



Neutral Citation Number: [2023] EWCA Civ 1273

Case No: CA-2023-000936

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT
Recorder Douglas Campbell KC (sitting as a Deputy High Court Judge)
[2023] EWHC 1043 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2023

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE BIRSS

Between :

Lufthansa Technik AG

Claimant/
Respondent

- and -

Panasonic Avionics Corporation

Defendant/
Appellant

and Others

Defendants

Iain Purvis KC, Miles Copeland and Alice Hart (instructed by Hogan Lovells) for the Appellant

Hugo Cuddigan KC and Mitchell Beebe (instructed by Jones Day) for the Respondent

Hearing date: 12 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. The question in this appeal is whether or not an application to correct information provided by a defendant in an intellectual property claim pursuant to an *Island Records* order, made to allow the claimant to elect between two inconsistent financial remedies, is an application for relief from sanctions to which CPR r3.9 applies.
2. Lufthansa is the claimant in this patent action. There are various groups of defendants. The relevant group can be referred to as Panasonic. Lufthansa has a patent for an invention relating to electric plug sockets used on aeroplanes to supply power to passengers. Last year (January 2022) this court dismissed an appeal from the judgment of Morgan J in which he found the patent valid and infringed by the defendants' products. Paragraph 10 of his order dated 22 July 2020 at the conclusion of the trial required Panasonic to provide information about their sales revenue for the relevant infringing goods, along with information about the costs. The information was to be provided by a director. The point of this order was to allow the patentee Lufthansa to elect between pursuing an enquiry as to damages or an account of profits. Such an order was first made in *Island Records v Tring* [1996] 1 WLR 1256. The successful claimant is entitled to choose which remedy to pursue and the information provided allows them to make a rational choice.
3. It will be necessary to come back to the nature and purpose of *Island Records* orders below, but a brief explanation of the choice they are designed to facilitate is worth mentioning now. If an IP rights holder's business is in licensing their rights then the damages would be measured by the loss of royalty on the defendant's infringing goods, which, if the infringements were highly profitable, may be a lower sum than the amount of profit the infringer earned from the infringement. The rational choice might then be to choose an account of profits. On the other hand if the infringer's business was unprofitable, perhaps trying to break into a new market, and the rights holder's business was a profitable one making direct sales to customers, which were lost due to the infringement, then a damages enquiry might be more sensible. Also the nature of the disclosure and evidence burdens, and on whom they fall, differs between these two kinds of proceedings and that may be another factor to bear in mind.
4. The order required the information to be provided by 30 October 2020, in a witness statement supported by a statement of truth. Panasonic duly served a witness statement of Steven Varner which, on the face of it, contained the required information. Mr Varner was not a director (and did not say that he was). No point was taken on that at the time. The precise figures given by Mr Varner are confidential (at this stage) and the details are not relevant. Broadly the revenue earned in the period was about \$165 million. The total of the direct and indirect costs left a very substantial figure for the profit. Perhaps not surprisingly given that Lufthansa's relevant business is licensing, Lufthansa elected to pursue an account of profits.
5. The election actually took place much later, on 2 September 2022. At the same time Lufthansa served Points of Claim in the account proceedings. One reason why this happened so long after Morgan J's order was the appeal to this court of Morgan J's judgment on liability. It made sense not to spend too much time and effort on financial remedies until the appeal was resolved. One thing which had happened in the meantime at the High Court level was a hearing in February 2021 to resolve terms of confidentiality relating to the information in Mr Varner's witness statement.

