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Case Nos: CA-2023-001045, 001189

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY**  
**COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD),**  
**PATENTS COURT**

**Mr Justice Morgan and Recorder Douglas Campbell KC**  
**[2020] EWHC 2296 (Pat) and [2023] EWHC 1136 (Pat)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 November 2023

**Before :**

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE ARNOLD**  
and  
**LORD JUSTICE PHILLIPS**

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**Between :**

**LUFTHANSA TECHNIK AG**

**Claimant/  
Appellant**

**- and -**

**(1) ASTRONICS ADVANCED ELECTRONIC SYSTEMS**  
**(2) SAFRAN SEATS GB LIMITED**  
**(3) PANASONIC AVIONICS CORPORATION**

**Defendants/  
Respondents**

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**Hugo Cuddigan KC and Christopher Hall** (instructed by **Jones Day**) for the **Appellant**  
**Tom Mitcheson KC, Miles Copeland and Alice Hart** (instructed by **Hogan Lovells**  
**International and Pinsent Masons LLP**) for the **Respondents**

Hearing date : 31 October 2023  
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**Approved Judgment**

## **Lord Justice Arnold:**

### Introduction

1. This is an application by the Claimant (“Lufthansa”) for permission to appeal against two orders: an order made by Recorder Douglas Campbell KC sitting as a Deputy High Court Judge on 5 June 2023 and an order made by Morgan J dated 22 July 2020 but in fact made on 21 August 2020. Recorder Campbell held that, on the true interpretation of Morgan J’s order, Lufthansa was precluded from advancing certain claims which had previously been adjourned (referred to as “the Adjourned Issues”) as part of an account of profits directed by Morgan J. The applications are alternative routes to achieving Lufthansa’s goal of being able to pursue those claims on the account. The second application is long out of time, and so Lufthansa requires relief from sanction in order to make it. Since it was unclear from the papers whether permission to appeal should be granted, I directed an oral hearing of the applications with the appeals to follow if permission was granted. In the event we heard full argument from both sides on all issues.

### Split trials in patent cases

2. Before proceeding any further, it will be helpful if I explain that it is conventional for a patentee alleging infringement of its patent by a defendant to claim as relief for infringement at its election either an inquiry as to the damages it has suffered by reason of the defendant’s infringing acts or an account of the profits made by the defendant as a result of those acts. Absent an order to the contrary, which has very seldom been made, this leads to a split trial with liability being tried first and quantum second. This procedure has the enormous advantage that it is not necessary to undertake the effort and expense of investigating quantum if the court decides that the patent has not been infringed. If successful in establishing liability, the patentee is entitled to some information from the defendant to enable the patentee to make an informed election between the two financial remedies: see this Court’s very recent judgment in another appeal involving some of the same parties: *Lufthansa Technik AG v Panasonic Avionics Corp* [2023] EWCA 1273.
3. It is well established that, on an inquiry as to damages or an account of profits, the patentee is in principle entitled to claim relief for types of alleged infringement which have not been the subject of determination in the judgment on liability. If such claims are made, and denied by the defendant, then the quantum phase of the proceedings may include those additional issues of liability: see *Unilin Beheer BV v Berry Floor NV* [2007] EWCA Civ 364, [2007] FSR 25 at [49] (Jacob LJ). I say “in principle” and “may include” because circumstances can exist which prevent a patentee from raising certain infringement claims during an inquiry or account. This may be because it is procedurally inapposite, and the better course would be for the patentee to bring fresh proceedings; or, more fundamentally, because it is not open to the patentee to advance the new infringement claims at all. The Defendants’ position is that the present case falls into the latter class.

### The proceedings

4. Lufthansa was the proprietor of European Patent (UK) No 0 881 145 (“the Patent”), which expired on 22 May 2018. The Patent concerns an apparatus that supplies a

voltage to a socket that can be used by aircraft passengers to power electrical devices such as laptops and mobile phones. The apparatus comprises a number of components and ensures that the voltage is only supplied to the socket if a plug is fully inserted and two contact pins are detected simultaneously.

