Neutral Citation Number: [2023] EWHC 2547 (Pat)

Case No: HP-2017-000085

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: Tuesday, 10th October 2023

Before:

SIR PAUL MORGAN
(Sitting as a Judge of the Chancery Division)

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Between:

LUFTHANSA TECHNIK AG ("LUFTHANSA") **(a company incorporated in Germany)**	**Claimant**
- and -	
(1) ASTRONICS ADVANCED ELECTRONIC SYSTEMS ("ASTRONICS") **(a company incorporated in the state of Washington, USA)** **(2) SAFRAM SEATS GB LIMITED ("SAFRAN")**	**Defendants**

Case No: HP-2021-000032

And Between:

LUFTHANSA **(a company incorporated in Germany)**	**Claimant**
- and -	
PANASONIC AVIONICS CORPORATION ("PANASONIC") **(a company incorporated in the state of Delaware, USA)**	**Defendants**

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- -

MR. CHRISTOPHER HALL (instructed by **Jones Day**) for **Lufthansa**

MR. JOHN TAYLOR KC, MR. MILES COPELAND and MS. TIFFANY TANG (instructed by **Hogan Lovells International LLP**) for **Astronics and Panasonic** (and instructed by **Pinsent Masons LLP**) for **Safran**

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Approved Judgment
(On Claimant's Application)

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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SIR PAUL MORGAN:

1. This is an application which was issued on 28th June 2023 and amended recently, on 4th October 2023.

2. The applicant is Lufthansa Technik AG. The respondents to the application are Astronics Advanced Electronic Systems, Safran Seats GB Limited and Panasonic Avionics Corporation. Mr. Hall appears on behalf of the applicant and Mr. Taylor, KC, together with Mr. Copeland and Ms. Tang, appear on behalf of the respondents

3. The application is for an order, pursuant to CPR 40.12, usually referred to as the slip rule, or pursuant to CPR 3.1(7). Putting it neutrally, the order which is sought is one which changes the terms of an earlier order, which I made in August 2020. That earlier order, although it is dated 22nd July 2020, was to give effect to, and to be in all respects in accordance with, a judgment I had given on 21st August 2020. That judgment and the order dealt with matters consequential on a judgment I had given on 22nd July 2020, being the outcome of a contested trial between these parties. The order which I am asked to change today bears the date, 22nd July 2020, but it is important to remember it was made on or after 21st August 2020, to give effect to the judgment of that date.

4. I do not need to say very much about the underlying litigation between these parties. In essence, the claim by Lufthansa against the respondents to this application, who are defendants in the action, was a claim for a financial remedy for infringement of a patent.

5. Before the trial took place before me, leading to the judgment of 22nd July 2020, there were two earlier orders to which it is necessary to refer. The first was an order made by Nugee J (as he then was), on 14th January 2020. Paragraph 7 of his order identified three issues which were to be adjourned, with liberty to apply. That is to say they were not to be part of the liability trial which I heard in June 2020.

6. To somewhat similar effect was an order by Marcus Smith J, on 22nd May 2020. Paragraph 7 of his order said :

> "The Trial shall determine the issues set out in the List of Issues agreed between the parties and attached at Schedule B to this Order. All other issues in the case, including the cross-examination of the PPD fact witnesses, shall be adjourned with liberty to apply."

It is not necessary to refer to the list of issues in the schedule to that order; nor is it necessary to explain what were the case management reasons for those orders being made.

7. The trial duly took place over six days between 22 June and 1 July 2020. I prepared a reserved judgment, running to 289 paragraphs. I provided it to the parties in draft on 17th July 2020, with a view to it being handed down on 22nd July 2020. That is what then happened.

8. Most of the judgment deals with issues as to the validity of the patent-in-suit. It is only towards the end of the judgment, in, I think, about three or four pages, that I dealt with the question of infringement. I had to consider infringement, or alleged infringement, by the three different defendants and the claims that they had infringed differed from one defendant to the other. I held that there had been liability for infringement on the part of each defendant. In the case of Panasonic, in particular, I was able to say that since I had found it was liable for infringement in one way, it was not necessary for me to deal with other ways in which the case had been put against Panasonic. For today's purposes, issues which had been argued before me in June 2020, but not decided by me in that judgment, have been referred to as "unresolved issues".

