



ORD_598476/2023
ACT_581538/2023
UPC_CFI_376/2023
Infringement claim

Brussels - Local Division

UPC_CFI_376/2023
Procedural Decision (Order)
R. 105.5. RoP
From the Court of First Instance of the Unified Patent Court (UPC)
Local Division Brussels
Issued on 17 September 2024

CLAIMANT:

Mr [REDACTED] residing at [REDACTED]

Represented by: Mter. C. Ronse and Mter. K. Claeys, lawyers at Havenlaan 86C, B414, 1000 Brussels (Belgium), and Mter. M.W. Rijdsdijk and Mter D.E. Colenbrander, lawyers at Amstelplein 1 (Rembrandt Tower, 28th floor), 1096 HA Amsterdam (The Netherlands);

DEFENDANT(S):

- (1) OrthoApnea S.L.**, a company incorporated under Spanish law, with its registered office at Flauta Mágica 22, 29006 Malaga, Spain,
- (2) VIVISOL B BV**, a company incorporated under Belgian law with registered office at Zoning Ouest 14, 7860 Lessines, Belgium, and registered in the Crossroads Bank for Enterprises with enterprise number 0454.915.053;

Represented by: Mter. van den Horst and Mter. Niemeijer, lawyers at Prinses Beatrixlaan 582, 2595 BM The Hague (The Netherlands)

OCROOI(S) SUBJECT TO THE DISPUTE

Patent no.
EP 2 331 036

Patent holder(s)
[REDACTED]

LANGUAGE OF PROCEDURE:

DUTCH

PANEL/DIVISION:

Present Department (Brussels) with the panel consisting of:

President /	Judge-
Rapporteur Samuel Granata	Legally qualified judge (LQJ)
	Margot Kokke
Legally qualified judge (LQJ)	András Kupecz

OBJECT OF PROCEDURE (ORDER):

Patent infringement - R. 105.5

DATE AND CONTENT OF THE INTERIM CONFERENCE:

6 September 2024 (10am by video conference in application of R. 105.1. RoP)

The agenda of the Interim Conference was transmitted to parties along with the link offered for the video conference. Parties were given the opportunity to submit additional elements.

INTERIM CONFERENCE PARTICIPANTS:

In court:

- Samuel Granata (President and Judge-Rapporteur)
- Margot Kokke (LQJ as a listener)
- András Kupecz (LQJ as a listener)

For the Claimant

- Mter. C. Ronse
- Mter. K. Claeys
- Patent attorney N. D'Halleweyn

For the Defendants

- Mter. M. van den Horst
- Mter. B. Niemeijer

PROCEDURAL STATE OF PLAY:

The parties regularly uploaded their written arguments (claim/defence) and supporting documents to CMS during the written phase of these proceedings and in line with:

- the relevant rules of the RoP;
- The Panel's Procedural Decision dated 19 July 2024 (ORD_42503/2024) (after request for Review dated 16 July 2024 in application of R. 333.1. RoP and R. 334 RoP of Final Decision (Order) ORD_37783/2024 rendered on 8 July 2024);
- The Order of the UPC Court of Appeal issued on 26 July 2024 (UPC_430/2024 - App_42818/2024).

The parties' positions and mutual claims are reflected in this written argument supported by documentary evidence. In the context of the present decision, repetition of them is out of the question.

ASSESSMENT IN THE LIGHT OF R. 104 RoP:

1. Probing an amicable agreement (R. 104 (d) RoP)

In sounding out a possible amicable solution between the parties, it was noted that there was a will to do so on the Plaintiff's side and a limited will on the Defendants' side (and this essentially because of the significant costs already incurred in these proceedings).

It was made clear to the parties that these costs could still rise significantly (taking into account a possible appeal and follow-up proceedings (if any) regarding damages). The Judge-Rapporteur informed the parties that an amicable solution will still be cost-effective.

Should the parties decide to engage in amicable negotiations for the time being, the parties were informed that such negotiations (at this stage of the proceedings) would not affect the date of the oral hearing. Should the parties consider more time necessary, the parties were informed that a postponement of the date of the oral hearing would be a possibility if there is mutual agreement on this.

2. Offer of proof made by Rejecting Parties (R. 104 (g) RoP)

2.1. Regarding the offer of proof made in the Statement of Reply (p. 57 under point 10) (the European patent attorney [REDACTED])

Given that Mr [REDACTED] is among the Defendants' representatives (as a patent attorney and reflected as such in the Defendants' briefs), the request for an offer of proof lacks merit. Mr [REDACTED] is free to speak at the oral hearing in his capacity as Defendants' representative.

2.2. On the offer of proof made in the Conclusion of Duplicity ("Rejoinder") (in Part B p. 20-21 and Part C p. 36 under point 7) (Mr. [REDACTED])

It is considered appropriate for Mr [REDACTED] to be available as part of a hybrid form of the oral hearing so that he can, (only) if necessary, answer any questions from the panel. The Claimant will be given the opportunity (including by allowing Mr [REDACTED] to speak) to take position on any statements made by Mr. [REDACTED]

For practical (linguistic) reasons, any questions from the panel to Mr [REDACTED] will be translated into [REDACTED] English by the panel. Defendants give in this regard that Mr [REDACTED] is proficient in English.

3. Consequences of the (alleged) late institution of proceedings on the merits in application of R. 198 (1) RoP (R. 104 (g) RoP)

Given that the Defendants, *on the* basis of an alleged lateness in instituting the proceedings on the merits, request, *on the one hand*, the lifting of the attachment (of evidence) on counterfeiting ("*Order to Preserve Evidence*") in application of R. 198 (1) RoP, but, *on the other hand*, make use of the findings in execution of the descriptive attachment, the parties are requested to take oral position on this matter at the oral hearing.

