

UPC Court of Appeal, 26 April 2024, AIM Sport v Supponor



PATENT LAW – PROCEDURAL LAW

Infringement proceedings and Provisional measures proceedings are two different proceedings (Article 32.1(a) and (c) UPCA)

These actions are dealt with separately in the UPCA ([Art. 32.1\(a\)](#) and [Art. 32.1\(c\) UPCA](#) respectively) and also in the RoP (Part 1, Chapter 1, section 1 and Part 3 respectively). The fact that the basis for both proceedings is the same – the same infringement – does not lead to a different conclusion

9. When the Court of First Instance finally decides in infringement proceedings, the form of decision is a ‘final decision’ as meant in [R.220.1\(a\) RoP](#), whether it allows or rejects the request(s). When the Court of First Instance decides in provisional measure proceedings, it must not decide in a ‘final decision’ but in an order. This already follows from the fact that the proceedings are of a provisional nature. In line therewith, [R.220.1\(c\) RoP](#) mentions “orders referred to in Articles (...) [60](#), [61](#), [62](#) (...) of the Agreement”.

- The “Information about appeal” in the decision should have distinguished between the separate proceedings, such that in the infringement proceedings (ACT 545571/2023) the time period of two months applied and in the provisional measure proceedings (ACT 551054/2023) the applicable time period was 15 days.

Because of principle of the protection of legitimate expectations excusable error concerning applicable appeal time period

- because of non-obvious incorrect information provided by Court of First Instance, but outcome in future cases may be different now that the Court of Appeal has clarified the wording used in Rule 220.1(c) RoP

21. The Court of Appeal is of the opinion that under the circumstances of this case, it was not obvious that the decision of the Court of Instance was wrong, in not referring to it as an order in relation to ACT_551054/2023 and in providing incomplete information on appeal. The wording used in [R.220.1\(c\) RoP](#) (“orders referred to in ...”) in combination with the wording of [Art. 62 UPCA](#) (“The Court may, by way of order, grant injunctions’...”), is ambiguous and – failing any case law clarifying the wording of this provision at

that time, as is now done by the Court of Appeal in this order – could have led AIM to believe that the time period for filing the Statement of appeal in provisional measures proceedings where the request was denied was indeed two months, as indicated by the Court of First Instance. It is the Court’s opinion that the principle of the protection of legitimate expectations under these exceptional circumstances require that AIM is allowed to rely on the information provided by the Court of First Instance that the applicable time period for lodging the Statement of appeal was two months in ACT_551054/2023 as well. As such, this time period must be considered to be applicable to the Statement of appeal in ACT_551054/2023. Thus, it must be held to have been lodged in time and the appeal is therefore admissible. The Court of Appeal notes that in another case in which the Court of First Instance incorrectly suggests that the time limit for lodging an appeal against a rejection of a preliminary measure is two months, the outcome may be different, as the Court of Appeal now has clarified the wording used in [R. 220.1\(c\) RoP](#) in this order.

Source: [Unified Patent Court](#)

UPC Court of Appeal, 26 April 2024

(Kalden, Simonsson, Rombach)

UPC_CoA_500/2023

APL_596892/2023

ORDER

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

concerning the time period for lodging a Statement of appeal in an order pursuant to [Art. 62 UPCA](#)

HEADNOTE

An ambiguity arising when reading [Article 62 UPCA](#) and [Rules 220.1\(c\)](#) and [224.1\(b\) RoP](#) together, in combination with incorrect, or at least incomplete, information provided by the Court of First Instance, has led the appellant to believe that a two months’ time period applied for an appeal of an order. The principle of the protection of legitimate expectations requires that the appellant under the exceptional circumstances of this case is allowed to rely on the information provided by the Court of First Instance that the applicable time period for lodging the Statement of appeal was two months, when in fact it was 15 days.

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:

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

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SUPPONOR ITALIA SRL, Busto Arsizio, VA, Italy

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hereinafter also jointly referred to as Supponor, represented by:

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

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LANGUAGE OF THE PROCEEDINGS: English

PATENT AT ISSUE

EP 3 295 663

PANEL

Second Panel

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 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

INDICATION OF PARTIES' REQUESTS

In this appeal, lodged as APL_596892/2023, AIM has appealed the **decision of the Court of First Instance 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**.

SUMMARY OF FACTS AND SUBMISSIONS OF THE PARTIES

1. 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 (inter alia for a preliminary injunction) as well as the requests (inter alia for a permanent injunction) in ACT_545571/2023, as it was of the opinion that the Unified Patent Court does not have competence over European patent EP 3 295 663 owing to its opt-out on 12 May 2023.

2. 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**)."

