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Case No: HP-2017-000085

Case No: 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
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 14/01/2020

Before:

MR. JUSTICE NUGEE

Between:

LUFTHANSA TECHNIK AG
(a company incorporated under the laws of the
Federal Republic of Germany)

Claimant

- and -

(1) ASTRONICS ADVANCED ELECTRONIC
SYSTEMS

Defendants
in HP-2017-000085

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

(2) SAFRAN SEATS GB LIMITED

- and -

PANASONIC AVIONICS CORPORATION
(a company incorporated under the laws of the
state of Delaware, USA)

Defendants
In HP-2019-000019

MR. HUGO CUDDIGAN QC and MR. CHRISTOPHER HALL (instructed by **Jones Day**)
for the **Claimant**

MR. THOMAS HINCHLIFFE QC and MR. MILES COPELAND (instructed by **Hogan**
Lovells International LLP and Pinsent Masons LLP) for the **Defendants**

Approved Judgment

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MR. JUSTICE NUGEE :

1. Given the time and the fact that counsel both know the background to this in great detail, I will not go through the background facts. Nor am I going to set out in extenso the legal principles.
2. I have in mind the terms of paragraph 7.2 of Practice Direction 14. I was very helpfully shown the relevant authorities, in particular the approach of David Steel J in *American Reliable Insurance Company & Ors v Willis Ltd* [2008] EWHC 2677 (Comm); the comments on that by Ward LJ in the Court of Appeal in *Woodland v Stopford & Ors* [2011] EWCA Civ 266, particularly at [26]; and the summary by Popplewell L in *Bayerische Landesbank Anstalt Des Offentlichen Rechts v Constantin Medien AG* [2017] EWHC 131 (Comm), who, having set out those three matters, summarises the jurisprudence at [54]. I have also had a look at what he says at [55] to [57], and the judgment of Phillips J in *Aldersgate & Ors v Bank of Scotland & Anor* [2018] EWHC 2601.
3. I am content to take that jurisprudence as, in effect, succinctly and accurately summarised by Popplewell J at [54]:

“It is apparent from that passage that each case turns on its own facts; all the circumstances of the case must be taken into account; Rule 14.1(5) confers a wide discretion; and that the fullness or adequacy of an explanation for the withdrawal of an admission is not a threshold condition, but one which may have greater or lesser importance depending on all the other circumstances of the case.”

4. I will say straightaway that I do not propose to allow the defendants to withdraw this admission. The factors which are relevant have been addressed at great length by counsel, as will appear on the transcript, but I will go through them as briefly as I can in the order in which they appear in paragraph 7.2 of the Practice Direction.

(a) The grounds on which the applicant seeks to withdraw the admission

5. The upshot of the evidence is that the defendants’ in-house counsel assumed that, because Astronics, as I will call it, was sending goods to recipients in the UK, it was supplying in the UK. That is what Mr. Sterner says at paragraph 4:

“I knew that AES had supplied EmPower components to companies in the UK and therefore assumed that AES itself must have undertaken such supplies. As far as I was concerned, AES had supplied EmPower components that were going to be shipped to the UK ...”.

He says in those circumstances he thought it appropriate to make the admissions.

6. I have no evidence as such beyond that. Privilege has not been waived in the legal advice given by the English lawyers, who are very experienced solicitors and counsel, acting for Astronics, but I am prepared to accept from Mr. Hinchliffe that the point, for whatever reason, was not taken, and that the most likely explanation is that it

simply did not occur to Astronics and its legal team to take the point. I am certainly not going to proceed on the basis, Mr. Cuddigan accepting that he could not say that this was the case, that the point was considered and it was decided by Astronics not to run the point. So, as I say, I will proceed on the basis that, for whatever reason, the point was not taken, probably because no one thought of the point.

7. This is not a case, picking up the language of 7.2(a), where “new evidence has come to light which was not available at the time the admission was made”. The facts are exactly what the facts have always been. It is simply a case where, in considering further amendments to the particulars of infringement, the defendants have turned their mind to something which they think gives them an arguable case that they were not, in fact, responsible for the importation or supply of the goods in question into the UK. That is why they seek to withdraw it.