4. Valuation of the case (R. 104 (i) and (j) RoP)

Provisional damages of €1 (Statement of Claim) were initially claimed by the Claimant, which were later increased to a provisional damages of €50,000 (Reply to Statement of Defence). The Claimant argues that a concrete estimate of damages will only be able to be determined after obtaining further information (as claimed).

None of the parties offers any guidance today for concrete assessment of the value of the case.

The claimant stated during the Interim Conference that he could agree to value the case at €250,000.

The defendants oppose this, arguing that valuing the case at the proposed amount of €250,000 will be insufficient in light of the costs already incurred. They request that the case should be valued at €500,000.

The value of the case is set at €250,000 with reasons given as follows:

- R. 370.6 RoP as R. 152.3 RoP (referring to the decisions of the UPC Administrative Committee) set as the lowest (minimum) threshold an amount up to € 250,000 up front, so a lower valuation is not an issue.
- There are neither concrete elements before us nor factual arguments offered that would lead to a higher valuation of the case than €250.000.
- Whether or not a valuation is "*sufficient*" in the light of possible recoverable costs (in application of R. 152.3. RoP) does not concern an element to be considered in assessing the valuation of the case.

5. Conduct of oral proceedings (R. 104 (g) RoP)

5.1. Use of pleading notes and visual representations

Possible pleading notes and/or visual representations (including in the form of a PPT presentation) as (pleading) aids will be admitted. However, these do not form part of the written argumentation (claim/defence).

Indicated (pleading) aids can only serve to support the written argumentation already formulated. After all, the written phase of the proceedings has been concluded so that no additional/derogatory pleas can be provided.

Indicated (pleading) aids must be communicated to the Registry (LD Brussels) and the opposing party in good time (i.e. 48 h before the hearing).

5.2. Use of physical examples/models

The parties are further free to use the jaw model cited at Interim Conference during oral arguments, but again only in support of the written arguments already formulated.

In such a case, this model must be filed as an additional document at the Registry (LD Brussels) and communicated to the opposing party at the latest 14 days before the hearing as well as at the same time as it is filed at the Registry (LD Brussels).

DECISION:

1. The value of case is set at €250,000.
2. The request for offer of proof by the European patent attorney [REDACTED] is rejected for lack of object.
3. It is considered appropriate for Mr [REDACTED] to be available as part of a hybrid form of the plea hearing so that he can, (only) if necessary, answer any questions from the panel.
4. The parties are invited to further oral submissions on the consequences of the alleged late filing of proceedings on the merits in the light of the descriptive attachment measures and its consequences.
5. The use of pleading notes and visual (pleading) aids will be allowed under the following conditions:
 - These should only be used to support the argument already formulated
 - These should be notified to the Registry (LD Brussels) no later than 48h before the hearing
 - These should also be communicated to the opposing party no later than the same date they are communicated to the Registry (LD Brussels).
6. The use of a jaw model during oral arguments will be allowed under the following conditions:
 - The model should only be used to support the argument already formulated
 - The model should be lodged at the Registry (LD Brussels) no later than 14 days before the plea hearing
 - The model must be communicated to the counterparty no later than the same date on which they are filed at the Registry (LD Brussels).
7. Defendants should inform the Registry (LD Brussels) of Mr [REDACTED]'s email address to invite the hybrid hearing.

GUIDELINES PLEADING:

1. Time lapse/division:

(a) General

Action	Duration
Administrative and technical control	15 minutes
Introductory report by the court containing a factual situation outline, a overview of the claims (and counterclaims) and the main discussion points	15 - 30 minutes
Pleadings Plaintiff	(maximum) 60 minutes
<i>Break</i>	<i>To be determined at hearing</i>
Pleadings Defendants	(maximum) 60 minutes
<i>Lunch break</i>	<i>To be determined at hearing</i>
Opportunity to reply Plaintiff	(maximum) 15 minutes
Opportunity to respond Defendants	(maximum) 15 minutes
Possibility of the panel asking questions to one or both parties followed by an interactive debate	<i>To be determined at hearing</i>

(b) Deviations

Should questions already be asked by members of the panel or any other intervention take place during the pleadings, this will be taken into account in the context of the parties' allotted pleading time (in the sense that it will not be included in the time calculation).

2. Recording of plea hearing:

In application of R. 115 RoP, an audio recording will be made of the plea hearing.

Neither the parties nor the public will be allowed to make any recording of the oral hearing itself.

3. Publicity and attendance at oral hearing:

The oral hearing is open to the public.

4. Further practical guidelines in the context of the plea hearing:

Further practical guidelines will be communicated by the Registry (LD Brussels) prior to the oral hearing.

INSTRUCTIONS TO THE REGISTRY (LD BRUSSELS):

- If a jaw model is deposited, it should be kept at Griffes (LD Brussels).
- A hybrid hearing should be organised from the plea hearing. Invitation should be sent to Mr.
- Prior to the oral hearing, any practical guidelines should be conveyed to the parties

PANEL REVIEW:

Each party is given the opportunity to request a reassessment in application of R. 333 RoP. However, pending such request, this Procedural Decision will remain in force (R. 102 RoP).

Referred on 17 September 2024 by:

<p>Samuel GRANATA Legally Qualified Judge</p> <p>Judge-Rapporteur</p>	<p>Samuel Rocco M Granata</p> <p>Digitally signed by Samuel Rocco M Granata Date: 2024.09.17 11:48:43 +02'00'</p>
--	--

CASE DETAILS:

Order no. ORD_598476/2023

ACTION NUMBER: ACT_581538/2023

UPC number: UPC_CFI_376/2023

Action type: Infringement Action