during the liability trial. This was done at paragraph 8A of the Re-Amended Particulars of Infringement in action HP-2017-000085. This issue was then adjourned pursuant to paragraph 7(b) of the Order of Nugee J dated 14 January 2020 and remained so pursuant to paragraph 7 of the Order of Marcus Smith J dated 22 May 2020. Hence it is an "Adjoined Issue" and I have concluded that Lufthansa is prevented from raising such issues.

53. The new point which Lufthansa seek to introduce, and to which the Defendants object, is as follows (my underlining):

13B. For the avoidance of doubt, it is Lufthansa's case that the joint liability between Astronics and Panasonic results in Astronics being jointly liable in respect of the judge's finding recorded in paragraph 3(e) above.

54. There is no dispute that the issue which Lufthansa now seeks to raise “for the avoidance of doubt” is new in the sense that it was not raised during the liability stage. Lufthansa described it as “*a claim that Astronics is jointly liable in respect of Morgan J’s finding that Panasonic was itself liable pursuant to a common design with its customers*”. Furthermore, had it not been for the effect of Morgan J’s Order on the Adjourned Issues I would have seen no reason not to allow this amendment as being just and convenient.

55. However, Lufthansa’s problem is the words I have underlined. As the Defendants correctly submitted, the reason why proposed paragraph 13B cannot be supported as pleaded is not because the infringement to which it is directed is an Adjourned Issue (it is not) but because the reasoning pleaded as support for it relies upon an Adjourned Issue, and I have held that Lufthansa are prevented from raising such Adjourned Issues.

56. I therefore rule that proposed paragraph 13B cannot be raised on the account, and will accordingly disallow this proposed amendment.

57. Lufthansa hinted that paragraph 13B might rely on something broader than the joint liability issue between Astronics and Panasonic which had been adjourned, but did not explain what that broader allegation might be or where it was set out. In addition the Defendants pointed out, and Lufthansa did not dispute, that this suggestion is contrary to Lufthansa’s evidence in support of this proposed amendment. If paragraph 13B does rely on something broader than the Adjourned Issue, which I do not accept, it is unclear what it means and I would have ruled that it cannot be raised on the account for this reason.

Overall

58. In short, I find for Lufthansa on the first question and for the Defendants on the second and third questions. I will hear counsel as to the form of Order I should make.

Annex - the Defendants' table of liability issues

§3 Lufthansa's Order (as explained by Jones Day in correspondence)	Trial Infringement Issues	Determined Issues	Abandoned Issues	Adjourned Issues	Not previously alleged
Panasonic	1				
(1) Importation/disposal of components - Kit of Parts s60(1)(a)	2				
(2) Importation/disposal of components - Equivalence s60(1)(a)	3				
(3) Supply of components (PPD Knowledge) s60(2)	4				
(4) Joint liability – customers' assembly of Systems s60	5				
(5) Supply of components s60(2)					
Safran					
(6) Assembly of Systems s60(1)(a)	6				
(7) Disposal of Systems incorporated in seats s60(1)(a)					
Astronics					
(8) Importation/disposal of components - Kit of Parts s60(1)(a)	7				
(9) Importation/disposal of components - Equivalence s60(1)(a)	8				

(10) Supply of components s60(2)		9			
(11) Joint liability with PAC: (1)-(3) and (5)					
(12) Joint liability with PAC: (4)					