5. Lufthansa commenced proceedings for infringement of the Patent against the First Defendant (“Astronics”) and the Second Defendant (“Safran”) on 28 December 2017 and against the Third Defendant (“Panasonic”) on 13 May 2019. The allegation of infringement concerned three components (referred to as “the Primary Components”) which formed part of a system known as an EmPower System. The Defendants are independent of each other, and their roles in the alleged infringements varied: Astronics manufactured the Primary Components in the USA; Panasonic is a US supplier of in-flight entertainment (“IFE”) systems, some of which incorporated the Primary Components; and Safran is a UK manufacturer of aircraft seats, into some of which the Primary Components were installed and connected together by Safran. Astronics made some sales of Primary Components direct to airlines into whose aircraft the EmPower System was fitted, and those airlines might direct that the Primary Components were delivered to seat manufacturers such as Safran for incorporation into seats that the airlines bought from the seat manufacturers. Astronics also made sales to IFE system suppliers such as Panasonic, which in turn sold their IFE systems to airlines. Again, the airlines might direct that the IFE systems, including the Primary Components, were delivered to seat manufacturers such as Safran.
6. The Adjourned Issues arose in two stages. The first stage began in October 2019 when Lufthansa applied to amend its Particulars of Infringement to introduce allegations of joint tortfeasance between Astronics and Safran and between Astronics and Panasonic and an allegation of continuing offers for sale of EmPower Systems falling within claim 2 of the Patent (referred to as “the bait-and-switch claim”). At that stage, the liability trial was listed for February 2020, and the Defendants’ solicitors expressed concern in a letter dated 24 October 2019 that the introduction of the joint tortfeasance issues might prejudice the trial date. They therefore proposed that “these issues would be more appropriately dealt with during any damages enquiry rather than as part of the trial in February 2020”.
7. The upshot was that the parties agreed that Lufthansa should have permission to amend its Particulars of Infringement, but its allegations of joint tortfeasance, together with the bait-and-switch claim, should be adjourned to any damages inquiry (or, impliedly, any account of profits).
8. Accordingly, on 14 January 2020 Nugee J (as he then was) made an order, paragraph 7 of which provided that those issues “be adjourned with liberty to apply”.
9. The trial was subsequently adjourned for other reasons and relisted to start in late June 2020. Preparation for the relisted trial was affected by the Covid-19 pandemic. On 7 May 2020 Lufthansa’s solicitors wrote to the defendants:

“We believe it would be sensible to limit the witnesses at trial to the 2 experts ... The factual issue of knowledge of the internal design of the product, which will require cross examination of the PPD fact witnesses can then be left to the

damages enquiry (if any, and if needed), along with the contributory infringement [actually joint tortfeasance] and continuing offers for sale arguments which were adjourned by Mr Justice Nugee's Order of 14 January 2020."

10. On 14 May 2020 the Defendants' solicitors replied:

"We agree that it is sensible to limit the witnesses at trial to the two expert witnesses ... only and adjourn any cross-examination of the remaining fact witnesses until any damages enquiry."
11. Accordingly, Marcus Smith J made an order on 22 May 2020, paragraph 7 of which provided that the trial would determine the issues set out in an agreed list of issues. All other issues in the case were "adjourned with liberty to apply".
12. The actions were tried together by Morgan J in June 2020. Morgan J was informed about the status of the Adjourned Issues, in particular by the Defendants in their written submissions as follows:

"Further issues concerning infringement – in relation to particular infringing acts that are alleged, and in relation to joint tortfeasorship between AES and PAC – have been adjourned to the financial relief action, should one take place."