6. On 22 September 2022, three weeks after the election and the Points of Claim were served, Panasonic's solicitors told Lufthansa's solicitors that there were going to be "updates" to the information in Mr Varner's witness statement. On 2 December 2022 Panasonic served a witness statement of Mr Ryogen Takahashi. Mr Takahashi was a director of Panasonic Avionics Corp. Many of the figures in Mr Takahashi's statement are identical to those in Mr Varner's. The gross revenue and direct costs are the same. The indirect costs figures differ, but the major change is the introduction of a sales credit which reduces the gross revenue down to a significantly lower net revenue figure. The overall effect of all this, says Panasonic, is to reduce the profits by about \$30 million.
7. A week later, on 9 December 2022, Lufthansa's solicitors wrote to Panasonic's solicitors raising concerns about what had happened. Lufthansa made the point that the new evidence appeared to have been triggered by the election and Points of Claim. Lufthansa contended that now it had made its election it was not open to Panasonic to retrospectively change the basis on which that election was made and not open to it to advance a materially different factual position to that set out in Mr Varner's evidence. Lufthansa also noted that Mr Varner was not a director, unlike Mr Takahashi.
8. On 11 January 2023 Panasonic's solicitors wrote offering Lufthansa an opportunity to revisit the election. Lufthansa declined to do so.
9. Lufthansa made an application, and in reaction to it Panasonic made a cross-application. The matter came before Mr Recorder Douglas Campbell KC sitting as a Deputy Judge of the High Court on 27 April 2023. In paragraph 1 of its application notice Lufthansa were seeking an order that Panasonic may not rely on the additional costs and deductions referred to in Mr Takahashi's statement which had not been addressed in Mr Varner's statement. By contrast Panasonic were seeking an extension of the deadline in paragraph 10 of the Order of Morgan J in July 2020 up to the date of service of Mr Takahashi's statement in December 2022.
10. The evidence for the hearing addressed what had happened. Panasonic explained that in fact an internal review in January 2021 by a Mr Duckworth indicated that items must have been missing from Mr Varner's statement. That was only two months after Mr Varner's statement was served. Nevertheless at the confidentiality hearing in February 2021, witness statements from Panasonic's solicitor Mr Bennett, and from Mr Mark Jennings of Panasonic, referred to Mr Varner's evidence but made no mention of any problem with its content. As Mr Campbell KC later noted in his judgment, that evidence would have looked very different if Mr Duckworth's comments had been mentioned. Panasonic also explained that by the end of June 2021 an employee, Mr Nguyen, had come to the preliminary view that the costs figures in Mr Varner's statement were incorrect and a more detailed review was needed. Then in May 2022 Mr Nguyen was prompted to pick up the review again. At no time were Lufthansa told anything about this.
11. Crucially, before Mr Campbell KC there was common ground between both Lufthansa and Panasonic that the nature of what was before the court was a matter of relief from sanctions. Paragraphs 23 and 24 of the judgment ([2023] EWHC 1043 (Pat)) accurately set out the position as it was before the court at the hearing:

23. Panasonic's application notice does not state in terms that Panasonic is seeking relief from sanctions. However, it was common ground before me that that was the essential nature of Panasonic's application and that the three-stage test set out in the well-known case of *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3296 was the test which I should apply.

24. It was not suggested there was any material difference in the end result between paragraph 1 of Lufthansa's application notice and Panasonic's application for relief from sanctions in this respect. Hence counsel for Lufthansa addressed me on why relief from sanctions should not be granted, his application being first in time, and counsel for Panasonic then addressed me on why such relief should be granted.

12. The judge therefore considered the matter on that basis, i.e. as an application for relief from sanctions. CPR r3.9 was referred to along with well known cases on relief from sanctions. *Clearway v Miles Smith* [2016] EWCA Civ 1258 was cited for the proposition that the fact a trial date would not be imperilled is not a trump card when a breach is found to be serious or significant. The judge held on the facts before him (paragraphs 38-39) that there was no material risk of the trial date being at risk.
13. In the judgment, after dealing with the law briefly (since it was common ground) the judge analysed the facts in detail in paragraphs 46-73. There is no suggestion he made any error there. He identified essentially two breaches of Morgan J's order. The first was that the statement was not given by a director. The second was that it missed out or misstated important costs and deductions. Notably in this section the judge also observed that the evidence provided by Panasonic's solicitors to explain what had happened left important questions unanswered, essentially not excluding the possibility that the types of mistake which Mr Takahashi's statement reveals were in Mr Varner's evidence had been identified by Mr Duckworth back in January 2021.
14. The judge considered the first *Denton* stage and assessed the seriousness and significance of the breaches. This was at judgment paragraphs 74-78. He had no doubt the failure to comply with the order was both serious and significant, even though it did not of itself affect the trial date. He did reject a submission of Lufthansa that the breach rendered "a huge proportion of the work done wasted", noting that much of Mr Varner's statement was in fact correct. So the judge held that if the case continued as an account that work will not be wasted.
15. The second *Denton* stage (why the failure occurred) was dealt with at paragraph 79, the judge concluding that the reason for the failure was because Panasonic gave the job of compliance not only to someone too junior to give correct evidence but to someone not even permitted to do it by the terms of the order (since they were not a director). Therefore the breach in failing to provide the right information arose because of another breach of the same order, in not having a director give the statement.
16. The third *Denton* stage (all the circumstances) were addressed fully in paragraphs 80 to 100. The judge held (paragraph 89) what should have happened is that Panasonic ought to have told Lufthansa in January 2021 that there was reason to believe that Mr Varner's statement was inaccurate to a significant extent but Panasonic had not yet had time to