9. Following the release of a draft of the judgment, on 17th July 2020, there were communications between the court and the parties' lawyers, pursuant to which it was agreed that the court would deal with matters consequential on the judgment, having received witness statements, if necessary, and written submissions, in time for the matter to be dealt with without undue delay.

10. For that purpose, I was provided with some material, which is today highly relevant. I was provided with the seventh witness statement of Mr. McCulloch, the solicitor for the claimant; I was provided with the third witness statement of Mr. Bennett, the solicitor for the defendants. Both of those statements appear to have crossed on the same day, 28th July 2020. I was also provided with a written submission on behalf of the claimant, prepared by Mr. Hall, who had been junior counsel at the trial, and I was provided with written submissions on behalf of the defendants, prepared by leading and junior counsel, who had been leading and junior counsel at the trial. Finally, I was provided with a draft order.

11. Let me now go to the draft order. Most of the draft order was agreed, although, as it happens one part of the agreed order, namely paragraph 4, was later corrected by Mr. Campbell KC sitting as a High Court Judge, when, by consent, he corrected one of the findings in paragraph 4 of the order. I need not, I think, elaborate that point further; it is not material to today's application.

12. The draft order contained a number of recitals which were agreed and one recital which was not agreed. A recital was sought by the claimant in these terms: "AND UPON the Adjourned Issues having fallen away in light of the Court's Judgment." I should add that "the Adjourned Issues" there referred to was a defined term, referring to the matters adjourned by the orders of Nugee J and Marcus Smith J to which I have referred.

13. The next place where the parties did not agree was paragraph 11. Paragraph 11 started with words which were agreed. Those words were: "The parties have liberty to apply for further directions on the Inquiry/Account." Then there were words which were not agreed. Effectively, there were two versions put forward for the court to consider and to choose between them. What the defendants said was that there would be liberty to apply for further directions in relation to determination of the Adjourned Issues. Lufthansa, however, did not agree that formulation. Lufthansa put forward a qualification on the liberty to apply for directions in relation to determination of the Adjourned Issues. Lufthansa's case was that that should only arise and become a possibility, "insofar as may be necessary following any appeal." Therefore, if there was no appeal, the need for directions could not be necessary following an appeal, and

if there was an unsuccessful appeal, leaving matters where they stood at the date of my judgment, again, it would be difficult to see how it would be necessary to seek directions. However, if there were a successful appeal, one could see the possibility that the changed circumstances following a successful appeal might lead to a determination of the Adjourned Issues becoming appropriate.

14. I have read the wording in red ink, without going any deeper into the issues that wording might have thrown up. The reason I did that is that the position of the parties, in relation to the red ink amendments, was elaborated in the witness statements and the submissions, to which I will now refer.

15. I can say this: I do recall my reaction to reading the draft order, which I think I read before I read the witness statements and the submissions. When I read the draft order, I recall focusing on the words "having fallen away", and asking myself, "what does that mean? Is it appropriate for me to make an order where I am not clear as to what the words mean?" Similarly, as to paragraph 11, I could see some lack of clarity in the red wording and I asked myself, "should I make an order where I do not know for certain what the words mean?" It was in that spirit that I turned for enlightenment to the witness statements and the submissions of the parties.

16. I can also say that when I first read the draft order, my initial reaction was that the matter could be dealt with reasonably quickly, without spending a large amount of time. However, when I read the witness statements and the submissions, I found myself going backwards and forwards between the witness statements, as I considered I had been given a more difficult task than I had expected as to working out what were the parties' true positions.

17. I start with the seventh witness statement of Mr. McCulloch, on behalf of the claimant. That gave me some assistance as to what the claimants were asking the court to do. In paragraph 2, Mr. McCulloch said, and I paraphrase, that there were only two points I had to decide. One was permission to appeal and one was to do with costs. I could see at once that that was not accurate because whatever I did about permission to appeal and costs, I had to decide about the recital in red ink and the wording of paragraph 11. Therefore, the task was not as straightforward as Mr. McCulloch there described it.

