



UPC Court of Appeal
UPC_CoA_486/2023
App_595643/2023

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 11 January 2024
concerning request for discretionary review

HEADNOTES: ADMISSIBILITY OF A REQUEST FOR DISCRETIONARY REVIEW OF AN ORDER BY THE JUDGE RAPPORTEUR WHEREBY HE REFUSED AN APPLICATION PURSUANT TO RULE 333.1 ROP TO HAVE HIS DECISION PURSUANT TO RULE 20.2 ROP REVIEWED BY THE PANEL.

KEYWORDS: DISCRETIONARY REVIEW, REVIEW UNDER RULE 333

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

Netgear Inc.

Netgear Germany GmbH

Netgear International Limited

Represented by: Dr. Stephan Dorn, Freshfields Bruckhaus Deringer Attorneys, Düsseldorf

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

Huawei Technologies Co. Ltd

Represented by: Dr. Tobias J. Hessel, Clifford Chance, Düsseldorf

LANGUAGE OF THE PROCEEDINGS

German

DECIDING JUDGE:

This order has been issued by the standing judge Ms. Rian Kalden

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Date: 11 December 2023
- Order no. 588901/2023 in UPC_CFI_9/2023 of the Munich local division (Judge rapporteur Dr. Matthias Zigann)

PATENT

EP 3 611 989

POINT AT ISSUE

Admissibility of discretionary review of an order refusing an application to review pursuant to Rule 333.1 RoP issued by the judge rapporteur.

FACTS

1. In the CFI main proceedings, the Applicants filed a preliminary objection under Rule 19 RoP on 7 September 2023. On 30 October 2023 the JR informed the parties that the Preliminary objection would be dealt with in the main proceedings.
2. On 14 November the Applicants filed a request pursuant to Rule 333.1 RoP (App_586381/2023) in order to have the 30 October 2023 decision reviewed by the panel. The JR rejected this request as inadmissible with the order dated 11 December 2023. In that order, the JR also considered that appeal of that order was not allowed.
3. The Applicants subsequently made a request for discretionary review under R. 220.3. They requested that the Court of Appeal:
 - a. review the judge-rapporteur's decision not to allow the appeal against the judge-rapporteur's order from 11 December 2023 (Rule 220.3);
 - b. allow the appeal (220.4 RoP UPC);
 - c. review the judge-rapporteur's procedural order from 30 October 2023 (ORD_575956/2023), according to which the Defendants' Preliminary objection (App_570172/2023) must be handled in the main proceedings, and rule that a decision must be made immediately about the Defendants' objection pursuant to Rule 19 RoP UPC in accordance with Rule 21.1 RoP UPC, and
 - d. decide on the Preliminary objection immediately and then admit that objection.
4. The respondents were given the opportunity to express their opinion, which they have done on 4 January 2023. They consider the request for discretionary review to be inadmissible.

ADMISSIBILITY OF THE REQUEST FOR DISCRETIONARY REVIEW

5. Pursuant to Rule 333.1 RoP, a case management decision or order made by the judge-rapporteur or the presiding judge, shall be reviewed by the panel on a reasoned Application by a party. Rules 333.4 provides that the panel shall as soon as possible decide the Application for review.
6. As a general principle, unless provided otherwise, a case management decision or order made by the judge-rapporteur or the presiding judge can only be appealed if such decision or order has first been reviewed by the panel pursuant to Rule 333.1. This follows from the fact that it is only possible to make a request for discretionary review to the Court of Appeal under Rule 220.3 RoP in the event leave to appeal of an order of a panel is refused. Therefore, in such a situation, first a request pursuant to Rule 333.1 must be made in order to obtain a panel decision, which can then – if necessary – subsequently be the subject of

an appeal under Rule 220.2 RoP if leave to appeal is granted by the panel, or be the subject of a request for discretionary review under Rule 220.3 RoP if such leave is not granted.

7. In the order of 11 December 2023, the JR refused to refer his decision of 30 October 2023 to the panel for review. This decision was based on an interpretation of Rule 20.1, Rule 20.2 and Rule 21 RoP, leading to the conclusion that the 'notice' pursuant to Rule 20.2 RoP (i.e. that the Preliminary objection is to be dealt with in the main proceedings) (a) does not qualify as a case management decision or order of the judge rapporteur or presiding judge as meant in Rule 333.1 RoP; and (b) cannot be appealed, as it is not a decision to either allow or reject the objection as meant in Rule 21 RoP.
8. The fact that the JR himself decided on the admissibility of the application to have his 30 October 2023 decision reviewed by the panel pursuant to Rule 333.1 RoP, rather than have the panel decide on the admissibility of the application, prevents that a request for discretionary review pursuant to Rule 220.3 may be made, since there is no panel order. This would however only be justified if the underlying reasoning of the JR to consider himself competent to decide on the admissibility of the request for the review pursuant to Rule 333.1 RoP and to consider it inadmissible, as set forth in his 11 December 2023 order, is indeed accurate.
9. Under these circumstances, the standing judge considers it justified to allow the request for discretionary review to the extent that the applicant is allowed to appeal the decision of 11 December 2023.
10. The standing judge notes that the appeal shall not extend to the decision of 30 October 2023. If the appeal of the 11 December 2023 order is successful, then the application to review the 30 October 2023 decision shall first be reviewed by the panel of the CFI (see par. 6 above).
11. On the basis of the foregoing, the standing judge considers the request for discretionary review admissible and allows the applicant to appeal the 11 December 2023 order.

ORDER

The standing judge allows the applicant to appeal the 11 December 2023 order. The case is referred to the President of the Court of Appeal to assign the appeal to a panel.

Issued on 11 January 2024

NAME AND SIGNATURE
Rian Kalden, standing judge