identify the precise figures. Panasonic should not have served the witness statements it did at the confidentiality hearing a month later (judgment paragraph 90). One of the points stated in that evidence in support of the confidentiality was that it was possible to calculate Panasonic's profit margin from Mr Varner's evidence, but that was wrong. Panasonic had not been diligent, had not applied with any promptness even after its own suggested date of October 2022 when it told Lufthansa that updates were required and had not taken its obligations seriously (judgment paragraphs 91-93).

17. On the other hand the judge noted that Lufthansa had been given a chance to re-elect but had not done so. Panasonic's evidence proposed that even if the accurate figures now available had been in Mr Varner's statement as they should have been Lufthansa would have made the same election – for an account of profits. Hence Panasonic submitted there is nothing unjust in granting relief from sanctions. At paragraph 96 the judge did not agree, accepting Lufthansa's simple submission that the impact on Lufthansa of granting relief from sanctions would be that it would be worse off than if relief was not granted.
18. The judge reached his conclusion at paragraph 100, noting the force in Panasonic's submission that providing the correct information would have made no difference to Lufthansa's election but holding that that was not strong enough to overcome the factors pointing the other way and finding that the balance came down in favour of refusing Panasonic's application for relief from sanctions.
19. On appeal Panasonic changed tack. Ground 1 seeks to advance an entirely new case, on the basis that their application was not one for relief against sanctions at all (nor should Lufthansa's application be approached that way). Rather the matter was one to be governed by ordinary case management principles under CPR r3.1 in accordance with the overriding objective. Panasonic recognised this is a new point not run before but submitted that permission should be given to advance it, applying the familiar principles. Arnold LJ gave permission to appeal on that basis. Grounds 2, 3 and 4 were advanced assuming the matter was one of relief from sanctions and sought to find ways of overturning the judgment on that basis. In giving permission to include these further grounds too Arnold LJ expressed his reservations about their cogency but gave Panasonic the benefit of the doubt.

Ground 1 –Relief from sanctions and Island Records

20. The starting point is the pair of rules in the CPR which relate to sanctions generally. They are r3.8 and r3.9 which provide as follows:

Sanctions have effect unless defaulting party obtains relief

3.8

(1) Where a party has failed to comply with a rule, practice direction or court order, any sanctions for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanctions.

[...]

Relief from sanctions

3.9

(1) On an application for relief from any sanctions imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

