

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 26 February 2024
concerning the (non-)compliance with R.224.1(b)

KEYWORDS:

Time period for lodging a Statement of appeal pursuant to R.220.1(c) RoP in conjunction with Art. 62 UPCA

APPELLANT/CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

AIM SPORT DEVELOPMENT AG, Luzern, Switzerland

hereinafter also referred to as: AIM,

represented by:

Johanna Flythström and Mikael Segercrantz, attorneys-at-law, Roschier, Helsinki, Finland;

Ari Laakkonen and Siddharth Kusumakar, attorneys-at-law, Powell Gilbert (Europe), Dublin, Ireland;

Ralph Nack and Niclas Gajeck, attorneys-at-law, Noerr, Munich, Germany

Maximilian von Rospatt, attorney-at-law, rospatt osten pross, Düsseldorf, Germany

RESPONDENTS/ DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

SUPPONOR OY, Espoo ,Finland

SUPPONOR LIMITED, Hammersmith Grove, London, United Kingdom

SUPPONOR SASU, Sophia-Antipolis, Valbonne, France

SUPPONOR ITALIA SRL, Busto Arsizio, VA, Italy

SUPPONOR ESPAÑA SL, Barcelona, Spain

hereinafter also jointly referred to as Supponor,

represented by:

Dr. Henrik Lehment, attorney-at-law, Hogan Lovells International, Düsseldorf, Germany

Dr. Matthias Sonntag, attorney-at-law, Gleiss Lutz, Düsseldorf, Germany

Panu Siitonen, attorney-at-law, Hannes Schnell Attorneys, Helsinki, Finland

LANGUAGE OF THE PROCEEDINGS:

English

PATENT AT ISSUE

EP 3 295 663

PANEL

Second Panel

DECIDING JUDGES:

This order has been adopted by
Rian Kalden, Presiding judge and judge rapporteur

IMPUGNED DECISION OF THE COURT OF FIRST INSTANCE

- Date: 20 October 2023, ORD_572699/2023 (in ACT_551054/2023 concerning, inter alia, a request for a preliminary injunction and evidentiary measures; decided together with the infringement action ACT_545571/2023)
- Action number attributed by the Court of First Instance: UPC_CFI_214/2023

SUMMARY OF FACTS

In ACT_551054/2023 and ACT_545571/2023, AIM filed identical Statements of claim. In the impugned decision, the panel of the Court of First Instance of the Local Division Helsinki dismissed the requests in ACT_551054/2023 as well as the requests (inter alia for a permanent injunction) in ACT_545571/20230), as it was of the opinion that the Unified Patent Court does not have competence over European patent no EP 3 295 663 owing to its opt-out on 12 May 2023.

In its decision of 20 October 2023, the Court of First Instance noted:

"INFORMATION ABOUT APPEAL

The present decision dismissing the actions constitutes a final decision of the Court of First Instance and may be appealed by the unsuccessful party within two months of the date of the notification of the decision (Article 73(1) UPCA, R.220.1(a) and R.224.1(a) RoP)."

INDICATION OF PARTIES' REQUESTS

In this appeal, lodged as APL_596892/2023, AIM has appealed the decision of the CFI concerning ACT_551054/2023. AIM has lodged a separate appeal, as APL_596007/2023, against the decision of the Court of First Instance of 20 October 2023 concerning ACT_545571/2023. It has filed identical Statements of appeal.

In this appeal (and in the parallel appeal case), AIM requests the Court of Appeal to:

- (i) order the reversal of the decision of the Court of First Instance of 20 October 2023 insofar as the Court of First Instance has dismissed the actions CMS no 545571/2023 and CMS no 551054/2023 due to the claimed lack of competence of the Unified Patent Court over European patent no EP 3 295 663; and, consequently, to
- (ii) declare that the withdrawal of opt-out with regard to the EP 3 295 663 on 5 July 2023 is effective and therefore the Unified Patent Court has competence to hear actions CMS no 545571/2023 and CMS no 551054/2023;
- (iii) order the remittance of the application for provisional measures on action CMS no 551054/2023 back to the proceedings before the Court of First Instance; and

- (iv) order the remittance of the infringement action CMS no 545571/2023 back to the proceedings before the Court of First Instance.

POINTS AT ISSUE

Time period for lodging a Statement of appeal pursuant to R.220.1(c) RoP

FOUNDATIONS FOR THE ORDER

1. AIM lodged its Statement of appeal on 20 December 2023, within two months of service of the CFI decision of 20 October 2023.
2. In the 'Information about Appeal', the CFI, indicating that the decision could be appealed by the unsuccessful party within two months of the date of notification of the decision, referred to Article 73(1) UPCA and R.220.1(a) and R.224.1(a) RoP. These provisions concern an appeal against a decision of the Court of First Instance, such as a decision in an infringement action, like ACT_545571/2023, lodged by AIM in parallel to ACT_551054/2023.
3. The measure sought by AIM in its ACT_596892/2023 was, however, inter alia, a preliminary injunction pursuant to Art. 62 UPCA, which reads: "The Court may, by way of order, grant injunctions against an alleged infringer (...)" (underlining added by CoA). It also sought an order to preserve evidence and to inspect premises pursuant to Art. 60 UPCA.
4. Pursuant to R.224.1(b), the term for lodging an appeal against an order referred to in Rule 220.1(c) – which includes orders referred to in Art. 60 and Art 62 UPCA – is 15 days of service of an order.
5. Neither the UPCA, nor the Rules of Procedure contain a provision that allows a Court of First Instance to determine a time period for lodging a Statement of appeal in derogation from R.224, in particular R.224.1(b) RoP.
6. At the time of lodging the Statement of appeal, the non-compliance with the applicable time period for lodging a Statement of appeal under R.224.1(b) was not noticed by the Registry, when doing the formal checks under R.229 RoP, but has now been noticed by the judge-rapporteur when consulting the case file before the Court of First Instance, in view of the preliminary examination of the Statement of grounds of appeal pursuant to R.233 RoP.
7. The judge-rapporteur requests both AIM and Supponor to comment on the non-compliance with R.224.1(b) RoP by AIM when it lodged its Statement of appeal and the consequences thereof, notably whether or not this should under the circumstances of this case, lead to inadmissibility of the appeal lodged as APL_596892/2023.

ORDER

The judge rapporteur invites both parties to comment in writing as set out in paragraph 7 above, with 14 days of service of this order.

This order shall not have suspensive effect for lodging a Statement of response by Supponor in accordance with R.235 RoP.

Issued on 26 February 2024

Rian Kalden, Presiding judge and judge-rapporteur