18. Mr. McCulloch then said a number of things about the Adjourned Issues and, in paragraph 5, he said this:

> "In light of the Court having held all three Defendants' dealings in both the EmPower Systems and Modified EmPower Systems to have infringed claim 1 of the Patent, those Adjourned Issues are no longer necessary and accordingly have fallen away (see the fourth recital proposed by Lufthansa). The question thus arises as to how to deal with the costs of them."

19. I plainly noticed the words "fallen away", that is what the recital said, but paragraph 5 of the witness statement went on to say, "those Adjourned Issues are no longer necessary", so I noted that.

20. Later in his witness statement, Mr. McCulloch said, at paragraph 18, and I will paraphrase this, he referred to certain arguments which were amongst the Adjourned Issues being “no longer needed”, that is 18.1, or “not needed”, paragraph 18.2, and paragraph 19 also refers to "was not needed".

21. It might be said, particularly in the light of the arguments today, that Mr. McCulloch's words were open to interpretation, but the matter was put beyond serious argument by the written submissions, drafted by Mr. Hall on behalf of the claimant. Those submissions contain a number of relevant passages. In paragraph 4, it was said:

> "Therefore, for reasons of procedural efficiency they were put to one side unless and until they became necessary to resolve. Following Judgment, however, it is no longer necessary to resolve them."

22. In paragraph 15, Mr. Hall made a submission about the right approach. He referred to preliminary issues and summary judgment decisions and he then said, and I quote:

> "The usual order is that the defendant gets all its costs of the action, including of the points of substantive defence that will never be decided."

23. There, he was dealing with a specific type of case, but the clear inference is that the present case was that type of case also.

24. Then, in paragraph 16, he referred to the defendants' position about costs. He described the defendants' position as involving a proposal that nothing be done in relation to the Adjourned Issues or costs, and he said, and I quote:

> "The problem with that suggestion is that, because the Adjourned Issues no longer need to be decided, in the absence of a successful appeal the only direction that a party will seek is for payment of its costs."

25. He pointed out why that was inappropriate. I draw attention to the phrase "the Adjourned Issues no longer need to be decided".

26. In paragraph 17, again referring to the defendants' proposal, Mr. Hall said, "... the costs of the Adjourned Issues are never revisited ...". That was said to be the consequence of not making an order for costs there and then.

27. Later in the skeleton argument, Mr. Hall addressed the red ink in the draft order. He said at paragraph 29:

> "The fourth recital records that the Adjourned Issues have fallen away. Although the Defendants have not formally agreed to this, we understand it is common ground that the Adjourned Issues no longer need to be decided."

28. I draw attention to the words "... no longer need to be decided" in that phrase I have quoted.

29. Then, in paragraph 30, he ended the paragraph by saying: "Accordingly, these alternative infringement arguments fall away." There, again, we have the words "fall away", picked up in the fourth recital, plainly intended to mean the same as paragraph 29 of the skeleton argument, the Adjourned Issues "... no longer need to be decided."

30. In paragraph 39 of the skeleton, Mr. Hall dealt with another difference between the two parties. He explained what was meant by the red amendment to paragraph 11. He said this:

> "Lufthansa seeks the inclusion of the red text 'insofar as may be necessary following any appeal' because, for the reasons discussed above, unless an appeal is successful the Adjourned Issues do not need to be decided, and if the appeal is not successful it would be rather unhelpful for this Court to leave the incidence of those matters over to another Judge who will not have had the benefit of hearing the recent trial of liability."

31. That was the case being put to me, as to consequential matters, by the claimant. I will deal with what the defendants said in a moment, but what I felt I was able to take from that material was that when Lufthansa used the phrase "... the Adjourned Issues having fallen away ...", in their red ink recital, they meant what Mr. Hall said, which was the Adjourned Issues no longer need to be decided.

32. I did not use the claimant's draft of the red ink recital in the final order. The reason I did not use it was, it seemed to me, that talking about something "falling away", lacked the precision which Mr. Hall had provided in the phrase "... the Adjourned Issues no longer need to be decided." So in the order which I made, resolving this dispute about the fourth recital, I recited as follows, and I quote:

> "Upon the Adjourned Issues no longer needing to be determined in the light of the Court's Judgment."

