

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 11 April 2024
concerning a request for a decision by default

HEADNOTES:

- If an appeal is lodged under R.220.2 RoP and leave is granted in the impugned order itself, the Statement of appeal must be lodged within 15 days of service of that order containing the decision to grant leave. If the decision to grant leave to appeal is contained in a separate order on a request to that effect (which separate order must be issued within 15 days of the impugned order, cf R.220.3 RoP), the Statement of appeal has to be lodged within 15 days from the date of service of this separate order containing the decision to grant leave to appeal.

KEYWORDS:

- Time period for filing a statement of appeal under R.220.2 RoP

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

Neo Wireless GmbH & Co KG, Ratingen, Germany,
hereinafter also referred to as 'Neo'

Represented by:

Dr. Christoph Walke, Matthias Waters and Dr. Martin Rütten, patent attorneys,
COHAUSZ&FLORACK Patent- und Rechtsanwälte, Düsseldorf, Germany

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

Toyota Motor Europe NV/SA, Evere, Belgium,
hereinafter also referred to as 'Toyota'

Represented by:

Dr. Constanze Krenz and David Kleß, attorneys, DLA Piper, Munich, Germany

LANGUAGE OF THE PROCEEDINGS:

English

PANEL AND DECIDING JUDGES:

This order has been issued by the second panel consisting of:
Rian Kalden, presiding judge and judge-rapporteur;
Ingeborg Simonsson, legally qualified judge;
Patricia Rombach, legally qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE:

- Date: 9 February 2024
- Order no. 597664/2023; UPC_CFI_361/2023 of the Central Division, Paris seat (judge-rapporteur Maximilian Haedicke)

POINTS AT ISSUE:

The time period for filing a statement of appeal under R.220.2 RoP

SUMMARY OF FACTS AND PARTIES' REQUESTS

1. Toyota initiated a revocation action before the Central Division, Paris seat, requesting that European patent EP 3 876 490 be revoked.
2. Neo filed an application pursuant to R.19.1(a) RoP and objected to the jurisdiction and competence of the Unified Patent Court (UPC) to hear the matter and requested that the complaint be dismissed for lack of competence of the UPC over European Patent 3 876 490 owing to its opt-out on 30 March 2023.
3. The judge-rapporteur by its order of 9 February 2024 rejected the preliminary objection.
4. Neo appealed the order by Statement of appeal and grounds of appeal lodged on 8 March 2024. It requests that the order is set aside and that the preliminary objection is allowed.
5. On 13 March 2024, the Registry performed formal checks and requested a correction from Neo. This was done by the application to change the details of the representative, uploaded on 26 March 2024.
6. Due to malfunctioning of the CMS, the formal checks could subsequently only be finalised on 9 April 2024. On this day, the parties received a notification of the positive outcome of the formal checks.
7. On 10 April 2024, the judge-rapporteur performed the preliminary examination, pursuant to R.233.2 RoP, concluding that the Statement of appeal and grounds of appeal satisfies the requirements of R.226 RoP. This automatically generated a notification of service on Toyota within the CMS.
8. On 3 April 2023, Toyota lodged a request for a decision by default.

Toyota requests pursuant to R.355.1 RoP in conjunction with R.357.3 RoP, that Neo's appeal be rejected with a decision by default. It argues that:

- (i) Neo has not provided any correction after the Registry of the Court of Appeal on 13 March 2024 issued a request for correction of formal deficiencies in accordance with R. 229.2 (a), 225(c) RoP;
- (ii) The appeal was not filed within 15 days after the date of the impugned Order, which was issued on 9 February, as prescribed by R.224.1(b) RoP, as the 15-days deadline is to be calculated from the date of the appealed order and not from the date on which leave for appeal is granted.

There is no need to hear Neo on the request.

REASONS:

9. The first ground for Toyota's request proceeds from an incorrect understanding of the facts.
10. The correction requested by the Registry pursuant to R.229.2(a) RoP was lodged on 26 March 2024. This is within the applicable time period of 14-days of service of the notification from the Registry requesting for a correction on 13 March 2024.
11. The situation that the appellant fails to correct the deficiencies within the applicable time period, which would allow a decision by default to be given under R.229.4 RoP in conjunction with R.229.2(a) RoP, has not occurred. Therefore, the request cannot be allowed on this ground.
12. The second ground for Toyota's request proceeds from an incorrect reading of R.224.1(b) in conjunction with R.220.2 RoP. These Rules read as follows:

R.220.2: Orders other than those referred to in paragraph 1 and Rule 97.5, may be either the subject of an appeal together with the appeal against the decision or may be appealed with the leave of the Court of First Instance within 15 days of service of the Court's decision to that effect.

R.224.1(b) within 15 days of service of an order referred to in Rule 220.1(c) or a decision referred to in Rule 220.2 or 221.3.
13. R.220.1 RoP deals with appeals against decisions (under paragraphs (a) and (b)) and certain specifically named orders (under (c)). R.220.2 deals with appeals against other orders than those referred to in R.220.1 RoP and R.97.5 RoP. Such orders are commonly referred to as 'procedural orders'.
14. The importance of the differentiation is that appeals under R.220.1 RoP are always admissible without leave to appeal. Appeals against orders under R.220.2 RoP are admissible,
 - (i) either together with the decision, i.e. the final decision in the proceedings in which the order is given. This is possible without leave to appeal (cf R.220.1 RoP). The time period for lodging such an appeal is provided for in R.224.1(a) RoP;
 - (ii) or with the leave of the Court of First Instance. R.220.2 RoP provides that in case of an appeal of an order with leave, this must be done within 15 days of service of the Court's decision to that effect.
15. The decision on leave can already be given in the (impugned) order itself, or – if that is not the case – afterwards by a separate decision upon a request for leave.
16. From R.220.2 RoP it is clear that the wording "a decision referred to in Rule 220.2" in R.224.1(b) RoP refers back to the decision of the Court of First Instance to grant leave to appeal. After all, if it was intended to refer back to the impugned order, then it would have used the word *order* and not *decision*. In addition, the words "to that effect" clearly refer

to the leave being granted. An order that does not already contain leave to appeal cannot be "a decision to that effect".

17. It follows that if leave is granted in the impugned order itself, the Statement of appeal must be lodged within 15 days of service of that order containing the decision to grant leave. If the decision to grant leave to appeal is contained in a separate order on a request to that effect (which separate order must be issued within 15 days of the impugned order, cf R.220.3 RoP), the Statement of appeal has to be lodged within 15 days from the date of service of this separate order containing the decision to grant leave to appeal.
18. In the present case, Neo requested leave to appeal by application 9607/2024, lodged on 22 February 2024. Leave was granted by the judge-rapporteur on 23 February 2024. This means that the appeal was to be lodged within 15 days of 23 February 2024. The Statement of appeal was lodged on 8 March 2024 and therefore within this time period.
19. The above means that R.224.1(b) RoP was complied with and that there is no ground for a decision by default under R.229.5 RoP.

ORDER

The request is rejected.

Issued on 11 April 2024

Rian Kalden, presiding judge and judge-rapporteur

Ingeborg Simonsson, legally qualified judge

Patricia Rombach, legally qualified judge