Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC Court of Appeal
UPC_CoA_480/2024
APL_46747/2024
UPC_CoA_481/2024
APL_46749/2024

Decision

of the Court of Appeal of the Unified Patent Court
issued on 9 January 2024
concerning public access to the register (R.262.1(b) RoP)

HEADNOTES:

1. A member of the public generally has an interest that written pleadings and evidence are made available. The general interest of a member of the public getting access to pleading and evidence of the Court of First Instance (CFI) file regularly arises after a decision or order concluding the proceedings at the first instance was rendered.

2. This principle applies regardless of whether or not
   - an appeal against this decision or order is pending,
   - the rendered order concerns an application for provisional measures (R.206 RoP),
   - the information and evidence is also subject to other proceedings for example because they are dealing with the same patent or patents in the same patent family and
   - the CFI decision deals with all the arguments and evidence in the case.

KEYWORDS:
Public access to written pleadings and evidence, R.262.1 (b) RoP, pending appeal, application for provisional measures, parallel proceedings

APPELLANT (APPLICANT IN THE MAIN PROCEEDINGS AS WELL AS RESPONDENT IN THE APPLICATIONS ON ACCESS TO REGISTER BEFORE THE COURT OF FIRST INSTANCE)

Abbott Diabetes Care Inc., Alameda, United States of America (hereinafter 'Abbott')

represented by: Eelco Bergsma and David Mulder, Attorneys-at-law
(Taylor Wessing, Eindhoven, Amsterdam, the Netherlands)

RESPONDENT (APPLICANT IN THE APPLICATIONS ON APPLICATIONS FOR ACCESS TO REGISTER BEFORE THE COURT OF FIRST INSTANCE)

Powell Gilbert LLP, London, United Kingdom (hereinafter ´Powell Gilbert´)
represented by: Tom Oliver, Attorney-at-law, and Adam Rimmer, European Patent Attorney (Powell Gilbert LLP, London, United Kingdom)

DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

1. **Sibio Technology Limited**, Kowloon, Hong Kong, Special Administrative Region of the People´s Republic of China
2. **Umedwings Netherlands B.V.**, Rijswijk, The Netherlands

(hereinafter jointly referred to as ´Sibionics´)

represented by: Thomas Gniadek, Attorney-at-law (Simmons & Simmons LLP, Munich, Germany)

PATENTS AT ISSUE

EP 2 713 879 and EP 3 831 283

LANGUAGE OF THE PROCEEDINGS

English

PANEL AND DECIDING JUDGES

Rian Kalden, presiding judge and legally qualified judge,
Ingeborg Simonsson, legally qualified judge,
Patricia Rombach, legally qualified judge and judge-rapporteur

IMPUGNED DECISIONS OR ORDERS OF THE COURT OF FIRST INSTANCE

- □ Local Division The Hague, 29 July 2024, ORD_39917/2024, App_39761/2024, UPC_CFI_130/2024; ACT_14944/2024.
- □ Local Division The Hague, 29 July 2024, ORD_39938/2024, App_39789/2024, UPC_CFI_131/2024; ACT_14945/2024.

POINT AT ISSUE

Public access to the register (R.262.1 RoP)

SUMMARY OF THE FACTS

1. On 19 June 2024, the Local Division The Hague rendered its orders granting partially Abbott´s application for provisional measures against Sibionics (ORD_30434/2024) and denying the application for preliminary measures in the parallel case (ORD_39938/2024). On 3 July 2024, Powell Gilbert as a member of the public, applied under R.262.1(b) Rules of Procedure of the Unified Patent Court (RoP) to be given access to the written pleadings and evidence listed below which were lodged in these proceedings:
   - Application for provisional measures, lodged on 20/03/2024;
   - Communication pursuant to Rule 209 – comments pursuant to R.264, lodged by Abbott on 29 March 2024;
   - Sibionics´ formal responses to the Order of the Court, lodged on 23/04/24;
   - Abbott´s formal response to the Order of the Court, lodged on 08/05/24;