33. There is a difference between "decided" and "determined" as a matter of language, but not, I think, as a matter of sense.

34. When I came to consider the red ink amendment to paragraph 11, I was guided by paragraph 19 of Mr. Hall's submissions, where he made it plain that the red ink was dealing with the possibility of a successful appeal. In that event, it may be necessary, following any appeal. I will record in a moment what I then did with paragraph 11, now that Mr. Hall had clarified the meaning of the red ink amendments.

35. I said that I would refer to the evidence and submissions made by the defendants for the consequential matters issue. Mr. Bennett prepared a third witness statement of 28th July 2020. He dealt with the costs of the adjourned matters. He made a number of points about what was involved. He was rather critical of the arguments being put forward, but I do not, I think, need to refer to any other part of the witness statement.

36. I have been referred, however, to the written submissions for the defendants. The defendants made a case which, if the premise had been right, might have had force, relating to the costs of the adjourned matters. What the defendants said was that Lufthansa has not given up the adjourned matters and so they might be decided later

and Lufthansa might lose them or some other order made in the light of the decision on those matters, but yet Lufthansa was trying to get its costs of the reserved matters at this earlier point in time. Therefore, the case being put was that Lufthansa had not given up the reserved matters.

37. As I have indicated, I found that the way in which the parties were conducting their cases caused me to take more time in the resolution of this question than I had initially expected. However, I read and re-read the material and I handed down, in the form of simply releasing to the parties, a written judgment on 21st August 2020, dealing with the differences as to the form of order.

38. In paragraph 2 of that judgment, I said:

> "The form of the order is largely agreed and I will make an order as drafted in relation to agreed matters."

Of course, the recital in red ink was not agreed and paragraph 11 was not agreed.

39. Mr. Hall, today, has sought to ignore the red ink in paragraph 11 and has suggested that the rest of paragraph 11 was agreed, but I do not accept that submission. The red ink in paragraph 11 cut down the operation of the other words in the second part of paragraph 11.

40. Paragraph 2 went on:

> "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."

41. Just pausing there, that idea that the amendment to paragraph 11 would apply following a successful appeal by the defendants was not something I had made up. I had taken it from Mr. Hall's submission to me as to the effect of the revised paragraph 11.

42. I then went on in paragraph 2 to say:

> "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. "

43. Where did I get that from? “Absent a successful appeal” is how it had been put by Mr. Hall, and “it was not said they would seek a determination of the Adjourned Issues” was again taken from Mr. McCulloch and Mr. Hall, stating that these issues did not need to be decided.

44. I then, in paragraph 3, dealt with the point that if there were to be a successful appeal, which was the only candidate for the red wording in paragraph 11, that would be dealt

with by the Court of Appeal and it was not for me, at first instance, to write the script for what would happen in that event.

45. I then dealt with the issue as to costs. I described what the adjourned issues had been. At paragraph 12, I summarised the defendants' case, that the claimant should not have its costs because those issues had not been decided. I then said:

> "The Defendants also say that the Claimant has not abandoned the Adjourned Issues so that they have not fallen away so that the Claimant wishes to keep the Adjourned 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 Adjourned 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 Adjourned Issues do not need to be determined."

I took that from the witness statement and the skeleton submissions to which I have referred.

46. The result of that was that I made some relatively minor changes to the draft order. I considered that the fourth recital should be expressed so that one did not use the words "fallen away", but instead recited that "the Adjourned Issues no longer needing to be determined in the light of the court's judgment".

47. As to paragraph 11, understanding Lufthansa to say that the red amendment and the words following it would only apply in the case of a successful appeal, and having taken the view that the result of a successful appeal was for the Court of Appeal and not me, I shortened paragraph 11 so it read:

> "The parties have liberty to apply for further directions on the Inquiry/Account."