21. These rules do not create sanctions but apply when a sanction exists. Rule 3.8 operates to make clear that when a sanction is provided for there is no need to come back to court for an order imposing it. It takes effect and the onus on taking action is the other way round. The party in default needs to apply for relief from it. Rule 3.9 provides for the principles to be applied in applications for relief from sanctions, now explained fully in *Denton* itself. *Denton* is not concerned with identifying whether or not a relevant sanction exists. The sanction may be expressly provided for, in which case no difficulty arises, but there are also cases in which, as Moore-Bick LJ put it in *Salford Estates v Altomart* [2014] EWCA Civ 1408 at paragraph 13, “the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and therefore now the [*Denton*] principles.” This has been applied to the filing of a Notice of Appeal (in *Sayers v Clarke Walker* [2002] 1 WLR 3095 per Brooke LJ). The idea in *Sayers* is that although the rule providing for the time limit has no express sanction connected to it, it is implicit that without the relief (i.e. an extension of time) the appeal could not be brought, which amounts to a sanction. In *Salford* itself this same principle was extended to apply to a Respondent’s Notice.
22. Many kinds of application for an extension of time in cases of breach do amount to applications for relief from sanctions, such as an application for an extension having failed to serve witness statements in the time ordered (*Chartwell v Fergies* [2014] EWCA Civ 506). Similarly an application to set aside a default judgment has the same character (see the recent *FXF v Ishinryu Karate Association* [2023] EWCA Civ 891). However it does not follow that breach of any rule, PD or order which required something to be done within a certain time necessarily requires a relief from sanctions application, and in that respect I agree with both Martin Spencer J in *Mark v Universal Coatings & Services* [2019] 1 WLR 2376 at paragraph 54 and with HHJ Paul Matthews in *In Re Wolf Rock (Cornwall) Ltd* [2020] EWHC 2500 (Ch) at paragraph 26. Simply because a rule, PD or order uses a word like “must” does not on its own engage the relief from sanctions doctrine. As Martin Spencer J observed in *Mark v Universal*, one needs to look at what the default position would be if no extension of time (or other relief) was granted. If a sanction is in effect, either as a result of the express terms of a rule, PD or order, or by implication, then relief is required, but if not, not. For example in the context of witness statements (see *Chartwell*), rule 32.10 provides that if a

witness statement is not served in time the witness may not be called to give evidence, unless the court gives permission. This therefore makes provision for a sanction for failure to comply with the order setting a deadline for service of witness statements.

23. Before turning to the specific circumstances in this case, I should address the respondent's submission that this question of relief from sanctions makes no difference, because the same principles apply anyway irrespective of r3.9. Put briefly, the principles referred to are the emphasis on compliance, and the need for efficient conduct of litigation at proportionate cost (in the given case and other litigation). Of course these two principles are now firmly embedded in the overriding objective (r1.1) and they play an important part in its application. That is why it can be said that the "ethos" of *Denton* (c.f. *FXF* paragraph 76) applies generally in the overriding objective. However the characteristic feature of applications for relief from sanctions is not these factors as such, it is the fact that the application arises in circumstances in which the sanction is already properly in place and the applicant is seeking to disapply it. Thus as Lord Dyson MR (giving the judgment of the court) noted in *Mitchell v News Group Newspapers* [2014] 1 WLR 795 at paragraph 45:

"On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective."

24. The point was developed by Davis LJ in *Chartwell* at paragraph 24, referring to *Mitchell* paragraph 45:

"24. It can therefore be seen that CPR 32.10 provides its own sanction for failure to serve a witness statement within the time specified by the court: that is, that the witness may not be called to give oral evidence unless the court gives permission. Since the rules have determined the applicable sanction (unless the court gives permission) there can accordingly be no available argument that the sanction prospectively to be imposed is of itself unjust or disproportionate.

[quotation of *Mitchell* paragraph 45]

The question thus is not whether the sanction prescribed by CPR 32.10 is of itself disproportionate or unjust but whether the sanction should be disapplied in the particular case."

25. It is this aspect which distinguishes a relief from sanctions application to which *Denton* applies, from a different application governed only by the overriding objective.
26. Turning to the present case, one needs to start with *Island Records* orders. The approach of making an *Island Records* order at the conclusion of a trial concluded in the claimant's favour is not provided for in any rule or practice direction but it is well established in intellectual property cases. In *Island Records* itself (a copyright case) Lightman J. reasoned that a party should not be required to elect between an enquiry as to damages or an account of profits unless and until they were able to make an informed choice, which could be done after being able to consider "readily available information" relating to the likely entitlement under each remedy. This could be provided by