"In any event, the issue of joint tortfeasorship is adjourned so that [it] will only arise on any inquiry or account in the event that Lufthansa establishes liability and starts an action for financial relief."
13. On 22 July 2020 Morgan J handed down his judgment on liability ([2020] EWHC 1968 (Pat), "the Liability Judgment"). He rejected the Defendants' challenges to the validity of the Patent (and the Defendants' appeal against that aspect of his judgment was dismissed by this Court on 14 January 2022: [2022] EWCA Civ 20). He also held that each Defendant had committed certain acts of infringement. Astronics was found to be liable for indirect infringement under section 60(2) of the Patents Act 1977 for acts of supplying the Primary Components of the EmPower System to customers in the UK. Safran was found to be liable for direct infringement under section 60(1)(a) of the 1977 Act for acts of making the EmPower System in the UK. Panasonic was held to be jointly liable for its customers' acts of direct infringement by making the EmPower System.
14. As Morgan J explained at [277] and [286], these conclusions made it unnecessary for Morgan J to determine certain other infringement allegations which Lufthansa had pursued at trial, and in particular allegations that Panasonic had infringed the Patent either by virtue of the doctrine of equivalents or by supplying a "kit of parts" or pursuant to section 60(2) by virtue of its admitted knowledge of the commercial destiny of the IFEs (as opposed to knowledge of the technical function of the Primary Components, which it denied). These allegations are referred to as "the Unresolved Issues".

Morgan J's order

15. Following the Liability Judgment there was a large measure of agreement between the parties as to the consequential orders which should be made, but certain areas of dispute. Apart from the question of permission to appeal, the principal issue concerned costs, but there was also an issue concerning the wording of the order with respect to the Adjourned Issues. As I will explain, these issues were inter-related.
16. So far as costs were concerned, it was agreed that Lufthansa was the overall winner and that Lufthansa's costs recovery should be reduced by 2% to reflect its failure on an argument concerning claim 7. There was no dispute that Lufthansa should recover its costs of the Unresolved Issues. The dispute was as to the costs of the Adjourned Issues. Lufthansa contended that it should recover its costs of those issues (estimated at about £50,000), whereas the Defendants disputed that.
17. As to the wording of the order, Lufthansa proposed that the order should include a fourth recital stating "AND UPON the Adjourned Issues having fallen away in the light of the Court's Judgment", but the Defendants resisted this. In addition, there was a dispute as to the wording of paragraph 11. Lufthansa contended that this should include the additional wording underlined below, but the Defendants opposed this:

"The parties have liberty to apply for further directions on the Inquiry/Account and (insofar as may be necessary following any appeal) in relation to the determination of the Adjourned Issues."
18. Neither party made any formal application in respect of the Adjourned Issues pursuant to the liberties to apply contained in the orders of Nugee J and Marcus Smith J. Understandably, both parties proceeded on the basis that it was sufficient to raise these issues informally before the court.
19. The parties exchanged and filed evidence from their solicitors on the costs issue on 28 July 2020. Alastair McCulloch, on behalf of Lufthansa, said in paragraphs 4 and 5 of his seventh witness statement that "the Adjourned Issues simply represented different ways of running the infringement case" and that, in the light of the Court's finding that all three Defendants had infringed the Patent, "those Adjourned Issues are no longer necessary and accordingly have fallen away (see the fourth recital proposed by Lufthansa)". He went on to explain what each of the Adjourned Issues was and how it had arisen. In paragraph 18 he said in respect of each of the Adjourned Issues that, given what had happened, it "was no longer needed" or "was not needed".
20. Stephen Bennett, on behalf of the Defendants, said in paragraph 16 of his third witness statement that the Adjourned Issues "were the Claimant's back-up arguments in case it lost on the case that was run at trial" which had been "introduced as the Claimant evidently had doubts about the primary case and wanted further bites at the cherry". He went on to say that the Defendants objected to paying Lufthansa "for its over-engineering of the case".
21. The parties exchanged and filed written submissions on the form of order on 31 July 2020. By this stage the parties had cooperated to produce a composite draft order setting out agreed wording in black text, the wording proposed by Lufthansa

discussed in paragraph 17 above in red text and the wording proposed by the Defendants in blue text. Paragraph 12 of the composite draft provided (with the Defendants' wording underlined):

“The Defendants shall pay the Claimant 98% of its costs in both HP-2017-000085 and HP-2019-000019, save as already provided for by court order (and save for its costs of the Adjoined Issues), together with interest at the rate of 1.5% from the date on which those costs were paid by the Claimant, such costs to be assessed on the standard basis if not agree.”