48. The first thing to notice, a matter that is rightly stressed by Mr. Taylor on behalf of the defendants, is that there is no mismatch between the reasoned judgment of 21st August 2020 and the order I made. The changes I had made to the fourth recital I explained in the reasoned judgment and were precisely what I intended. The changes I made to paragraph 11 were explained in the reasoned judgment and were precisely what I intended. Indeed, it would be remarkable if I had drafted an order introducing the wording which I wished to use and then gave my reasons for choosing that wording over alternative wording, for me to have intended one thing and achieved a quite different thing.

49. Perhaps before leaving the order, I should say that Lufthansa persuaded me that I should order the defendants to pay the costs of the Adjourned Issues. That was not inevitable, given my finding that Lufthansa had given up the Adjourned Issues, but I followed what I conceived to be a fairly standard approach, that if a claimant makes a number of allegations and gets what he seeks on those allegations, the fact that other allegations are left unresolved should not mean that the defendants get their costs of the unresolved issues or that the claimant should not recover its costs of the unresolved

issues. After all, I was treating the unresolved issues, which I referred to in the trial judgment, in the same way as the Adjourned Issues.

50. What I would have done if Lufthansa had stated that they were keeping the Adjourned Issues alive, I do not know, but I think there would have been considerable force in the defendants' argument that if the Adjourned Issues were going to be kept alive and might well be determined subsequently, that the costs of the adjourned issue should be dealt with subsequently and not at this point. I do not say the defendants would necessarily have prevailed. It would have been a perfectly proper argument that would have had to have been considered.

51. August 2020 was the last I saw of this case until very recently. However, the parties have taken a number of steps in the litigation. As I understand it, the claimant served points of claim, having elected to take an account of profits in relation to the defendants' infringements. As I understand it, in their points of claim, the claimants put forward a number of infringements which went beyond infringements I had determined in the trial judgment and, in particular, they put forward three alleged infringements which were within the defined Adjourned Issues. As I understand it, the defendants defended by saying that those three matters were no longer open to the claimants. They relied, as I understand it, in particular, on the recital to my order, that the Adjourned Issues were no longer needing to be determined.

52. The parties disagreed about the position and there was a hearing before Mr. Douglas Campbell KC, sitting as a Judge of the Chancery Division, and he gave a reserved judgment following that hearing on 12th May 2023. The neutral citation of judgment is 2023 EWHC 1136 [Pat].

53. The Deputy Judge's judgment is in two parts. The first concerns the general practice in a patent infringement case, where a claimant having established one, or more than one, infringement, is entitled to call evidence to support and attempt to prove other infringements for the purpose of the quantum trial. The second part of the Deputy Judge's judgment was to consider what was the effect of the order I made in August 2020. In short, the Deputy Judge considered the arguments before him and concluded that my order had meant that it was not open to the claimants to put forward the three Adjourned Issues at the quantum stage, although it was open to the claimants to put forward issues as to infringement which had been argued before me and which I had left unresolved. There is a very helpful table attached to the Deputy Judge's judgment which distinguishes between the unresolved issues in yellow and the three Adjourned Issues in blue. There is a separate story about an issue in green, which I need not describe.

54. Lufthansa do not care for the position in which they now find themselves. They did not apply to Mr Campbell, nor to me, to be released from the concession, or the statement they had made as recorded in the recital to the order. Instead, they have appealed Mr. Campbell's order. That is to say, they seek permission to appeal and I understand the application for permission to appeal will be heard at a rolled-up hearing later this month.

55. In the light of Mr. Campbell's decision about the effect of the order of August 2020, the claimants also seek permission to appeal out of time, against the order I made in August 2020. Rather interestingly, the order they seek on appeal does not involve any

alteration of the recital. Instead, it addresses only paragraph 11 of the order I made and the intent is that the liberty to apply should expressly mention Adjourned Issues. It is not clear to me that paragraph 11 needs to mention the Adjourned Issues as it is an entirely general, unqualified permission to apply.

56. I will not go to the grounds of appeal. It is not for me to comment on the grounds of appeal. It will be for the Court of Appeal to consider whether my judgment of 21st August 2020 should be the subject of permission to appeal and should be reversed or varied on appeal.

