

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 21 August 2024
concerning an application for a discretionary review by the
Court of Appeal under Rule 220.3 RoP

HEADNOTES:

1. An appeal against an order denying the request to reject an action as manifestly bound to fail according to R.361 RoP is admissible under the requirements of R.220.2 and R.220.3 RoP.
2. Such order is a case management order. As such it can only be the subject-matter of an appeal if it has been issued by a panel.

APPLICANT, APPELLANT AND DEFENDANT IN THE MAIN PROCEEDINGS BEFORE THE CFI

Microsoft Corporation, Washington, US
represented by Prof. Tilmann Müller-Stoy and Nadine Westermeyer, attorneys at law, Bardehle Pagenberg, Partnerschaft mbB Patentanwälte Rechtsanwälte

RESPONDENT AND CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE CFI

Suinno Mobile & AI Technologies Licensing Oy, Helsinki, Finland
represented by Mikko Kalervo Väänänen, European Patent Attorney

PATENT IN SUIT

EP 2 671 173

LANGUAGE OF THE CASE

English

DECIDING JUDGE

This order was issued by Patricia Rombach, standing judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

Central Division Paris

- Date: 2 July 2024
- App_28103/2024, UPC_CFI_164/2024; ORD_33379/2024

SUMMARY OF THE FACTS

1. The claimant in the main proceedings (hereafter referred to as Suinno) is asserting a claim against the defendant in the main proceedings (hereafter referred to as Microsoft) for infringement of European patent 2 671 173. Microsoft has filed an application pursuant to R.361 RoP (App_28103/2024) to reject (I) claimant's application pursuant R.262A RoP of April 9, 2024 (App_19084/2024, hereafter also referred to as 'the R.361-R.262A RoP request') and (II) Suinno's infringement action (ACT_18406/2024, hereafter also referred to as 'the R.361 RoP-action request') as manifestly inadmissible.
2. By order issued on 26 June 2024 ('concerning the application RoP 262A No. App_19084/2024', ORD_27206/2024) the judge-rapporteur ordered that the access to agreements A & B is restricted to Microsoft's attorneys and Microsoft's directors who have a legitimate need to access these agreements for the purposes of the current proceedings.
3. By order issued on 2 July 2024 (ORD_33379/2024, hereafter referred to as 'the impugned order') the judge-rapporteur rejected the request to declare 'the revocation action' (insertion of 'revocation' obviously accidentally) manifestly inadmissible. Leave to appeal was not granted.
4. On 17 July 2024 Microsoft filed a request for panel review of the impugned order pursuant to R.333 RoP (App_42138/2024) to the Court of First Instance. The panel has not yet decided.

PARTIES' REQUESTS

5. On 1 August 2024 Microsoft lodged a request for discretionary review, requesting:
 - I. The Order pursuant to R.361 RoP made by the judge-rapporteur and issued on July 2, 2024 concerning the Application No. App_28130/2024 lodged in the infringement proceedings UPC_CFI_164/2024 is reviewed by the Court of Appeal (R.220.3 RoP).
 - II. The Order pursuant to R.361 RoP made by the judge-rapporteur concerning the Application No. App_28130/2024 lodged in the infringement proceedings UPC_CFI_164/2024 is set aside and
 1. Claimant's Application pursuant to R.262A RoP of April 9, 2024 (App_19084/2024, as corrected in the statement dated on 20 August 2024) is rejected as being manifestly inadmissible (R.361 RoP); and
 2. Claimant's action (ACT_18406/2024) is rejected as being manifestly inadmissible (R.361 RoP).
 - III. In the alternative:

The following question is referred to the CJEU for preliminary ruling:
"In order to comply and be compatible with Union law, shall the requirement of independence of representatives before the Unified Patent Court, as set out in Article 48.5 of the Agreement on a Unified Patent Court and in Article 2.4.1 of the

Code of Conduct for Representatives before the Unified Patent Court, be interpreted as meaning that a legal person cannot be validly represented before the Unified Patent Court by a person who is at the same time its managing director and main shareholder?