- Sibionics´ objections to the Application for provisional measures, lodged on 15/05/2024;
- Sibionics´ Rejoinder to Application for Provisional Measures, lodged on 15/05/2024;
- Sibionic´s formal Response to the Order of the Court, lodged on 15/05/2024;

and, respectively

- Application for provisional measures, lodged on 20/03/2024;
- Sibionics´ formal responses to the Order of the Court of Sibionics, lodged on 23/04/24;
- Abbott´s formal response to the Order of the Court, lodged on 08/05/24;
- Sibionics´ objections to the Application for provisional measures, lodged on 15/05/2024.

2. The judge-rapporteur of the Local Division The Hague granted Powell Gilbert access to the pleadings and evidence they requested within 15 days from service of his order, on the condition that no party has filed an appeal within that period. The judge-rapporteur granted leave to appeal.

3. Abbott appealed the orders.

PARTIES' REQUESTS

4. Abbott requests the Court of Appeal to

i. revoke the impugned orders and
ii. deny the applications of Powell Gilbert on access to the written pleadings and evidence

5. Powell Gilbert requests that the Court of Appeal dismisses Abbott´s appeals (i) and upholds the orders (ii).

PARTIES´ SUBMISSIONS

6. *Abbott in summary submits the following*.

- There is no reasoned request.

- Powell Gilbert has not provided a "concrete and verifiable" reason in the application as to why it requires access to Abbott´s documents and evidence. The only interest put forward by Powell Gilbert is "to have a better understanding of the decision rendered".

- Granting access to written pleadings and evidence will not provide Power Gilbert with a better understanding as to how the decision was made and how the Court handled it. Having sight of the parties´ arguments and evidence will not assist with that understanding. How the decision is rendered is an act of the Court and that justification is not evident from Abbott´s documents. Granting access to the written pleadings and evidence of Abbott will thus not provide for a better understanding of how the Court came to its decision.

- The application is premature.

- The proceedings for a preliminary injunction and other provisional measures are ongoing and it is artificial to treat the first instance and appeal as separate. Accordingly, while the appeal is pending, it is submitted that it is premature to grant access to any of the requested documents

on file. The CJEU (21 September 2010, *API v Commission,* C-514/07) stated therefore that the access to documents should be withheld as long as the case is pending.

- It appears that the Court of Appeal´s reasoning in *Ocado v Autostore* was intended to be limited to circumstances in which a publicly available decision contained the relevant arguments and evidence presented by the parties, and thus where these matters may already be subject to public debate. This is not the case in the present proceedings.

- The judge-rapporteur of the Court of First Instance did not give proper consideration of the parties´ interests.

  - The "integrity of proceedings" must still be maintained until a final decision of the Court of Appeal in these proceedings and regarding EP 3 831 283 and EP 2 713 879 or upon an order confirming settlement of the case or cases.

  - In the present cases, the integrity of proceedings is still at issue. The orders (granting and denying relief respectively) did not address the substantive arguments and evidence in the cases. The substantive arguments and evidence in the cases are therefore not in the public domain and are not already subject to public debate.

  - Further, arguments and evidence submitted by Abbott in relation to patent EP 3 831 283 at issue has much in common with the arguments and evidence in the parallel proceedings on patent EP 2 713 879 and vice versa which is also the subject of the appeal. If the documents sought from one of these proceedings were disclosed, Abbott would not be able to bring forward its arguments and evidence for decision by the Court of Appeal in the appeal relating to the other patent in an impartial and independent manner, without risk of influence and interference from external parties in the public domain, as envisaged in *Ocado v Autostore*.

  - More importantly, favouring the public interest to access written pleadings and evidence above the general interest of integrity of proceedings for instance exists if the applicant is involved in opposition proceedings regarding the validity of the patent in suit (CFI, Central Division Paris, in the *NJOY v Juul Labs* case ORD_587436/2023, 24 April 2024). It follows that in infringement proceedings, the standard does not in general lean towards the public´s interest.