22. Lufthansa's submissions on the costs issue included the following statements with regard to the Adjoined Issues: “for reasons of procedural efficiency they were put to one side unless and until they became necessary to resolve. Following Judgment, however, it is no longer necessary to resolve them” (paragraph 4); they stood in the same position as the Unresolved Issues in that “it has similarly not been necessary to resolve them in order to determine liability” (paragraph 11); they were “each alternative ways of putting the infringement case to address the various defences raised” (paragraph 13): there was an analogy with preliminary issues and summary judgment decisions that had the effect of terminating the whole action, when the usual order was that the defendant would get all its costs of the action “including the points of ... defence that will never be decided” (paragraph 15); given that the Adjoined Issues “no longer need to be decided”, it was not either in the parties' interests or the court's interest “to try to resolve where the merits on the Adjoined Issues might lie purely to determine the incidence of costs” (paragraph 16); and the Defendants' proposal would mean that the costs of the Adjoined Issues “are never revisited”, whereas the court deciding the matter now would not prejudice the Defendants in the event of a successful appeal (paragraphs 17-18).
23. With respect to the fourth recital it proposed, Lufthansa said that “we understand it is common ground that the Adjoined Issues no longer need to be decided” (paragraph 29) and that, given the judge's findings of infringement, “these alternative infringement arguments fall away” (paragraph 30). As for paragraph 11, Lufthansa explained that it sought “the inclusion of the red text ‘insofar as may be necessary following any appeal’ because, for the reasons discussed above, unless an appeal is successful the Adjoined Issues do not need to be decided” (paragraph 39).
24. The Defendants' submissions on the costs issue included the following statements about the Adjoined Issues: “the issues have not really fallen away at all – the fallacy in that suggestion is evidenced by the fact that Lufthansa has not felt able to indicate that it is giving up pursuing the Adjoined Issues. They are to be kept up Lufthansa's sleeve” (paragraph 9); “Lufthansa wants its costs now of issues which have not fallen away, but which Lufthansa seeks to keep in reserve” (paragraph 13); “That being so, it is plainly inappropriate to make an award of costs. The Court has not heard these issues, and Lufthansa has not abandoned them. So they may be heard in future, and Lufthansa may win on them or lose” (paragraph 14); and “Those issues have not yet been determined for Lufthansa and could yet be determined against Lufthansa and so no costs award can properly be made now in respect of them” (paragraph 16).

25. The Defendants' submissions did not address the dispute concerning the fourth recital and paragraph 11 of the draft order. The Defendants' submissions did seek permission to appeal, but only in relation to the validity of the Patent.
26. On the face of it, the effect of paragraph 12 of the draft order as proposed by the Defendants if read in isolation would have been that each side bore their own costs of the Adjoined Issues in any event. When read together with paragraph 11 in the Defendants' version, however, it becomes apparent that the intended effect of the Defendants' proposed order was that the incidence of the costs of the Adjoined Issues would only fall to be decided once those issues had been determined following an application for their determination under paragraph 11. Absent any such determination, the costs would lie where they fell.
27. On 21 August 2020 Morgan J made his order and handed down a written judgment explaining his reasons for making that order ([2020] EWHC 2296 (Pat), "the Relief Judgment").
28. The order recited the orders of Nugee J and Marcus Smith J adjourning the Adjoined Issues, the trial of the other issues and the handing down of the Liability Judgment. It included declarations reflecting the judge's findings on infringement. Paragraph 8 directed an inquiry as to damages or, at Lufthansa's election, an account of profits. Paragraph 10 required the Defendants to provide information to enable Lufthansa to make that election. Paragraph 12 required the Defendants to pay Lufthansa 98% of its costs without limitation i.e. including the costs of the Adjoined Issues. The fourth recital and paragraph 11 were in the following terms:

"AND UPON the Adjoined Issues no longer needing to be determined in the light of the Court's judgment

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

29. In the Relief Judgment Morgan J explained his reasons for adopting those formulations of the fourth recital and paragraph 11 as follows:

"2. ... 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 Adjoined 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 Adjoined 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 Adjoined 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 Adjoined 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. ...

4. In any case, I do not see how a successful appeal by the Defendants would make it appropriate to determine the Adjoined Issues. The Grounds of Appeal which have been put forward by the Defendants challenge the validity of the Patent. ... There is no separate appeal as to infringement if any claim in the Patent were held to be valid.”
30. Morgan J explained his reasons for ordering the Defendants to pay the costs of the Adjoined Issues as follows:
- “13. I will deal first with the [Defendants’] suggestion that the Claimant has not abandoned the Adjoined 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 Adjoined 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 Adjoined Issues will become material following an appeal in relation to the validity of the Patent, if they are no longer material at first instance.
  14. As to the wider considerations relied upon by the Defendants, I consider that it is appropriate for the Claimant to recover the costs of the Adjoined Issues. Those issues were put forward as alternative ways in which the Claimant sought to establish that each Defendant had infringed the Patent. The Claimant established that each Defendant had indeed infringed the Patent although it was able to do so in a fairly straightforward way and without needing to rely on the Adjoined Issues. Overall, the Claimant succeeded and the Defendants failed on infringement. I consider that the just result is that the Claimant should recover all of its costs in relation to infringement and that those costs should include not only the costs incurred in relation to the arguments which succeeded but also in relation to arguments which did not need to be decided and in relation to the Adjoined Issues.”

#### The genesis of the application before Recorder Campbell

31. The Defendants gave disclosure as ordered by Morgan J on dates between 13 October 2020 and 17 November 2020. On 2 September 2022 Lufthansa elected for an account of profits and served its Points of Claim. On 27 October 2022 Bacon J made an order giving directions for the taking of the account. On 10 November 2022 Lufthansa served draft Amended Points of Claim. The effect of the proposed amendments was to advance as part of Lufthansa’s case on the account the infringement allegations which had given rise to the Adjoined Issues (except for the bait-and-switch claim) and the



Unresolved Issues and a new infringement allegation. On 24 November 2022 the Defendants objected to the proposed amendments, arguing among other things that Morgan J's order precluded Lufthansa from pursuing the Adjourned Issues. On 9 December 2022 the Defendants served their Points of Defence. On 31 January 2023 Lufthansa applied for permission to amend its Points of Claim. The Defendants opposed the application. The application came before Recorder Campbell on 27 April 2023.

### Recorder Campbell's judgment

32. Recorder Campbell held in his judgment dated 12 May 2023 ([2023] EWHC 1136 (Pat)) that Lufthansa was entitled to raise the Unresolved Issues on the account, and accordingly granted Lufthansa permission to make the relevant amendments to the Points of Claim. There is no challenge by the Defendants to that aspect of his decision.
33. Recorder Campbell held that the same conclusion applied to the Adjourned Issues unless (to quote from the heading to the relevant part of his judgment) "Lufthansa [was] specifically prevented from advancing the Adjourned Issues by reason of the Order made by Morgan J". He went on to hold that Morgan J's order did prevent Lufthansa from raising the Adjourned Issues on the account, and it followed that Lufthansa was also precluded from raising the new allegation since it depended on an Adjourned Issue. He therefore refused Lufthansa permission to make these amendments. His reasoning may be summarised as follows.
34. He noted that the principles concerning the interpretation of court orders were not in dispute. He cited the summary by Flaux LJ, with whom Lewison and Gross LJJ agreed, in *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525 at [41] of the judgment of Lord Clarke of Stone-cum-Ebony, with whom the other members of the Supreme Court agreed, in *JSC BTA Bank v Ablyazov (No. 10)* [2015] UKSC 64, [2015] 1 WLR 475 at [16]-[26]. The key parts of that summary are as follows:
  - "(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 ....
  - ...
  - (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 ..."
35. Recorder Campbell also cited Flaux LJ's judgment at [42], in which the latter cited the judgment of Lord Sumption on behalf of the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [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.”