3. In the **order of 26 February 2024**, the judge-rapporteur noted that in APL_596892/2023; UPC_500/2023, AIM lodged its Statement of appeal on 20 December 2023, within two months of service of the Court of First Instance decision of 20 October 2023, in accordance with the 'Information about appeal' provided in that decision. However, pursuant to **R.224.1(b) RoP**, the time period for lodging an appeal against an order referred to in **Rule 220.1(c) RoP** – which includes orders referred to in **Art. 60** and **Art. 62 UPCA** – is 15 days of service of an order.

4. The judge-rapporteur invited both parties to comment on the non-compliance with **R.224.1(b) RoP** by AIM 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.

5. AIM argued that the Statement of appeal was lodged within the correct appeal period and is admissible, because the decision of 20 October 2023 constitutes a 'decision' that may be appealed within two months of its service. Alternatively, it states that it's right to appeal may be re-established under **R.320 RoP**.

6. Supponor argued that the Statement of appeal was lodged too late in view of the applicable 15 days time period of **R.224.1(b) RoP** and is inadmissible.

7. The judge-rapporteur has referred the decision on the admissibility of the appeal to the panel.

GROUNDINGS FOR THE ORDER

8. The Court of Appeal does not agree with AIM that there has effectively only been one “action” before the Court of First Instance. As is clear from the Agreement on a Unified Patent Court (UPCA) and the Rules of Procedure, infringement proceedings (with a request for a permanent injunction) on the one hand and Provisional measures proceedings (where a request for provisional measures may be made) are treated as different proceedings. These actions are dealt with separately in the UPCA ([Art. 32.1\(a\)](#) and [Art. 32.1\(c\) UPCA](#) respectively) and also in the RoP (Part 1, Chapter 1, section 1 and Part 3 respectively). The fact that the basis for both proceedings is the same – the same infringement – does not lead to a different conclusion.

9. When the Court of First Instance finally decides in infringement proceedings, the form of decision is a ‘final decision’ as meant in [R.220.1\(a\) RoP](#), whether it allows or rejects the request(s). When the Court of First Instance decides in provisional measure proceedings, it must not decide in a ‘final decision’ but in an order. This already follows from the fact that the proceedings are of a provisional nature. In line therewith, [R.220.1\(c\) RoP](#) mentions “orders referred to in Articles (...) [60](#), [61](#), [62](#) of the Agreement”.

10. In [Art. 62 UPCA](#) it is stated that “The Court may, by way of order, grant injunctions (...)”. This may suggest, as AIM pointed out, that only when an injunction is granted, this is by way of an order and that when an injunction is rejected, this would be by a final decision. However, in the opinion of the Court of Appeal, this is not the right interpretation of [Art. 62 UPCA](#). After all, as said, the proceedings are of a provisional nature and consequently do not result in a ‘final decision’ if the request is denied.

11. In addition, if AIM’s argument would be accepted, this would lead to a situation where the time period for filing a Statement of appeal would be different depending on whether the request is allowed (15 days after service) or denied (two months after service). This leads to inequality and undesired uncertainty, especially for the defendant, who would then have to wait substantially longer before it is clear whether there is still a threat of a preliminary injunction. On a proper interpretation of [R.220.1\(c\) RoP](#), it should be understood as: “orders on applications referred to in ...”.

12. [R.20 RoP](#) does not point in another direction. [R.19 - 21 RoP](#) (Procedure when the defendant raises a preliminary objection) apply to infringement proceedings on the merits. They do not apply to provisional measures proceedings as meant in [Art. 62 UPCA](#) and [R.205 et seq. RoP](#). For this type of proceedings a specific provision – [R.209 RoP](#) – deals with the possibility to raise objections to an Application for provisional measures. These may include similar objections as those mentioned in [R.19 RoP](#), but an interim ruling on such objections is not foreseen. If the requested injunction is denied it leads to an order

rejecting the request for provisional measures. It does not lead to a different outcome if the request is rejected because an objection similar to one mentioned in [R.19 RoP](#) is allowed.

13. From the above, it follows that the Court of First Instance should have issued an order in the provisional measure proceedings, separate from the decision in the infringement proceedings, even when both requests were in fact denied for identical reasons and even if combined in one and the same document.

14. In addition, the “Information about appeal” in the decision should have distinguished between the separate proceedings, such that in the infringement proceedings (ACT_545571/2023) the time period of two months applied and in the provisional measure proceedings (ACT_551054/2023) the applicable time period was 15 days.

15. Consequently, AIM was to appeal in relation to the rejected request in the infringement proceedings and in relation to the rejected request in the provisional measure proceedings separately within different time periods. Although it did lodge identical Statements of appeal separately in relation to each of the proceedings, it lodged both on 20 December 2023, within two months of service of the Court of First Instance decision of 20 October 2023.