  - Powell Gilbert´s non- specific interest in gaining a better understanding of the decision should not outweigh Abbott´s interests of maintaining integrity of its written submissions. If Powell Gilbert wished to have a better understanding of how the Court handles applications for provisional measures, it could have attended the oral hearing on 22 May 2024. Powell Gilbert´s application appears to have been based on personal or professional curiosity and training purposes rather than a legitimate reason.

7. *Powell Gilbert defends the impugned decision and submits in summary the following.*

- It follows from the order of the Court of Appeal in *Ocado v Autostore* (ORD_9369/2024) that there is no lack of a reasoned request and no reason to consider that Powell Gilbert´s application is premature.

- The Ocado v Autostore order provided in particular clear guidance that in the context of R.262.1 (b) RoP, the first instance and appeal proceeding should be considered separately. In the context of proceedings seeking provisional measures such as a preliminary injunction, it is all the more appropriate to allow the public to access pleadings and evidence.

- Only permitting access to pleadings and evidence in cases where a decision addresses all pleadings and evidence put forward by the parties would result in two fundamental issues of principle for the operation of R.262.1 (b) RoP and the openness of the UPC. First, in nearly all situations where an appeal is pending, requests under R.262.1(b) RoP would have to be refused on the basis that some argument might not have been reported (or fully reported) in the first instance decision. Secondly, the applicant (not having access to the pleadings and evidence in question), is unable to properly consider the accuracy of the position put forward by any respondent who resists an application for access to pleadings and evidence on this basis.

- Including related proceedings in the consideration of a party´s interest in the protection of integrity of proceedings as Abbott argues is unworkable. The only practical solution for document access requests submitted pursuant to R.262.1 (b) RoP is that once a first instance decision has been made, all pleadings and evidence should be available. Should parties be concerned that an access request may give rise to disclosure of confidential information, parties are of course able to protect that information by well-established procedures in the Rules of Procedure.

REASONS

8. The appeal must be dismissed. The Court of First Instance (CFI) rightly granted Powell Gilbert access to written pleadings and evidence according to R.262.1 (b) RoP.

I. Provisions for a reasoned request under R.262.1 RoP

9. R.262.1 (b) RoP provides (without prejudice to several articles and rules that provide for the protection of confidential information mentioned in R.262.1 RoP, the redaction of personal data pursuant to Regulation (EU) 2016/679 and redaction of confidential information according to R.262.2 RoP) that written pleadings and evidence lodged at the Court and recorded in the Registry shall be available to the public upon reasoned request to the Registry.

10. According to the decision of the Court of Appeal in *Ocado v Autostore* (10 April 2024, UPC_CoA_404/2023, APL_584498/2023, para 43), in the decision on a request under R.262.1 (b) RoP the interests of a member of the public of obtaining the requested access must be weighed against the interests mentioned in Art. 45 UPCA. To allow the judge-rapporteur to balance all these interests the applicant of the R.262.1 (b) RoP request must set out the reasons why he has an

interest to obtain the requested access. It follows that 'reasoned request` in R.262.1 (b) RoP means a request that not only states which written pleadings and evidence (para 44) the applicant wishes to obtain, but also specifies the purpose of the request and explains why the access to the specified documents is necessary for that purpose, thus providing all the information that is necessary for the judge-rapporteur to make the required balance of interests.

11. The interests mentioned in Art. 45 UPCA include the protection of confidential information and personal data but are not limited thereto. The general interest of justice and public order also have to be taken into account. The general interest includes the protection of the integrity of proceedings (*Ocado v Autostore,* para 43). Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

12. As the Court of Appeal in *Ocado v Autostore* (para 47) also has stated, a member of the public generally has an interest that written pleadings and evidence are made available. This allows for a better understanding of the decision rendered, in view of the arguments brought forward by the parties and the evidence relied on. It also allows the scrutiny of the Court, which is important for trust in the Court by the public at large.