57. I cannot refrain, however, from going to the skeleton argument of the claimants seeking permission to appeal. Paragraph 17 of the skeleton argument contains a very striking statement. It states that the dispute between the parties in July 2020 as to the status of the Adjourned Issues was somewhat strategic. Both sides were adopting positions that suited their submissions on costs. On the one hand Lufthansa said that the Adjourned Issues had fallen away and no longer needed to be decided, and on the other, the defendants said they remained available to Lufthansa, so that they could be revisited subsequently. Then, the remainder of that paragraph is much more in the way of a submission, which it would not be right for me to comment on.

58. There is certainly a real possibility here that when Lufthansa said in its evidence and in its submissions to me as to the form of the order it wanted in August 2020, they wanted to give the impression that the Adjourned Issues had now finally fallen away, would not need to be decided, would not be raised for decision before a court at a later date, because that would improve their chances of getting their costs because my preference would be, as it turned out it was, that I should deal with unfinished business on Adjourned Issues, rather than leaving them to an uncertain future, where there may be difficulty in dealing with them later. So Lufthansa's, to use their word, "strategy" prevailed.

59. It is also right to comment that at the hearing today, Lufthansa's position on costs has entirely changed. When they brought their application to change the order I made, they did not propose any change to the favourable order for costs. However, in the evidence for this application, they suggested that they would repay the costs if the court ordered them to do so. It is difficult to see how a later court could make such an order, given that I had made a final order for those costs. That being pointed out, Mr. Hall took instructions and indicated that he would agree to the previous order being changed so that the relevant costs were reserved and that, in the meantime, the payment which had been made would be returned.

60. That, I fear, shows me that what is happening here is the following: it suited Lufthansa, in July and August 2020, to say that the Adjourned Issues did not need to be decided to improve their prospects on costs. Now they want to have those Adjourned Issues available to them. The costs they gained in August were, in the context of this case, very modest, some £50,000, and they now consider that it is far better to give up the £50,000 than to lose the benefit of these arguments on the quantum inquiry, where the sums of money involved are potentially many times more significant.

61. Therefore, what the claimants are doing is blowing hot and cold. To enable them to do that, they now suggest that the court has made mistakes and it is the court's duty now to correct those mistakes.

62. That brings me to the legal basis of this application. The first legal basis was pursuant to rule 3.1(7), but in the course of argument, the claimants have preferred, as their first argument, to rely upon rule 40.12, the slip rule. 40.12(1) says:

> "(1) The court may at any time correct an accidental slip or omission in a judgment or order."

63. I was referred to the decision of the Court of Appeal in *Libyan Investment Authority v King* [2021] 1 WLR 5269 for guidance as to the scope and operation of the slip rule. At paragraph 119, Arnold LJ said:

> "The slip rule cannot be used to enable the court to have second or additional thoughts, but it does enable the court to correct an order so as to ensure that it reflects the court's intention and to prevent the order from having an unintended consequence."

64. In summary, the claimant's submission to me about the slip rule is that, properly understood, I intended to leave the Adjourned Issues to be dealt with at the quantum hearing and Mr. Campbell's judgment, in May of this year, has held that the Adjourned Issues are not available to be dealt with at the quantum hearing. As to that, I will proceed today on the basis that Mr. Campbell is right about the order I made, but where the submission breaks down is that I do not accept that I intended to leave the Adjourned Issues to be dealt with at the quantum hearing. Anyone reading my judgment of 21st August 2020 will see that I held, in terms, that the Adjourned Issues did not need to be decided and I also rejected the defendants' submissions that the claimants had not abandoned the Adjourned Issues.

65. As Mr. Taylor points out, for the purpose of the slip rule, I am asking myself whether the order I made on or about 21st August 2020 does not give effect to my intention at the time of drawing up the reasoned judgment of that date. Given that the reasons were for the purpose of explaining what my intention was, and that the order I made was intended to be entirely faithful to that intention, it is really rather difficult to see how it could be said that there is a slip between the judgment and the expression in the order, but the simple fact is that I did not intend to leave the Adjourned Issues to be dealt with at the quantum hearing.

66. The next way the matter is put is reliance on rule 3.1(7). 3.1(7) provides:

> "(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."