(b) The conduct of the parties

8. Mr. Hinchliffe said that there was no relevant conduct of the parties. There is certainly “no conduct which led the party making the admission to do so”.
9. The way in which it was put by Mr. Cuddigan is that it was the defendants’ conduct which was responsible for the admission. All the materials were available to them, and they did not consider it. He made the point that they were on notice of the precise route by which the goods reached the UK as a result of the second German trial, where goods which were provided in the US would end up in Germany.
10. Mr. Hinchliffe, to my mind correctly, pointed out that, although the German law and English law have a common origin in the CPC, that does not mean that the actual application of the rules in Germany is the same as it is in England, and I cannot assume -- in fact there is evidence to the contrary -- that German law adopts exactly the same position in relation to these matters as English law and, therefore, the German case was not determinative.
11. That I accept. Nevertheless, I do accept that the only party responsible for making the admission is the defendant. It is not something which the claimant has had any part in pushing the defendant into making, so to that extent the conduct is all on one side.

(c) Prejudice to the claimant

12. So far as prejudice is concerned, which is (c), I prefer the submissions of Mr. Cuddigan to those of Mr. Hinchliffe. In my judgment, “prejudice that may be caused to any person if the admission is withdrawn” requires a comparison of the position they are in now on the basis that the admission stands, and the position they will be in if the admission is withdrawn. It does not, as Mr. Hinchliffe suggested in reply, require a comparison between the position which someone will be in if the admission is withdrawn and the position they ought to be in -- what he described as equating prejudice to being unfairly disadvantaged, losing something that you should not have lost.
13. It seems to me that, on the language of the Practice Direction, Mr. Cuddigan’s submission is to be preferred. Prejudice is caused to a person if the admission is

withdrawn in circumstances where they are worse off if the admission is withdrawn than if the admission is not withdrawn.

14. In the end, there did not really seem to be any dispute that the practical effect of allowing the admission to be withdrawn was that the claimants would be faced with the possibility, if the point ended up being a good one, of losing some two years plus of damages as a result of the operation of the limitation period, and, in my judgment, that is prejudice that would be caused to the claimant if the admission were withdrawn.
15. I will come back to Mr. Hinchliffe's suggested fallback position, but, on the face of it, if the admission were withdrawn in its entirety, the practical effect is that even if next week the claimants issued 16 claim forms against the known 16 recipients set out in tab 23 of the application bundle, that would not replicate the position they are in at the moment, because there is no way in which those claim forms would enable them to claim damages for infringement for a period of more than six years before the issue of the claim forms. That seems to me to be a prejudice caused to the claimants if the admission is withdrawn, and it is one that realistically I think the defendants are responsible for, in the sense that, had they plainly and clearly pleaded when these proceedings were started that Astronics was not responsible for the supply on the basis on which they now wish to argue it, that title passed to the purchasers before the importation took place, then the claimants would have considered bringing in other parties earlier, and to that extent they have undoubtedly been caused prejudice by the defendants' decision, for whatever reason, not to put that in dispute at the time of serving the defence.
16. I said I would come back to the question of Mr. Hinchliffe's fallback position. It is true that that particular prejudice -- the loss of the damages which would fall out for limitation reasons -- could be catered for by a slightly complicated, partial withdrawal of the admission, which would limit the ability of the defendants to withdraw the admission to supplies taking place after a particular date. To my mind, the appropriate date would be six years back from whenever claim forms could realistically be issued, whether that be next week or whether that be in six months' time, a suggestion floated by Mr. Cuddigan but not picked up by Mr. Hinchliffe.
17. I do not think that it would be appropriate, as Mr. Hinchliffe sought to do, to look at why the claimants did not issue proceedings against the 16 recipients, or whoever the recipients were, back in 2019, and thereby drop out some of the period between November 2013 and January 2014, because the fact is they did not look at that period, and they are now in the position where they have that claim and that claim will be lost if the admission is withdrawn.
18. Nevertheless, I do not propose to permit the defendants to withdraw the admission in that partial way. I pass over the question that this was not the application that was made, nor was it addressed in the evidence. It was floated in Mr. Hinchliffe's skeleton, and it is a point that can be dealt with on the evidence that is before the court.
19. Mr. Cuddigan's answer to it, apart from the technical point that he had not prepared to come to meet it, was that that was not the only prejudice that the claimants would suffer if the admission with withdrawn.