6. Suinno requests that the request be dismissed.

PARTIES' SUBMISSIONS

7. Microsoft argues, as far as relevant here, as follows.

8. R.363.2 RoP is not applicable in the present case. First according to the title, R.363 RoP relates to "Orders dismissing manifestly inadmissible claims". Therefore R.363 RoP only concerns situations in which the court orders that the action is declared manifestly inadmissible. It does not cover situations like the present, where an application to order manifest inadmissibility is rejected. This is also in line with the wording of R.361 RoP. Further support can be found in the Table of Court Fees; a fixed fee of EUR 11.000 is only appropriate if the matter in dispute has been decided as a whole and the action has been dismissed.

9. R.363.2 RoP refers to the "Court of First Instance", which is, in legal literature available to date, considered as meaning the whole panel rather than the judge-rapporteur. Assuming this to be correct R.220.1(a) RoP is not applicable here as the order under review was taken and issued by the judge-rapporteur.

10. Applicant is aware of the order of this Court issued on January 11, 2024, according to which "[a]s 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 R.333.1". However it is not clear from the law and case-law available to date whether the present order is to be considered a case management order which could be the subject of an application for panel review pursuant to R.333 RoP.

11. The impugned order of 2 July 2024 does not deal with the R.361-R.262A RoP request (although this request was included in Microsoft's application pursuant to R.361 RoP of 22 May 2024) nor does – insofar correctly so, as this request was not the subject matter of this application and workflow – the order of 26 June 2024 (ORD_27206/2024) concerning Suinno's R.262A RoP request.

12. Accordingly, by ignoring the R.361-R.262A RoP request, the Court of First Instance only incompletely dealt with and decided Microsoft's application pursuant to R.361 RoP, so that the impugned order of 2 July 2024 is also subject to review by the CoA in this respect and the CoA is also called upon to review, to lift this order and to decide also on Microsoft's R.361-R.262A RoP request. This is not affected by the fact that the time limit of R.220.3 RoP is not met with respect to the order of 26 June 2024, as this order only relates to Suinno's application pursuant to R.262A RoP and not to Microsoft's R.361-R.262A RoP

request, which is the subject matter of a separate workflow and should have been dealt with separately in the impugned order of 2 July 2024.

13. Suinno argues, as far as relevant here, as follows.

14. The R.220.3 RoP time limit expired 26th July 2024 and therefore the request is inadmissible.

REASONS:

I. Request for discretionary review regarding 'the R.361-R.262A RoP request'

15. The Request for discretionary review regarding the R.361-R.262A RoP request is inadmissible.

16. The impugned order only rejected the request to declare the 'revocation action' manifestly inadmissible, which clearly means that the judge-rapporteur only rejected 'the R.361 RoP-action request' as inadmissible. This is confirmed by the fact that the summary of facts and parties' requests as well as the grounds of the order deal only with Suinno's action or Statement of claim.

17. This is also supported by the fact that in the order issued on 26 June 2024 (ORD_27206/2024) the judge-rapporteur granted the request of 9 April 2024 and ordered 'pursuant to Article 58 UPCA and R.262A RoP' that the access to Agreements A&B is restricted to Microsoft attorneys and Microsoft directors who have a legitimate need to access these Agreements for the purpose of the current proceedings. The grounds for the order addresses Microsoft's objection of inadmissibility of the request, based on the grounds of a violation of R.290.2 RoP in relation to the non-compliance with the Code of Conduct by Suinno's representative.

18. Contrary to Microsoft's view, the fact that the order of 2 July 2024 does not address the R.361-R.262A RoP application does not mean that the order is incomplete and that the rejection of this application is also the subject of the request for discretionary review. The R.361-R.262A RoP application was (implicitly) decided in the order on the R.262A RoP application of 26 June 2024.