16. Under the exceptional circumstances of the case, this does not render the appeal inadmissible.

17. It is true that the time period for lodging an appeal is a mandatory time limit that cannot be extended (see [R.9.4 RoP](#)). The strict application of the rule on the time period laid down in [R.224.1 RoP](#) serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (cf consistent case law of the CJEU, see e.g. [Order of 14 January 2010, SGAE v Commission, C-112/09 P, ECLI:EU:C:2010:16](#), para. 20; [order of 17 August 2022, SJM Coordination Center v Magnetrol, C-4/22 P \(I\), ECLI:EU:C:2022:626](#) para. 39). It is for the Court of Appeal to examine ex officio whether the time limit has been complied with.

18. However, an excusable error can, in exceptional circumstances, justify a derogation from that rule. That is in particular so when it was the conduct of the court, either alone or to a decisive extent, that gave rise to confusion by a party, who acted in good faith and displayed all the diligence required of a normally well-informed person. This follows from the principle of the protection of legitimate expectations (see case law above and CJEU, [Judgment of 22 September 2011 Bell & Ross BV v OHIM C-426/10 P ECLI:EU:C:2011:612](#), para. 43, 45, 56; Order of the General Court of 13 January 2009, SGAE v Commission, T-456/08, ECLI:EU:T:2009:1, para. 17, 28; Doherty v Commission, para. 20, 27 on Article 45(2) of the Statute of the Court of Justice of the European Union).

19. In the present case, such an excusable error occurred.

20. As AIM rightly pointed out, the Court of First Instance in its impugned decision gave the wrong impression that the time period stated in [R.224.1\(a\) RoP](#)

would apply also to an appeal in ACT_551054/2023. The Court of First Instance incorrectly combined its decision in the infringement proceedings with the order in the provisional measure proceedings in one and the same decision, without making any distinction between them, in particular by not rejecting the request in the provisional measure proceedings by way of an order. Furthermore, the Court of First Instance also provided in its decision the wrong, or at least incomplete, information on the time period for lodging the Statement of appeal in the separate proceedings, in particular by not referring to [R.220.1\(c\) RoP](#) and [R.224.1\(b\) RoP](#) as well, thus leading AIM to believe that a two months time period applied for appeals in both proceedings.

21. The Court of Appeal is of the opinion that under the circumstances of this case, it was not obvious that the decision of the Court of Instance was wrong, in not referring to it as an order in relation to ACT_551054/2023 and in providing incomplete information on appeal. The wording used in [R.220.1\(c\) RoP](#) (“orders referred to in ...”) in combination with the wording of [Art. 62 UPCA](#) (“The Court may, by way of order, grant injunctions’...”), is ambiguous and – failing any case law clarifying the wording of this provision at that time, as is now done by the Court of Appeal in this order – could have led AIM to believe that the time period for filing the Statement of appeal in provisional measures proceedings where the request was denied was indeed two months, as indicated by the Court of First Instance. It is the Court’s opinion that the principle of the protection of legitimate expectations under these exceptional circumstances require that AIM is allowed to rely on the information provided by the Court of First Instance that the applicable time period for lodging the Statement of appeal was two months in ACT_551054/2023 as well. As such, this time period must be considered to be applicable to the Statement of appeal in ACT_551054/2023. Thus, it must be held to have been lodged in time and the appeal is therefore admissible. The Court of Appeal notes that in another case in which the Court of First Instance incorrectly suggests that the time limit for lodging an appeal against a rejection of a preliminary measure is two months, the outcome may be different, as the Court of Appeal now has clarified the wording used in [R. 220.1\(c\) RoP](#) in this order.

22. In accordance with the time period considered to be applicable to the lodging of the Statement of appeal and the Statement of grounds of appeal in ACT_551054/2023 under the specific circumstances of this case, the principles of due process and equality of arms then require that the time period of [R.235.1 RoP](#) (three months) must apply to the Statement of response (and if applicable: the Statement of cross-appeal) to be lodged by Supponor. The Court of Appeal extends the time period for lodging these Statements under [R.9.3\(a\) RoP](#) accordingly, such that these Statements must be lodged within three months after service of the Statement of grounds of appeal.

ORDER

- The applicable time period for lodging the Statement of appeal in ACT_551054/2023 must – under the exceptional circumstances of this case – be considered to be that of [Rule 224.1\(a\) RoP](#) and the appeal lodged by AIM against the impugned ‘decision’ is therefore admissible.

- The Statement of response (and if applicable: the Statement of cross-appeal) by Supponor must be lodged within three months after service of the Statement of grounds of appeal.

Issued on 26 April 2024

Rian Kalden, Presiding judge and judge-rapporteur

Ingeborg Simonsson, legally qualified judge

Patricia Rombach, legally qualified judge