36. Recorder Campbell’s analysis of Morgan J’s order proceeded in two stages. First, he considered the wording of the order, and in particular the fourth recital and paragraph 11:

“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.”

37. Secondly, he considered Morgan J’s reasons for making that order:

“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. ...

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.”
38. He expressed his conclusion at [49] as follows:
- “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 Adjourned 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 Adjourned Issues, it needs to appeal against Morgan J’s Order.”

Lufthansa’s application for permission to appeal against Recorder Campbell’s order

39. Lufthansa contends that Recorder Campbell made four errors in his reasoning. First, he failed to take into account the facts that the Adjourned Issues had been pleaded by Lufthansa during the liability phase of the proceedings and that it had not been suggested by the Defendants that the allegations did not have a real prospect of success. In those circumstances Lufthansa could only be precluded from advancing those allegations on the account by clear wording to that effect in Morgan J’s order, but there was no such wording. Secondly, the absence of a liberty to apply was not enough to preclude the Adjourned Issues being advanced on the account. Recorder Campbell was wrong in principle to derive any implication from the recital, but in any event the recital was not inconsistent with the Adjourned Issues being asserted on the account. Thirdly, Recorder Campbell had failed to take into account the fact that Nugee J and Marcus Smith J had previously granted liberties to apply in respect of the Adjourned Issues, and nothing in Morgan J’s order discharged those liberties. Fourthly, Morgan J’s reasoning in the Relief Judgment was concerned only with the issues which had been raised before him, and in any event was only an aid to interpretation and what mattered was the operative wording in the order.
40. In his well-constructed submissions in support of these contentions, counsel for Lufthansa relied in particular on two arguments. First, he pointed out that Morgan J had expressly left open the Unresolved Issues in the Liability Judgment, and Recorder Campbell had held that it was open to Lufthansa to advance those on the account. The Adjourned Issues had not been determined by Morgan J in the Liability Judgment either, and there was no proper basis for any different outcome with respect to those issues.
41. Secondly, he argued that it was important to distinguish between the liability and quantum phases of a patent infringement action. With the benefit of hindsight, it could be seen that neither the parties nor Morgan J had clearly done so in the debate over the form of order. In context, however, the discussion at that time had been about the liability phase and not the quantum phase. Accordingly, when one saw statements in the evidence, submissions and order about the Adjourned Issues “not [being] needed”,

“having fallen away” or “no longer needing to be determined”, those statements should be understood as referable to the liability stage, not the quantum stage.