disclosure or some other alternative satisfactory means such as a witness statement. The order should be made even though the information was likely also to be required on the taking of the enquiry or account. The information did not have to be exact and should not be the product of an overly lengthy or sophisticated exercise. Picking up this theme, in *Brugger v. MedicAid* [1996] FSR 362 Jacob J rejected the “extreme view” that all necessary information for the account or enquiry should be given, emphasising that all that was needed was enough information to make an informed election. That would only require approximate estimates, particularly of costings, as long as they are explained. In *Brugger* therefore, as Panasonic submitted, Jacob J was expressly disavowing the notion that an *Island Records* order amounted to a form of pre-action disclosure on the account or enquiry. Similar statements in other cases at the High Court level can be found in *Vestergaard v Bestnest* [2009] EWHC 2662 (Ch) at paragraph 16 (Lewison J), and in *Comic Enterprise v Twentieth Century Fox* [2014] ETMR 51 at paragraph 48 (Roger Wyand QC).

27. In other words *Island Records* orders have to be seen in the light of their purpose, which is only to facilitate the claimant’s election between two forms of remedy. To achieve this result two factors are relevant. First the information has to be something which can be produced fairly quickly and at proportionate cost because the election is made at the start. The process cannot advance much until the election is made. Second the information has to be sufficiently reliable for the purpose of making the choice but that is all. More detailed disclosure and analysis will follow. Approximate estimates are to be encouraged.
28. Morgan J’s *Island Records* order was in conventional form. It says nothing about what would happen if the defendant failed to serve the witness statement or breached the order in any other way. No doubt if the defendant did nothing at all, then no election could take place and the claimant would apply to the court for an unless order, although what the condition in such an order would be is not easy to imagine, or perhaps for an order for a fresh deadline which would be served endorsed with a penal notice. Of course Panasonic did not breach the order in this way, but it is not without importance that the order contains within it no express sanction for non-compliance. Moreover the absence of rules or practice directions specific to these orders means that there is no tailor made provision which applies a sanction for non-compliance with an *Island Records* order.
29. Lufthansa submitted there is in fact an express sanction for breach provided for in the rules and that in any event one can imply a sanction in this case for policy reasons.
30. The rule relied on is r31.21, which I will assume applies since an order had been made in the liability phase of the case to apply CPR Part 31 rather than the (then) disclosure pilot. The rule provides as follows:

Consequence of failure to disclose documents or permit inspection

31.21 A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission.

31. This rule prevents a party from relying on a document that they have failed to disclose unless the court gives permission. One can see what it is getting at by imagining a litigant mid-trial suddenly producing a document from their bag which had not been duly disclosed in the pre-trial disclosure process, and trying to rely on it. Permission would be needed, see *SOCA v Namli* [2011] EWCA Civ 1411 paragraph 20 and *McTear v Engelhard* [2016] EWCA Civ 487.
32. This rule in its own terms clearly does not apply since, apart from anything else, Panasonic are not seeking to rely on documents at all at this stage. However Lufthansa's submission is that although the present application is not about documents, the information in the witness statements of Mr Varner and Mr Takahashi was given in lieu of disclosure by Panasonic and so by analogy the same principles apply. I do not accept that either, for the following reasons.
33. First, as the explanation of the purpose of *Island Records* orders above shows, although one can say in a sense that the information is provided as a more convenient approach than requiring the defendant to produce underlying documents at that stage, and so could be said to be "in lieu of disclosure", it is not provided in lieu of the main disclosure obligation on the account. Once the order has been made and a statement served, the claimant can make the election which *Island Records* is intended to facilitate, and the order has done its job. The *Island Records* order said nothing about the full disclosure process, which would be sorted out in case management down the line. (In fact some directions for disclosure have now been given on the account.) In giving directions for disclosure on the account, the existence of the witness statement produced pursuant to *Island Records* would be no answer to a request by the claimant for disclosure of costing documents from the defendant. Those documents would bear on the very costs and deductions which the witness statement estimated.
34. Second, the proposition is that r31.21, which is absolute in its terms, should be applied by analogy to information produced in lieu of documents rather than the documents themselves. However the *Island Records* process envisages that the figures in the witness statement can be estimated and so the final figures may very well not be the same as those in the witness statement. Minor deviations are to be expected once the detail is examined, and there is nothing either express or by implication in the *Island Records* process which would take effect to say that such deviation is prohibited. Thus one would need to introduce, into the application of r31.21 by analogy, a distinction between minor deviations and more significant ones. There is no basis for that. I reject the submission based on r31.21.
35. The other basis on which a sanction is said to exist is on policy grounds. The information to be provided has to be fit for purpose. Compliance with that purpose is important. In effect part of Lufthansa's submission here is that if there were no sanction when it turned out that errors of the magnitude as have occurred here are found, then the whole scheme would be undermined. However this does not mean there is an implicit sanction which can be found to have taken effect automatically when a significant breach of the *Island Records* order is discovered. The question is not whether the court on an application by a party ought to impose a sanction of some kind in such circumstances, the question is whether on policy grounds one can identify that there is a sanction already in effect. I cannot do so. The most that policy considerations would support is the idea that when a claimant learns that the information is inaccurate to a significant extent they would be entitled to seek permission to revisit the election,