20. I agree. It does seem to me -- and this ties in with what Mr. Cuddigan said under the final subparagraph (g), the interests of the administration of justice -- that Mr. Cuddigan is right that the CPR encourages people to make admissions because it encourages people to narrow the issues in dispute and to concentrate on the real issues in dispute.
21. I am old enough to remember litigation under the previous set of rules in which, to a very large extent, people's real position was concealed as much as possible and pleadings were designed to obfuscate rather than clarify, but there is no doubt that the CPR which have now been in force for a very long time were designed to introduce a change in litigation culture to encourage parties to co-operate to identify the real issues that needed to be decided and the like in what has frequently been described as a "cards face up" or "cards on the table" approach to litigation.
22. The regime in relation to admissions is part and parcel of that, and I agree with Mr. Cuddigan that the purpose of what the CPR says about admissions is that, if an admission is made, the opponent can proceed on the basis that that will not be something in issue. Whether it is an admission of fact or an admission of law, it will not be necessary to devote any resources or energy or thoughts to that part of a case, because it is not one of the matters that will be in issue. That, of course, is subject to the powers of the court to allow the admission to be withdrawn in rule 14.1(5), and everybody who faces an admission knows that there is always a possibility that an admission may be withdrawn.
23. However, I agree with Mr. Cuddigan that litigation should be capable of being conducted on the basis that admissions mean what they say and that, if a party whose case has been admitted by the other side is facing an application to withdraw the admission, it is relevant to consider whether they will now be put in a worse position -- not in a worse position than they would have been had the admission not been made in the first place, but in a worse position than they are with the admission. Usually, of course, they will be put in a worse substantive position because they will be facing an issue which they thought was not going to be in issue, but they will also very frequently be put in a worse procedural position because of the withdrawal of the admission, and that is the case here, as Mr. Cuddigan explained. If the admission is allowed to be withdrawn, however confident he may be that it will be possible to provide an answer in the form of joint tortfeasance, the claimants will doubtless feel obliged at least to investigate, and probably to pursue, the UK recipients -- the 16 entities identified in tab 23 -- as a fallback position, and that will require them not only, shortly before this trial, which is due in three weeks' time, to take on the burden of investigating another 16 cases, but also to issue and quite possibly pursue those cases, and that will cause them prejudice of a procedural type.
24. In those circumstances I do not think that even Mr. Hinchliffe's fallback position of a partial withdrawal is something that will eradicate the prejudice that will be caused to the claimants by withdrawing the admission. That is not a complete bar on withdrawing the admission, because it has to be balanced against the prejudice that may be caused to the defendants if the application is refused.

