



Neutral Citation Number: [2020] EWHC 2296 (Pat)

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 21/08/2020

Before:

MR JUSTICE MORGAN

Between:

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

- and -

(1) ASTRONICS ADVANCED ELECTRONIC
SYSTEMS
(a company incorporated under the laws of
the state of Washington, USA) **Defendants**

(2) SAFRAN SEATS GB LIMITED

And between:

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

- and -

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

Hugo Cuddigan QC and **Christopher Hall** (instructed by **Jones Day**) for the **Claimant** in both actions

Piers Acland QC and **Stuart Baran** (instructed by **Hogan Lovells International LLP** and **Pinsent Masons LLP**) for the **Defendants** in both actions

Written submissions following hand down of judgment

**Judgment Approved by the court
for handing down**

This judgment is handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 21 August 2020.

MR JUSTICE MORGAN:

Introduction

1. This judgment deals with three matters which have been raised by the parties following the hand down of my judgment in this case on 22 July 2020 (“the first judgment”). The neutral citation of the first judgment is [2020] EWHC 1968 (Pat). The three matters relate to: (1) the form of the order to be made; (2) an issue as to costs; and (3) an application by the Defendants for permission to appeal to the Court of Appeal. I received written submissions in relation to these three matters.

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.
4. In any case, I do not see how a successful appeal by the Defendants would make it appropriate to determine the Adjourned Issues. The Grounds of Appeal which have been put forward by the Defendants challenge the validity of the Patent. If their appeal were to succeed, there would be no question of infringement. There is no separate appeal as to infringement if any claim in the Patent were held to be valid.

The issue as to costs

5. In accordance with my judgment, the Claimant has succeeded and the Defendants have failed in this litigation. The Claimant has established that its Patent was valid and has been infringed by all of the Defendants.
6. In the light of the Claimant’s success in the litigation, the Defendants agree that in general terms the Claimant should recover its costs of the litigation. This is subject to two qualifications, one of which is agreed and the other of which is in dispute.
7. The first qualification, which is agreed, is that the Claimant should not recover 2% of its costs because it failed in its claim that the Defendants had infringed claim 7 of the Patent. As that matter is agreed I will give effect to the parties’ agreement and I will not consider what I would have decided if that point had not been agreed.

8. The second qualification put forward by the Defendants but not agreed by the Claimant is that the Claimant should not recover the costs of certain issues which it had raised in support of its case that each of the Defendants had infringed the Patent.
9. As explained in the first judgment, I was able to deal with the question of infringement by each of the Defendants in a relatively straightforward way. By the time of the trial, Astronics admitted facts which made it liable for infringement within section 60(2) of the Patents Act 1977. By the time of the trial, Safran accepted that it had committed direct infringement within section 60(1) of the Patents Act 1977. Accordingly, in the first judgment, the only allegation of infringement which needed to be considered was the allegation of infringement by Panasonic and that was resolved on the straightforward basis that Panasonic was a joint tortfeasor with its customers, committing a direct infringement within section 60(1) of the Patents Act 1977.
10. However, the Claimant had made further allegations as to infringement. I referred to some of them in the first judgment when considering the way in which the Claimant put alternative cases, against Panasonic in particular. As I explained in paragraph [281] of the first judgment, the Claimant relied on additional grounds which concerned: (1) the construction of the Patent (where the Claimant failed); (2) an argument as to a “kit of parts” (which I did not decide); (3) an argument as to equivalents (which I did not decide); and (4) an argument as to the meaning of section 60(2) of the Patents Act 1977 (which I did not decide). These additional grounds essentially raised questions of law and, as I understand it, the Defendants do not say that the Claimant should not recover its costs of arguing these legal issues. I say that because the Defendants say that the Claimant should not recover its costs of the Adjoined Issues and the Adjoined Issues do not appear to include the legal arguments referred to above relied upon by the Claimant as additional grounds for holding there were infringements of the Patent.
11. The Adjoined Issues raised further issues as to joint tortfeasance, as to certain offers for sale and as to the extent of the knowledge of one or more of the Defendants for the purposes of section 60(2) of the Patents Act 1977. Those issues were pleaded but were then adjourned by orders made prior to the trial. I was told that the Claimant had incurred costs of approximately £50,000 in relation to the Adjoined Issues. The Claimant’s total costs are said to be in excess of £1.9 million.
12. The Defendants say that the Claimant should not have its costs of the Adjoined 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 Adjoined Issues so that they have not fallen away so that the Claimant wishes to keep the Adjoined 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 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 application for permission to appeal

15. The Defendants have applied for permission to appeal to the Court of Appeal. I have been provided with draft Grounds of Appeal. The Defendants have put forward 15 Grounds of Appeal. The Defendants submit that each of these Grounds of Appeal has a real prospect of success.
16. Grounds 1 to 3 challenge my findings as to the construction of the Patent. Grounds 4 to 6 seek to identify the consequences of the alleged errors as to construction. In Ground 5, it is said that my construction of the Patent in relation to the requirement of remoteness means that the claims in the Patent are conceptually uncertain and insufficient. In Ground 6, it is said that the correct construction of the Patent would have produced the result that the claims in the Patent lacked novelty and were obvious over both Sellati and Neuenschwander.
17. Grounds 7 to 15 are described as challenges to my findings as to the Defendants' allegation that the claims in the Patent were obvious over Sellati and Neuenschwander.
18. I have considered each of the Grounds of Appeal and have reached the following conclusions.
19. Grounds 1 to 3 (dealing with construction) do not have a real prospect of success and, accordingly, Grounds 4 and 6 do not arise. Grounds 1 to 3 relate to the construction of the Patent and I am not persuaded that the suggested challenges to my detailed reasoning as to construction are sufficient to establish a real prospect of success.
20. As to Ground 5 (dealing with alleged insufficiency), I do not consider that this Ground has a real prospect of success.
21. Grounds 7 and 8 relate to some of my findings as to the allegation of obviousness. Ground 7 states that the judgment correctly found certain matters and Ground 8 then asserts that those matters were not taken into account, properly or at all. As obviousness in this case was essentially a jury question involving a multi-factorial assessment, Ground 8 is inadequate as a challenge to my findings as to obviousness and has no real prospect of success.
22. Ground 9 deals with the mindset of the skilled person. The part of paragraph 234 of the judgment which is referred to in Ground 9(a) was not a finding but a reference to Mr Barovsky's evidence. The relevant findings were in paragraphs [236] and [237] and the suggestion that there was no evidence to support those findings does not have a real prospect of success. Further, the findings as to the mindset of the skilled person do not affect the earlier finding that claim 1 of the Patent was not technically obvious.
23. Ground 10 has no real prospect of success in view of what was said in paragraph [255] and [258] of the judgment.

24. Ground 11 has no real prospect of success when, as explained in paragraph [206] of the judgment, this point was not relied upon by the Defendants at the trial.
25. Ground 12 has no real prospect of success in relation to a multi-factorial assessment as to obviousness.
26. Ground 13 does not appear to relate to obviousness but to the disclosure in the prior art. Ground 13 does not have a real prospect of success as the findings in the judgment applied the established authorities which were relevant to the findings now being challenged.
27. Grounds 14 and 15 relate to the findings as to the disclosure in Neuenschwander. These grounds do not have a real prospect of success.
28. Having considered each of the 15 Grounds of Appeal, I hold that none of them has a real prospect of success and I decline to grant permission to appeal.