since the purpose of the order had been frustrated. However whether or not that would be permitted, and on what terms (e.g. as to costs), would always be a fact sensitive question which could not be provided for automatically. It would have to be decided on an application to the court.

36. For these reasons I conclude that no automatic consequence is provided for breach of an *Island Records* order, either expressly or by implication, by any rule, PD (or order). No relief from sanctions already in existence is required. Panasonic in particular does not have to persuade the court to disapply a sanction in place, whose prior imposition could not be said to have been disproportionate. The court has to apply the overriding objective.
37. It follows that the approach to be taken to resolving the rival applications before the court is on an entirely different basis from the approach below based on what was then common ground. That said, the judge's analysis of the facts stands, as do the judge's criticisms of Panasonic's conduct in failing to raise the problems with Mr Varner's evidence far earlier, in putting wrong evidence before the court at the confidentiality hearing in February 2021 and in not putting the full picture before the court at the April 2023 hearing. The fact Mr Varner was not a director, contrary to the order, was itself a cause of the wrong information being provided.
38. Even though this is not an application for relief from sanctions, it is still useful to consider the seriousness and/or significance of the breach, and the reasons for it, when looking at all the relevant circumstances and applying the overriding objective. The breach in this case was plainly a serious one and significant in its consequences, simply owing to the magnitude of the relative difference between the profit to be derived from Mr Varner's statement and the \$30 million lower profit to be derived from the figures in Mr Takahashi's statement. The absolute amount is large but even though the details are confidential one can also see given the revenue was about \$165 million, that the change is large in relative terms. It is manifest that such a large error in *Island Records* information means that there is, at its lowest, a question mark over whether the claimant would wish to reconsider its election. The seriousness of the breach is compounded by the fact noted by the judge that the wrong information was caused by the prior breach of the order in that Mr Varner was not a director. As the judge also identified (paragraph 76) the fact it took so long to be corrected compounds the negative consequences of the breach.
39. If this breach had never happened or had been corrected promptly and in any case before Lufthansa's election in September 2022, then it would not have led to a hearing in the High Court and on appeal. That alone shows that Panasonic's non-compliance with the court's order has had an impact on other litigants and the administration of justice.
40. Another factor in terms of consequences is whether the breach puts the trial date in jeopardy. Lufthansa submitted that if on ground 1 of the appeal, the court finds that the matter has to be considered afresh not as an application for relief from sanctions, then since this was a new point taken on appeal, the reference point for considering circumstances should be now rather than looking from the time of the judgment. Lufthansa then submits that if it re-makes its election and chooses to go for an enquiry rather than an account, then that puts the trial date in October 2024 in jeopardy. I accept the proposition that in these circumstances the fair reference point to consider is now, but I am not persuaded that this trial date would be imperilled if Lufthansa did elect for

an enquiry as to damages instead. There is no evidence directed specifically to that point before us. In any event the idea that an enquiry of this kind could not be brought to a trial in the Patents Court in a year is, to put it politely, unconvincing. The parties have highly experienced legal teams of counsel and solicitors. Even if the matter had to be done from a standing start, which it does not, it could be done.