42. It is convenient to address the supporting arguments before turning to the alleged errors on the part of Recorder Campbell. So far as the first is concerned, I do not accept that the Adjourned Issues and the Unresolved Issues stood in the same position as at 21 August 2020. The Unresolved Issues had been before Morgan J at trial, and had been argued, although in the event Morgan J had not found it necessary to determine them. Furthermore, there was no dispute between the parties as to the incidence of the costs of those issues. By contrast, the Adjourned Issues had not been before Morgan J at the trial, and had not been argued. Indeed, at least one of them required further oral evidence and fact finding for its determination. Furthermore, as noted above, the Adjourned Issues had been adjourned generally and, formally speaking, an application was required in order to pursue them. Nevertheless the parties invited Morgan J to decide what to do (or not do) about the costs of the Adjourned Issues on the basis of the evidence and submissions they filed directed to that question.
43. As for the second argument, I accept that, in principle, it is necessary to distinguish between the liability and quantum phases of a patent action. I have no difficulty with the notion that sometimes lawyers and judges may not distinguish between the two as clearly as they should. I do not accept, however, that there was any relevant confusion in the present case. Counsel’s argument presupposes that the parties and Morgan J were only concerned with the liability stage (the past) and not with the quantum phase (the future), but that is incorrect. While the costs issue concerned costs that had been incurred during the liability phase, the context of the argument was an order which was also starting the quantum phase by directing an inquiry or account and requiring the Defendants to provide information. Moreover, it can be seen from paragraphs 19-24 above that the parties’ evidence and submissions before Morgan J were forward-looking as well as backward-looking.
44. Turning to the first alleged error, Recorder Campbell’s starting point was that, unless Morgan J’s order precluded Lufthansa from doing so, Lufthansa was entitled to raise the Adjourned Issues on the account. Thus the question to be determined was whether Morgan J’s order had that effect, which depended on the correct interpretation of the order. There is no dispute that he was right to approach the matter in that way. I do not accept that clear wording was required for the order to have the effect contended for by the Defendants.
45. The third alleged error starts from a false premise. Recorder Campbell did take into account the fact that Nugee J and Marcus Smith J had adjourned the Adjourned Issues with liberty to apply: he expressly recited this at [24], and it formed the foundation for his reasoning in [37]. Otherwise, this is just a variant of the first alleged error.
46. As for the second alleged error, I do not think that Recorder Campbell was wrong to take the fourth recital into account when interpreting the order, as counsel for Lufthansa submitted in writing, although not orally. The authority he relied upon, *Mackenzie v Duke of Devonshire* [1896] AC 400, is readily distinguishable.
47. In that case the operative words of the trust deed provided that, in certain circumstances, the income from the trust fund was to be paid, in the absence of male

heirs, to “the heirs female”. The ordinary rule under Scottish law was that heirs female took as heirs portioners and the income was divided between them. As matters turned out, the heirs female were the Countess of Cromartie and Lady Constance Mackenzie, the former being the elder sister. The respondents argued that the deed should be interpreted as meaning that the Countess should receive all the income because of a recital to the deed stating that the settlor’s purpose was to enable beneficiaries “to support the dignity and title of the Earl of Cromartie”. The House of Lords rejected that argument because the operative part of the deed was clear and unambiguous, and its meaning could not be changed by the recital. Even if it was correct that the settlor’s intention had been that, in the circumstances which transpired, only the eldest heir female should benefit, that was not what he had provided for in the operative part of the deed.

48. In this case we are concerned with a court order, not a trust deed; the operative part of the order, paragraph 11, is far from clear and unambiguous taken on its own; the fourth recital is not a mere statement of intention, but a statement as to one of the bases upon which the order is made; and it is apparent (and confirmed by the history) that the two are meant to be read together.
49. I would accept that, even taking both the fourth recital and paragraph 11 into account, the meaning and effect of Morgan J’s order is not clear without reference to his reasons. It is possible to interpret them in the way that Recorder Campbell did, but without knowledge of Morgan J’s reasons it would also be possible to interpret them in the manner contended for by Lufthansa, namely as merely recording that the Adjoined Issues did not need to be determined at the liability stage and leaving the liberties to apply granted by Nugee J and Marcus Smith J intact.
50. Thus the crux of the appeal is the fourth alleged error. As to that, Recorder Campbell was entirely correct to take Morgan J’s reasons into account for the reasons explained by Lord Sumption in *Sans Souci*. That is particularly so in the present case given that (a) the wording of the fourth recital and paragraph 11 adopted by the judge was not that proposed by either side and (b) the order was made simultaneously with the giving of the reasons.
51. It can be seen from the Relief Judgment, in particular at [2] and [13], that Morgan J found that Lufthansa did not wish to seek a determination of the Adjoined Issues in order to seek a wider remedy than the remedy it would be entitled to on the basis of the findings in the Liability Judgment, but on the contrary had abandoned the Adjoined Issues. That was why the order recited that those issues no longer needed to be determined, and why it did not contain any liberty to apply with respect to those issues, contrary to the apparently agreed wording of the draft order. With the benefit of hindsight, it might have been better if the order had instead recited “AND UPON Lufthansa abandoning the Adjoined Issues”; but it is clear from the Relief Judgment that that was the order’s intended meaning. In short, Recorder Campbell’s interpretation of the order was correct.
52. In the result, I would grant Lufthansa permission to appeal, but dismiss the appeal.