19. It is not necessary to decide whether the present request for discretionary review shall be interpreted as also referring to the order issued on 26 June 2024. This is because the present request would not meet the time limit in R.220.3 RoP.

II. Request for discretionary review regarding 'the R.361 RoP-action request'

20. Also the request for discretionary review regarding 'the R.361 RoP-action request' is inadmissible.

21. A discretionary review by the Court of Appeal pursuant to R.220.3 RoP is only admissible, if leave to appeal against the impugned order is required (R.220.2 RoP (1)) and the Court of First Instance refused to grant leave within 15 days of the order (R.220.3 RoP (2)). In case

of an order made solely by the judge-rapporteur or the presiding judge, it also depends on whether it may be appealed directly (3). Unless otherwise provided, R.220.3 RoP provides for the grant of leave to appeal by the standing judge only if the subject-matter of the appeal, in case leave is granted, is an order issued by a panel (see Court of Appeal, order of 21 March 2024, UPC_CoA_486/2023, APL_595643/2023 para 21).

1. Leave required

22. The first requirement is met. Pursuant to R.220.2 RoP leave to appeal is required.
23. As laid down in R.220.2 RoP, only orders other than those referred to in paragraph 1 need leave to appeal if, as here, they are not subject of an appeal together with the appeal against the decision.
24. The impugned order does not qualify as an order referred to in R.220.1 RoP, even though, according to R.363.2 RoP it is a final decision within the meaning of R.220.1 (a) RoP where the decision is taken by the Court of First Instance *inter alia* pursuant to R.361 RoP.
25. This is because R.363.2 RoP only concerns orders granting a 'R.361 RoP request'. This is clear from the heading of R.363 RoP, which reads: 'Orders dismissing manifestly inadmissible claims'. Furthermore, according to the wording of R.363.2 RoP, this provision only relates to decisions taken *inter alia* pursuant to R.361 RoP. As can be seen from the heading of R.361 RoP ('action manifestly bound to fail') as well as from the fact, that R.361 RoP only stipulates that the Court may give a decision by way of order where it is clear that the Court has no jurisdiction to take cognizance of an action or of certain of the claims therein or where the action or defence is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, also R.361.2 RoP only concerns orders rejecting the action as manifestly inadmissible.
26. This corresponds to the purpose of R.220.1 RoP to enable an appeal without leave to appeal against such decisions with which the proceedings are terminated (see R.220.1(b) RoP). In line with this, R.21.1 RoP makes clear that only a decision of the judge-rapporteur allowing a Preliminary objection may be appealed pursuant to R.220.1(a) RoP. A decision rejecting a Preliminary objection is subject to R.220.2 RoP.

2. Direct appeal

27. The impugned order of the judge rapporteur may not be appealed directly.
28. Unless otherwise provided, a case management decision or a case management order of the judge-rapporteur may not be appealed directly. The admissible legal remedy against such decisions and orders is an application for review by the panel in accordance with R.333.1 RoP (Court of Appeal, order of 21 March 2024, UPC_CoA_486/2023 APL_595643/2023, para 21).
29. The order denying a R.361 RoP request is a case management order as meant in R.333.1 RoP. The notion of 'case management decision or order' is a broad concept that calls for a broad interpretation. All case management orders and decisions, notably those mentioned

in R.334 RoP, can be subject of review under R.333 RoP (Court of Appeal, order of 21 March 2024, UPC_CoA_486/2023 APL_595643/2023, para 35). According to R.334 (h) RoP, to dismiss a claim summarily if it has no prospect of succeeding is the use of case management powers. A fortiori this includes the rejection of a R.361 RoP request.

30. The fact that the panel shall review the order denying a R.361 RoP request is also supported by the fact that only the panel may grant a R.361 RoP request (R.363.1 RoP).

ORDER

The request for discretionary review is dismissed.

Issued on 21 August 2024

Patricia Rombach
Standing Judge