Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC – Court of Appeal
UPC_CoA_430/2024
App_42818/2024

ORDER

of the Court of Appeal of the Unified Patent Court
issued on 26 July 2024

HEADNOTE:

A request for suspensive effect regarding a decision of the Court of First Instance not to extend the time period provided for in the Rules of Procedure for lodging a written statement of a party (here: a statement of rejoinder) can be admissible.

KEYWORDS:

Suspensive effect; extension of time period to submit a statement of rejoinder

APPLICANTS / APPELLANTS / DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

1. **OrthoApnea S.L.**
   Flauta Mágica 22, 29006 Malaga, Spain

2. **Vivisol B BV**
   Zoning Ouest 14, 7860 Lessines, Belgium

represented by attorneys-at-law Marleen van den Horst and Benjamin Niemeijer (La Gro Geelkerken Advocaten),

RESPONDENT / CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

[redacted]

represented by attorney-at-law Christophe Ronse (ALTIUS Advocaten),

PATENT AT ISSUE

European Patent 2331036

LANGUAGE OF THE PROCEEDINGS:

Dutch

DECIDING JUDGE

Klaus Grabinski, President of the Court of Appeal and Standing Judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

□ Order of the Court of First Instance of the Unified Patent Court, Local Division Brussels, dated 19 July 2024, in the main infringement action ACT_581538/2023
Reference numbers: ACT_581538/2023 UPC_CFI_376/2023
App_41533/2024
ORD_42503/2024

FACTS AND REQUESTS OF THE PARTIES

1. Claimant and Respondent (hereafter Claimant) brought an action for infringement of European patent 2331036 against Defendants and Appellants (hereafter: Defendants) in the Brussels Local Division of the Unified Patent Court. Defendants filed a statement of defence and Claimant filed a statement of reply on 18 June 2024.

2. In a statement, filed on 24 June 2024, Defendants objected to certain parts of the statement of reply and requested the Judge-Rapporteur to refuse extension on the basis of equivalence, to refuse acceptance of newly introduced facts and to deny the new (amended) requests. Subordinately, Defendants requested an extension of the deadline for their statement of rejoinder to 18 August 2024.

3. In his case management order of 8 July 2024, the Judge-Rapporteur dismissed the main request but extended the time period for Defendants' statement of rejoinder to 1 August 2024.

4. Upon Defendants' request and after having heard the Claimant, the panel of the Brussels Local Division decided on 19 July 2024:

    I. To reject the preliminary request for suspending the deadline by one or two months for filing the rejoinder from 24 June until a final substantive decision on the procedural request is made,
    II. To reject as unfounded the request for partial review of the Judge-Rapporteur's final decision of 8 July 2024 and to affirm the Judge-Rapporteur's decision in all its parts,
    III. To reject the request to grant an additional deadline for filing the rejoinder and to maintain the date of 1 August 2024 for the rejoinder,
    IV. To grant leave to appeal against the decision of the panel.
    V. To stay the decision on the order to pay the costs in the application of 24 June 2024 and the request for review of 16 July 2024 until the final decision in the main proceedings.

5. On 23 July 2024 Defendants filed an appeal against the order of the panel and an application for suspensive effect under Rule 223 UPC Rules of Procedure (hereafter: RoP) requesting "the Court of Appeal/Standing Judge":

   I. To suspend, pending the appeal proceedings, the term of filing the Statement of rejoinder from 24 June, being the filing date of its general application, until the date of issuance of the final substantive Order with two months, should part I of the primary request be refused and one month, should part I of the primary request be granted,

   II. To extend the term for submitting the statement of rejoinder, in case of refusal of the request for suspensive effect (the preliminary procedural request), to 30 August or at least a deadline to be determined by the Court in good justice,

   III. To deny Claimant to claim infringement on the basis of equivalence as per part (i) of Defendants' primary request of 24 June 2024, and

   IV. To order Claimant to pay the costs of these applications proceedings or reserve the decision on the costs of these application proceedings until judgement in the main action.

GROUNDS FOR THE ORDER

Request I

6. Defendants' request for suspensive effect sub I is admissible.

7. Art 74(1) UPCA and Rule 223 RoP give the Court of Appeal, and in extremely urgent cases, the Standing Judge in exceptional circumstances the power to allow suspensive effect to an appealed decision or order. Such exceptional circumstances could be, for example, where the appeal is devoid of purpose or would render the appeal largely effective if the impugned order where not given suspensive effect, because the consequences of enforcement of the impugned order cannot be effectively reversed if the order is later set aside (see UPC_CoA_301/2024, order of 19 June 2024, para 6 f.).

8. In the case-at-hand, Defendants request suspensive effect regarding the decision of the Court of First Instance not to extend the time period for the statement of rejoinder until a final decision has been given on Defendants' request to deny Claimant to claim infringement by equivalent means.

9. This request for suspensive effect is admissible as it would render the request sub II to extend the time for submitting the statement of rejoinder devoid of purpose.

10. It is also extremely urgent as the time period for Defendants' statement of rejoinder will end in 5 calendar days.

11. Defendants' request for suspensive effect sub I, however, is unfounded.

12. Defendants argue that it would be necessary to know whether the allegation of an infringement by equivalent means brought forward by Claimant only in his statement of reply is permitted or not under Rule 263 RoP before expiration of the time period of their rejoinder because only in the second alternative they would be required to respond to that aspect in their rejoinder. If they would have to reply without knowledge of a respective finding of the Court of Appeal, the rejoinder would have to cover also this aspect. That would entail the risk that costs associated to such an extensive pleading were not necessary if it later turns out that the allegation were not permissible from the outset.

13. Considering Defendants' arguments there is no necessity to allow suspensive effect as requested.

14. According to the UPC Rules of Procedure, parties submit their statements in the written procedure without knowing how their allegations will be assessed by the Court of First Instance or the Court of Appeal. That entails the risk that part of their allegations will not be relevant for the outcome of the case.

15. It is also to be considered that the decision of the Court of First Instance to not exclude allegations brought forward by Claimant only in his statement of reply regarding an infringement of the patent-at-hand by equivalent means, given the evolutive course of the proceedings in the case-at-hand but also in general in patent litigation under the UPC Rules of Procedure, is not manifestly wrong.

16. In addition, it must be noted that the Judge-rapporteur in the proceedings before the court of First Instance granted Defendants an extension of the time period to submit their statement of rejoinder of 2 weeks until 1 August 2024.

17. For these reasons, it is not decisive in the case-at-hand that request II (the appeal against the decision of the Court of First Instance not to extend the time period for the statement of rejoinder) may become devoid of purpose as a consequence of the decision not to grant suspensive effect as requested by Defendants.

Requests II, III and IV

18. As requests II to IV concern the substance of the appeal t is not for the Standing Judge of the Court of Appeal to decide insofar. Consequently, these requests are referred to the competent panel of the Court of Appeal.

No hearing of Claimant

19. As the decision on request sub I has no effect on the Claimant and given the high urgency of the case, there was no need to hear him prior to this order. Claimant will be heard in the further course of appeal proceedings in accordance with the Rules of Procedure.

ORDER

I. The request for suspensive effect sub I is rejected.

II. The requests II, III and IV are referred to the competent panel of the Court of Appeal.

This order was issued on 26 July 2024.

Judge

Klaus Grabinski, President of the Court of Appeal and Standing Judge