(d) Prejudice to the defendant; and (f) prospects of success

25. The prejudice that is likely to be caused to the defendants if the application is refused is simply the inability to run an argument which is an argument with a reasonable prospect of success, and the Court is required by paragraph (f) to look at the prospects of success if the admission is withdrawn. I will proceed on the basis that neither side has asked me, or if they have asked me I am not going to accept the invitation, to decide who is right on the underlying question. There is clearly something to be said on both sides.
26. Mr. Hinchliffe can point to the decision of the House of Lords in *Sabaf SpA v MFI Furniture Centres Ltd* [2004] UKHL 45, which makes it clear that, where title to goods has passed to the purchaser outside the UK, the subsequent acts of bringing these goods into the UK will not be an importation by the seller: see what Lord Hoffmann says at [41] of his judgment.
27. Mr. Hinchliffe can say, and does say, that for the purposes of indirect infringement under section 60(2) the question of supply should be similar to that of importation. He has the benefit of being able to point to what Falconer J said in *Kalman and Anor v PCL Packaging (UK) Ltd and Anor* [1982] FSR 406, in particular at 419 to 420:
- “This sub-section requires the supply in the United Kingdom, or the offer to supply in the United Kingdom, of the means in question for putting the patented invention into effect in the United Kingdom. There was no supply in the United Kingdom to PCL or offer to supply in the United Kingdom to PCL by Berlyn Corporation of the filters in question. They were supplied to PCL in the United States of America pursuant to sales in the United States of America, f.o.b. the shipping point in the United States of America and, in my judgment, the plaintiffs cannot have any cause of action against Berlyn Corporation under this head.”
28. I proceed on the basis, therefore, that Mr. Hinchliffe has at least a seriously arguable case that Astronics is not, as a matter of law, liable for supply in circumstances where title has passed to the purchaser in the US, and that each of the forms of contract which I was shown contain a provision that title to the goods and risk in the goods does pass in the US, whether they are Ex Works contracts or the various other forms of contracts that were put before me.
29. On the other hand, I am not going to decide that that is a complete answer to the point. It is not obvious that “supply” in section 60(2) means the same as “import” in section 60(1). It is possible, as Mr. Cuddigan says, that the interpretation of “supply” in section 60(2) is influenced by the CPC, which applies throughout the EU, as I understand it. It is possible that complications are caused in a case like this, where there are three parties -- the seller Astronics in the US, the purchaser, who may not be and very often does not appear to be in the UK, and the recipient in the UK. The provisions in the contracts as to where particular goods are delivered, a concept which is different from the passing of title, may be relevant. I notice that Falconer J in the *Kalman* case said at 414 that the seller in that case not only retained no property in the goods but no possession of the goods:

“Once Berlyn Corporation delivered to the shipping point in the United States they had no further property in, possession of, or any rights in or any control of the goods, which were PCL’s, and Berlyn Corporation could not effect any further act of disposing of the goods.”

30. In circumstances where certainly under some of the forms of contract, although title has passed, delivery does not take place until delivered to the destination in the UK, it is not obvious to me that the same can be said of the vendors in this case. However, as I have already said more than once, I do not propose to decide the point.
31. I accept, therefore, that there is potential prejudice to the defendants in not being able to run a point which might succeed and should be treated at this stage as having a real prospect of success, but that has to be qualified by the fact that, as Mr. Cuddigan said, that is not the claimants’ only route to making Astronics liable for these supplies. It has two other routes; one is to sue the recipients, and it may very well be that Astronics will feel commercially obliged to stand behind them. The evidence on that leaves it entirely unclear in what circumstances Astronics will or will not stand behind people in that situation, but Astronics has chosen to indemnify both the existing defendants, Safran and Panasonic, and it is at least a possibility that it will feel commercially obliged to do the same with any of the 16 recipients who are sued. To that extent, the economic cost of any claim will ultimately fall on Astronics in any event. As Mr. Cuddigan pointed out, what the evidence leaves unclear is whether there will be such indemnities, but it is certainly not such as to enable me to conclude that Astronics has made a decision that it will not indemnify anybody who is sued in that way.
32. Moreover, Mr. Cuddigan says that he would, in those circumstances, seek to make Astronics liable as joint tortfeasors; that that would be an amendment under CPR 17.4, based on the same or substantially the same facts and would date back to the issue of the claim form, and therefore deal with the limitation point; and he says that there would be a good prospect -- indeed I think he put it rather higher -- of making Astronics liable as joint tortfeasors for the importation.
33. I was taken in some detail through all three stages of the *Sabaf* litigation, the upshot of which is that I do not think that any of the courts decided whether Meneghetti would be liable as joint tortfeasor for the importation. At first instance (31 July 2001), Laddie J found that Meneghetti was liable itself as primary tortfeasor for importing (at [42]) and, therefore, naturally did not go on to consider whether they would be jointly liable for importation. He did decide at ([43]) that they would not be jointly liable for other acts of MFI, such as selling the goods in England, but that is not something that is relevant to this question.
34. On appeal to the Court of Appeal, [2002] EWCA Civ 976, the Court of Appeal at [60]-[63] allowed an appeal against the decision that Meneghetti were liable as primary tortfeasor for importation and, as I read their judgment, did not consider whether Meneghetti might be made liable as joint tortfeasor for importation, there being no respondent’s notice from Sabaf to the effect that so far as importation is concerned, as opposed to the other acts of MFI in England, the judge’s conclusion that they were liable for importation should be upheld on an alternative basis.