Lufthansa's application for relief from sanction

53. Lufthansa's appellant's notice challenging Morgan J's order was filed on 20 June 2023, some 2 years and 10 months after the date of the Relief Judgment and Morgan J's order. The time limit for filing an appellant's notice prescribed by CPR rule 52.12(2)(b) in a case such as the present is 21 days from the date of the decision.
54. It is common ground that rule 52.12(2)(b) contains an implied sanction, and therefore an application for a retrospective extension of time under rule 3.1(2)(a) should be approached in the same way as an application for relief from sanction under rule 3.9, that is to say, applying the familiar three-stage approach laid down in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926: see *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472.
55. The first stage is to assess the seriousness and significance of the breach. In my judgment it was both serious and significant. It was serious because of the very long delay. It was significant because, although the account has not yet progressed very far (disclosure has not yet taken place and the trial is listed for October 2024), the parties have been proceeding in accordance with Morgan J's order since it was made. In absence of any appeal, the Defendants were entitled to take it that the order finally settled the status of the Adjourned Issues.
56. The second stage is to consider why the default occurred. Lufthansa says it did not appeal against the relevant parts of the order because it did not think there was anything it needed to appeal against prior to Recorder Campbell's decision. This is admittedly an *ex post facto* rationalisation of Lufthansa's conduct, because none of Lufthansa's legal representatives is able to recall what their thinking was at the time and there is no evidence as to Lufthansa's own thinking. I do not accept this explanation of Lufthansa's conduct. Morgan J said in terms that he considered that Lufthansa had abandoned the Adjourned Issues. It should have been plain to Lufthansa that that finding would have adverse consequences for Lufthansa if it should ever want to re-assert the Adjourned Issues. Yet Lufthansa made no application or protest to Morgan J on the basis that he had misunderstood Lufthansa's position. Nor did it challenge that finding by appealing the parts of the order based upon it. Thus the more likely explanation of Lufthansa's conduct, in the absence of evidence to the contrary, is that Lufthansa accepted that finding because it underpinned Morgan J's reasoning in its favour on the costs issue.
57. The third stage is to evaluate all the circumstances of the case. Given that the breach was serious and significant, and that there is no good reason for it, some compelling additional factor would be required to justify granting Lufthansa relief from sanction, but there is none. To the contrary, an additional factor pointing the other way is that Lufthansa did not apply promptly for relief from sanction. It waited until over five weeks after Recorder Campbell's judgment. Even if Lufthansa's time for filing an appellant's notice is measured from the date of that judgment, Lufthansa was over two weeks late. No explanation has been given for this, and it is difficult to see what excuse there could be given Lufthansa's resources and the sophistication of its legal team. Moreover, it is at least arguable that Lufthansa should have seen the problem coming well before Recorder Campbell's judgment was delivered. Thus I would refuse relief from sanction, and refuse to extend time for filing the appellant's notice.

58. That would be so even if the proposed appeal had a real prospect of success. Having heard the arguments on the merits, however, I am not persuaded that the appeal satisfies that test. In the light of the evidence and submissions before him, Morgan J was entitled to make the finding he did. It was a finding of fact, and to put it at its lowest it was rationally supportable.

**Lord Justice Phillips:**

59. I agree.

**Lord Justice Peter Jackson:**

60. I also agree.