41. The reasons for the breach were examined with care by the judge and are referred to above. They do not need to be repeated.
42. Turning to the balance, this is where the major difference between this application and one for relief from sanctions arises. No consequential provision is currently in place which may or may not be disapplied. The court has a free hand to make whatever order is appropriate in the circumstances, being a proportionate response to the breach which has occurred. If no order is made then there is nothing to prevent Panasonic from advancing a case at the trial of the account which involves all the costs and deductions shown in Mr Takahashi's statement. Panasonic does not need the court's permission at this stage to do that. That does not mean that the court does not have a wide range of powers to exercise, including I suppose the power to remove an issue from consideration, but whether that would be an appropriate response in these circumstances is a very different matter.
43. The obvious proportionate response is simply that Lufthansa should have the chance to remake its election in the light of the new information (that information being permitted to come in via Mr Takahashi's statement), potentially with costs consequences which I address below. Despite the time that has passed, the proceedings are in fact still at an early stage. There is time between now and trial to accommodate a change in the election if Lufthansa sees fit. Moreover there was even more time to accommodate this when Lufthansa were first offered the chance to re-elect, in January 2023. That offer was rightly made by Panasonic and the fact Lufthansa turned it down is itself a relevant factor.
44. Panasonic suggests that the basic rationality of Lufthansa's choice to seek an account of profit, given that its damages would only be lost royalty rather than a manufacturer's profit, will not have been changed by Mr Takahashi's new information. That may or may not be so but it does not mean Lufthansa ought not to have been offered the chance to reconsider, as Panasonic recognised in January 2023.
45. If the serious inaccuracy in the *Island Records* information had only emerged much closer to trial then I can see that much more difficult choices might face the court, but that is not this case and I need say no more about it.
46. One of the problems with the way the parties' common ground operated below can be seen in paragraph 96 where the judge considered the impact on Lufthansa of granting relief from sanctions. Although it is never spelled out, given the way the case was being argued below, the approach was being taken that it was only if relief was granted that Lufthansa would have to deal with a case based on Mr Takahashi's evidence whereas if no relief was granted then in effect Panasonic would not be able to advance a case inconsistent with Mr Varner's evidence. That is why Lufthansa would be worse off if relief was granted than if it was refused. The common ground that the matter was to be addressed as relief from sanctions presupposed that a sanction was already in place, but

did not spell that out. This again illustrates the importance of correctly characterising the nature of the application.

47. Taking the non-existent sanctions out of the picture, and provided Lufthansa has a chance to remake its election, I do not accept that Lufthansa would suffer any further prejudice aside from costs, by an order extending time for compliance with Morgan J's order. Despite the lamentable failure by Panasonic to approach this matter seriously over a period of nearly two years, the balance nevertheless comes firmly down in favour of refusing Lufthansa's application to prevent Panasonic from relying on the new Takahashi information. Whether Panasonic really needs the order extending time I am not sure but I note it was only sought as an understandable reaction to Lufthansa's application.
48. I would order that paragraph 10 of the order of Morgan J be extended to the date of service of Mr Takahashi's statement and that Lufthansa be given 14 days to either elect for an enquiry or confirm its election for an account. If Lufthansa does elect for an enquiry then Panasonic ought to pay the costs thrown away owing to the errors in Mr Varner's statement down to the end of January 2023 but no further. That is an appropriate cut-off date because Lufthansa was offered a chance to re-elect at that time and I do not see why it should recover any similar costs after that date.
49. So I would allow the appeal on ground 1. In that case there is no need to consider grounds 2, 3 or 4 nor the Respondent's Notice nor the argument about whether or not a point was open to Lufthansa having not been in the Respondent's Notice. In fact consideration of the seriousness and significance of the breaches to some extent traversed similar territory to ground 2 but in a different context. I will end by saying that if the matter had properly been one based on relief from sanctions, as the parties jointly put to the court below, I would have dismissed the appeal on grounds 2, 3 and 4. Approached that way the judge's conclusion was one open to him and no error of principle or approach was involved.

Lord Justice Newey:

50. I agree.

Lady Justice King:

51. I also agree.