35. It is clear that the point did not resurface in any form in the House of Lords: see [39] and [40]. I accept Mr. Cuddigan's characterisation of what Lord Hoffmann says in [40] as expressing at least a partially raised eyebrow as to whether there might not have been liability on that basis.
36. I will not, naturally, conclude that in these circumstances Astronics would be liable as joint tortfeasor, but I do accept Mr. Cuddigan's submission that there is a good prospect of establishing liability as joint tortfeasor for the importation. The facts are quite striking. There does not seem to be any dispute about it. In the circumstances of these particular contracts, the evidence in Mr. McCulloch's second witness statement at paragraph 24 is that "Astronics will either deliver the goods into the UK ... or will deliver to the freight carrier for shipment to the UK. In all circumstances, Astronics will ascertain a delivery address in the UK, and affix delivery labels for those addresses"; and he refers to some evidence given in the United States to the effect that Astronics arranges shipping and keeps tracking numbers.
37. Mr. Cuddigan also made the point that these are not goods supplied in the same form to everybody but are bespoke goods for particular customers, in which the cable lengths are cut to the precise requirements of the customer.
38. In those circumstances I certainly think that there is a reasonable argument that Astronics would have made itself jointly liable for the importation, the test, as set out in the judgment of Lord Hoffmann in *Sabaf* at [39] being "whether the acts were done pursuant to a common design so that the secondary party has made the act his own". I can see the argument that by providing a bespoke product for a particular customer and putting a UK address on the box, and either delivering it in the UK, if the contract is one where delivery takes place at destination, or giving it to a shipper in the US to deliver to the UK, Astronics has done sufficient to amount to participation in the act of importation pursuant to a common design.
39. As I say, I do not resolve that. However, that tends to weaken the prejudice that is suffered by Astronics in not being able to run the point it now wishes to run.

(e) Stage at which application made

40. As to (e), "the stage in the proceedings at which the application to withdraw is made" the stage is very shortly before trial. It is accepted that, if this point were allowed to be run, it would not be run at the trial in three weeks' time but would have to go off probably to any inquiry as to damages and possibly to a separate hearing of that particular issue. However, in any event, although the claimant would not lose the trial date and the technical trial would still go ahead, I accept that Mr. Cuddigan is right that the effect of that is that whereas, at the moment, provided he gets over his technical hurdles as to validity and the like, he will emerge from the trial in three weeks' time with a decision on liability one way or the other, if this point is allowed to be withdrawn and will not be determined at that trial, then the question of liability will remain unresolved.
41. Mr. Hinchliffe said this is not a case where the patent is still live. It has expired and therefore the only claim is for damages, so all that would happen is that it would go off and the claimants do not know if they will get any substantial damages in any event until after they have had an inquiry as to damages. But that seems to me to

slightly understate the impact of seeking to withdraw an admission which goes to the question of liability at such a late stage in the proceedings, very shortly before a trial, which, as presently constituted, will resolve questions of liability, at least in the primary way in which the claimant puts their case.

42. For all those reasons, taking account of the matters in 7.2 of the Practice Direction, and having regard to the overriding objective, it does seem to me that this is a case where I should refuse to allow the admission to be withdrawn, it being an admission that the defendants made entirely unprompted by the claimants and the withdrawal of which would have the consequences that I have sought to indicate.

MR. HINCHLIFFE: My Lord, I do not think my Lord has dealt with the claim 7 -- the knowledge point.

MR. JUSTICE NUGEE: You are quite right. I am going to allow you to withdraw the admission in relation to claim 7. It seems to me to be a very minor point and it would be artificial to proceed on a trial on the basis that Safran were responsible for infringement of claim 7 in circumstances where the evidence appears to be that they do not do anything that could amount to the MCU.
