

# EIP



## What a relief! Court of Appeal permits a party to rely on evidence served two years late

### **Lufthansa Technik AG v Panasonic Avionics Corporation [2023] EWCA Civ 1273**

The Court of Appeal has granted Panasonic an extension of time to a deadline so that they can rely upon a witness statement served two years after the deadline. This is on the basis that there was no sanction for late service in the original court order or relevant Civil Procedure Rule and the other party, Lufthansa, still had time to make an informed choice ahead of trial on quantum of damages and could be compensated for any additional costs caused by the delayed witness statement.

#### Legal Background

A company whose patent is infringed is entitled to either an enquiry as to damages to the patent owner or an account of profits from the infringer. An enquiry as to damages calculates the money owed by the loss of profits to the patent owner whether by loss of product sales or licensing revenue, whereas an account of profits calculates the money owed through the profits of the company that infringed the patent. There are reasons why either profits or damages would be greater, for example the patent owner does not have a huge profit margin on its products or the infringer has chosen to sell the infringing products as loss leaders.

The patent owner is required to elect at an early stage for either an enquiry as to damages or an account of profits and is entitled to choose the option it thinks will generate a larger sum or which it prefers for procedural reasons i.e. the patent owner does not want to disclose its profit margins. In order for the patent owner to make an

informed decision the court will order the infringer to provide financial information about its profits. This type of order is called an Island Records order after the case in which such an order was first made.

### Procedural background

In 2020 Panasonic were found by the High Court to infringe Lufthansa's patent that related to electric plug sockets used by passengers on aeroplanes. Panasonic's appeal against that judgment was dismissed in 2022. After the first instance trial the Judge made an Island Records order requiring Panasonic to provide a witness statement from a director setting out certain financial information.

Panasonic provided that witness statement in October 2020 which said that Panasonic's revenue was \$165m and after costs left a "very substantial figure for the profit". Following the dismissal of Panasonic's appeal in 2022 Lufthansa elected for an account of profits based on Panasonic's witness statement. However three weeks after that election Panasonic's solicitors wrote to Lufthansa saying that they would be "updating" the initial witness statement, despite Panasonic having been aware of issues with the first witness statement for several years. Two months later in December 2022 Panasonic provided a new witness statement which showed that gross revenue was much lower due to a significant sales credit which reduced Panasonic's profit by \$30m.

Lufthansa responded to this by applying to the Court for an order that Panasonic could not rely on the corrected numbers in the second witness statement. Panasonic cross-applied for an order seeking an extension of time so they could rely on the second witness statement.

The parties and the Judge at first instance all treated Panasonic's request for an extension of time and Lufthansa's objection to that as a request for relief from sanctions, which is governed by Civil Procedure Rule 3.9. The Judge refused to grant Panasonic relief from sanctions as Panasonic's breaches of the court order were serious and significant, the breach arose as Panasonic provided information from someone other than the director required by the order, Panasonic had not been diligent in correcting that information, and Lufthansa would be worse off if Panasonic could rely on second witness statement.

### Appeal

On appeal Panasonic changed its argument and argued that the Judge was wrong to approach the issue as one of relief from sanctions and should have approached the issue as a matter of general case management. The Court of Appeal accepted Panasonic's

arguments in this respect. The Court of Appeal's reasoning for this is that Island Records orders do not normally (and did not in this instance) contain a sanction for a failure to comply with the order. There is therefore no automatic sanction against a party that fails to comply with an Island Records order, unlike other court rules or orders where there are automatic sanctions for a failure to comply. It is therefore wrong to apply the test for relief from sanctions and instead the court should consider whether Panasonic's application for permission to rely upon the second witness statement was in accordance with the overriding objective which is to deal with cases justly and at proportionate cost. However, the Court of Appeal said that if the correct test was one of relief from sanctions then they would have upheld the decision of the High Court Judge and not allowed Panasonic to rely on the new evidence, instead holding them to the inaccurate first witness statement.

The Court of Appeal then turned to consider whether Panasonic's application to rely upon the second witness statement was in accordance with the overriding objective. The Court of Appeal made it clear that the purpose of an Island Records order is to provide a successful patentee with sufficient information to make an informed choice. That information is not the same as full disclosure and should instead be an approximate estimate. The Court of Appeal found that the breach of order was serious and significant, and compounded by both an earlier breach of the court order and the time Panasonic took to correct the breach. However, despite this the Court of Appeal did give Panasonic permission to rely on the new evidence by extending the time for compliance and permitted Lufthansa to choose again between an account of profits and an enquiry as to damages. This is as there was still enough time before the trial on damages for Lufthansa to make the choice fairly and the Court of Appeal ordered that if Lufthansa elected for an enquiry as to damages and not an account of profits then Panasonic would have to pay the costs caused by the errors in the first witness statement.

#### Takeaway points

The Court of Appeal has made it clear in this decision that the specific rules relating to relief from sanctions are only relevant where there are automatic sanctions for breach of a court order. If a court order or the relevant Civil Procedure Rules do not contain such sanctions then the courts will apply their general case management powers, which are more permissive, to any application to rectify breaches of the court order.

The Court of Appeal's decision also suggests the English Courts are likely to allow in evidence that corrects previous errors despite "serious and significant" breaches of a court order, where the other party to the litigation can be compensated in costs and there is still sufficient time before trial to ensure a fair trial.

Decision is [here](#).