13. This general interest of a member of the public usually arises after a decision was rendered. At this point, there is a decision, that needs to be understood and the handling of the dispute by the Court can be scrutinised (para 47).

14. As the Court of Appeal in *Ocado v Autostore* (para 50) noted this applies only to written pleadings and evidence in the proceedings at first instance if the decision is rendered by the Court of First Instance and an appeal is or may be lodged. Withholding access to these documents then no longer serves the purpose of protection of integrity of the CFI proceedings.

15. The CJEU´s Judgment *API v Commission (*21 September 2010, C-514/07) cited by Abbott does not suggest that the access to these documents should be withheld as long as the case is pending, even before the Court of Appeal. The CJEU stated that the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity (para 92). According to the CJEU, it is appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Art. 4 (2) of Regulation No 1049/2001, while those proceedings remain pending (para 94). According to the CJEU, such disclosure would flout the special nature of the category of documents which were subject of its decision and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with Art. 255 EC, would be largely frustrated (para 95). The statements in this judgment do not apply to R.262.1 (b) RoP for the simple reason that, according to the legal framework considered there, the Court of Justice was

excluded from the scope of the right of access to documents. R.262.1 (b) RoP, by contrast, provides in principle that written pleadings and evidence lodged at the Unified Patent Court and recorded in the Registry, shall be available to the public upon reasoned request to the Registry. Therefore, exceptions to this rule should only be allowed to a limited extent.

16. Since the public discussion begins once an order or decision is issued, it would be artificial to shield the Court of Appeal and the parties from a discussion that also concerns the contents of the file of the CFI.

17. The Court of Appeal in *Ocado v Autostore* (para 50) stated that the publicly available decision would contain the relevant arguments and evidence presented by the parties and thus (may) already become(s) subject to public debate. In order to scrutinize the handling of the dispute by the Court, there is a need to obtain access to all information and evidence of the case, including the arguments not mentioned in the decision, because the Court´s assessment of whether a submission or fact is relevant or not is an essential part of the handling of the dispute by the Court. This applies even more if the Court overlooked a piece of information or evidence. Further, a debate on information and evidence not considered in the decision can no longer jeopardize the integrity of proceedings that have already been closed. Further, Powell Gilbert has rightly pointed out that this information is often the subject of public oral hearings and therewith in the public domain already.

18. Therefore, once the CFI has concluded the proceedings, there is generally no reason to protect the integrity of the CFI proceedings, regardless of whether the CFI decision or order deals with all the arguments and evidence in the case or not.

19. Contrary to Abbott´s view, there is no reason to depart from these principles if the rendered order concerns an application for provisional measures (R.206 RoP). This applies regardless of the fact that, after the granting of provisional measures, proceedings on the merits will be initiated regularly within the time limits pursuant to R.213.1 RoP. Just as a public discussion of the case cannot be avoided during the appeal proceedings, neither can a public discussion of the case be avoided during the subsequent proceedings on the merits before the CFI.

20. The same applies if the information and evidence is also subject to other proceedings for example because they are dealing with the same patent, or with patents in the same patent family.

21. The consequence of the principles outlined above is that they allow for a `quick look´ assessment by the judge-rapporteur, as envisaged by R.262.1(b) RoP.

II. Reasoned request of Powell Gilbert

22. It follows that the interest put forward by Powell Gilbert ‘to have a better understanding of the decision rendered in view of the arguments brought forward by the parties and the evidence relied on’ corresponds to the general interest named in the *Ocado v Autostore* order, which arises after a decision was rendered.

23. Abbott has not requested that certain information should be excluded from public access for reasons of confidentiality or personal data protection. The CFI rightfully decided that the balance of interest was therefore in favour of allowing access.

III. Conclusion

24. For the reasons above, the appeal must be dismissed.

ORDER

The appeal is dismissed.

Issued on 9 January 2025

Judges

Rian Kalden

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Rian Kalden, Presiding judge and legally qualified judge

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Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Ursula Rombach

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For the Registrar

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Clerk at the Court of Appeal