

**EIP**

Be careful what you wish  
for - Court of Appeal  
refuses to let party rely on  
argument it had dropped  
multiple years ago

**Lufthansa Technik AG v Astronics Advanced Electronic Systems & Ors [2023] EWCA Civ 1306**

The Court of Appeal has denied Lufthansa permission to rely on certain arguments at an upcoming damages inquiry as part of its long running litigation with Panasonic and others. This is because as part of winning a costs argument previously in the litigation Lufthansa had argued that those issues had fallen away and the judge did not need to deal with them.

The initial patent infringement Judgment

In July 2020 the defendants were found by Morgan J to have infringed Lufthansa's patent which related to plugs for powering devices in-flight. In the lead up to the trial certain issues were adjourned (the "**Adjourned Issues**"). Those issues related to which defendant committed the infringing acts and whether there were continuing offers for sale by the defendants which amounted to infringement. There were also certain issues which the judgment handed down in July 2020 did not have to resolve due to other findings in the Judgment (the "**Unresolved Issues**").

In light of the judgment handed down in July 2020 the parties agreed the defendants should pay Lufthansa's costs of the Unresolved Issues but there was a dispute between as to whether the defendants should have to pay Lufthansa's costs of the Adjourned Issues. Lufthansa's position was that the Order should contain wording to state that the

Adjourned Issues had fallen away and they should be paid around £50,000 in respect of those issues. In support of this Lufthansa's solicitor described the adjourned issues as "different ways of running the infringement case" which were "no longer necessary". The defendants resisted this, with their solicitor saying that the Adjourned Issues were Lufthansa's "back-up arguments in case it lost on the case that was run at trial".

In August 2020, Morgan J handed down a decision on the appropriate consequences of the July 2020 Judgment. Morgan J ordered that Panasonic pay Lufthansa's costs of the Adjourned Issues and included wording that stated that the Adjourned Issues no longer needed to be determined. Morgan J's Order also ordered a damages inquiry. That damages inquiry was postponed whilst the defendants' appeal against the patent infringement finding was ongoing. That appeal was dismissed in January 2022.

Lufthansa's 2023 application to amend its pleadings to rely on the Adjourned Issues

In late 2022 Lufthansa served an amended pleading as part of the damages inquiry which raised arguments that related to the same allegations that were part of the Adjourned Issues and Unresolved Issues. The defendants objected to this amended pleading and Lufthansa then applied to the court for permission to amend its pleading. In May 2023 Recorder Campbell granted Lufthansa permission to amend its pleading to include the Unresolved Issues but denied permission to amend to include the Adjourned Issues. This was on the basis that the Morgan J's Order showed that the Adjourned Issues had been resolved and Lufthansa had been paid their costs in respect of them. Recorder Campbell also made it clear that if Lufthansa wished to amend its pleading to include the Adjourned Issues it would need to appeal against Morgan J's Order of August 2020.

Lufthansa's applications for permission to appeal

Lufthansa then applied for permission to appeal against the Orders of both Morgan J and Recorder Campbell, with the aim of being able to amend its pleading to rely on the Adjourned Issues. Lufthansa's application for permission to appeal against the Order of Recorder Campbell was granted but was then denied on appeal and Lufthansa's application for permission to appeal against the Order of Morgan J was dismissed.

The Court of Appeal first turned to Lufthansa's application for permission to appeal against the Order of Recorder Campbell. The Court of Appeal granted Lufthansa's permission to appeal but then denied that appeal on the basis that the Judge's interpretation of Morgan J's Order and Judgment was correct and the effect of Morgan J's order was to preclude Lufthansa from relying on the Adjourned Issues. The Court of Appeal relied in particular on paragraphs of Morgan J's judgment which made clear that it was Lufthansa that had said that it no longer relied upon the Adjourned Issues.

The Court of Appeal then turned to Lufthansa's application for permission to appeal against the Order of Morgan J from August 2020. The normal time limit for filing an application for permission to appeal at the Court of Appeal is 21 days. The Parties were agreed that there is an implied sanction under the court rules for a party that fails to meet the 21 day deadline. Lufthansa's application was made on 20 June 2023 almost 3 years after the order being appealed against. Lufthansa therefore needed the Court of Appeal's permission for relief from sanction in order to get permission to appeal against the Order of Morgan J.

The Court of Appeal decided that Lufthansa should not get relief from sanctions and so not get permission to appeal because Lufthansa's breach was serious and significant given how long it was, Lufthansa's breach occurred because it accepted Morgan J's reasoning on the Adjourned Issues as it meant a favourable costs decision, and there were no other compelling reasons to grant Lufthansa relief from sanctions for its delay.

#### Takeaway point

Lufthansa's decision earlier in the litigation to request that the Court award it its costs of the Adjourned Issues on the basis that those issues had fallen away has come back to bite it, with both the High Court and the Court of Appeal finding that Lufthansa is no longer able to rely on the Adjourned Issues at the upcoming damages inquiry. This decision by the Court of Appeal is a reminder to parties engaged in litigation to be certain that they will not want to rely upon a point later on before dropping such a point.

The decision can be found [here](#).