67. There was argument before me as to whether the order which I am asked to vary was a final order or an interim order. The defendants submitted that the order was a final order and the claimants submitted that it was an interim order. I indicated in the course of argument that I would assume in the claimants' favour that it was an interim order, as this issue probably did not need to be resolved. I also suggested that the part of the order which the claimants wanted to change was not paragraph 11 but was the recital and the parties had not addressed me on the nature of an application to change a recital.

68. I have been referred to two authorities in particular as regards rule 3.1(7). The first is *Tibbles v SIG plc* [2012] 1 WLR 2591. I think the parties agree that the statements of

principle which are relevant to an application to vary an interim order are those set out in paragraph 39 of the judgment of Rix LJ, with whose judgment, the other members of the Court of Appeal agreed. I need not read out very much of paragraph 39. Paragraph 39(i) refers to the relevance of considerations of finality, the undesirability of allowing litigants to have two bites of the cherry and the need to avoid undermining the concept of appeal.

69. Then in 39(ii), Rix LJ referred to two ways in which a court might consider it should vary or revoke an earlier order. The first of those refers to a material change of circumstances, the second where the facts on which the original decision was made were innocently or otherwise misstated. Mr. Hall does not say that either of those applies here.

70. At 39(vi) Rix LJ said this:

> "(vi) *Edwards v. Golding*" [2007] EWCA Civ 416 "is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order."

71. That is a third type of case where the rule might be invoked and the headnote to *Tibbles* picks up those three separate ways of the jurisdiction being available.

72. This rule was also dealt with in *Libyan Investment Authority*, to which I have referred. In the *Libyan Investment Authority*, the majority of the Court of Appeal held that the facts of that case came within the third possible approach identified in *Tibbles*. I note that Nugee LJ, who was in the minority, discussed *Edwards v Golding* in a little detail at paragraph 86 of his judgment.

73. The majority, Arnold and Floyd LJJ, held the case did come within the third possible approach in *Tibbles*. The places where they dealt with the facts of the *Libyan* case are paragraphs 121 and 122 of Arnold LJ's judgment and a number of places, but in particular, paragraphs 140-144 of Floyd LJ's judgment.

74. Arnold LJ held that it was a case of a manifest mistake by the judge in the *Libyan* case and Floyd LJ held that there was a clear difference between what the judge intended and what the order achieved in that case. Therefore, there is some overlap, as both counsel have submitted to me, between the slip rule and this third possible approach in *Tibbles*, as applied in the *Libyan Investment Authority* case.

75. That being so, my reasoning in relation to the slip rule really does double-duty here again. I do not think there was a mistake in formulating the order, if you ask yourself, is it different from, does it depart from, the judgment I gave on 21st August 2020? In fact, if I ask what is manifest, I would say it is manifest there was no mistake.

76. Mr. Taylor, I think correctly, points out that when I ask the questions needed for these two rules, I am comparing the judgment I gave on 21st August 2020 and the order I made. I am not comparing the order I made with some other statement of my intention.

77. There is a wholly separate question, whether the judgment I gave on the 21st August 2020 is open to appeal. I have my own views on that and, indeed, some of the matters I have referred to today may throw light on that question but, ultimately, it is not a question for me and it is certainly not a question which I need to address under the slip rule or rule 3.1(7).

78. I return to the application which is before me. The application is accompanied by different possible changes that might be made to the order of 21st August 2020. I think it is not necessary to discuss the drafting of those changes, because my conclusion is that the case simply does not come within either of the two rules which are relied upon. For the sake of completeness, I should say there was discussion in the course of argument about whether I should refuse the application on the grounds of delay on the part of the claimants and whether I should, in particular, refuse the application on the ground that the delay has caused prejudice to the defendants.

79. As I consider, this is a very clear case where the application must be dismissed, I will not lengthen the judgment by considering the law or the facts as to delay and prejudice. If the Court of Appeal finds itself in the position where it needs to consider the question of delay and prejudice, the factual material is not complicated and it will be able to address that and assess that without a commentary from me in this judgment.

80. The result is, I will dismiss the application.

(For continuation of proceedings: please see separate transcript)

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