Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Action n°: CoA_PC 01/2024 (written proceedings)
Application: appeal against the order of the CFI ORD_41423/2024 in the main proceedings ACT_588685/2023 UPC_CFI_440/2023

Procedural order
of the Court of Appeal of the Unified Patent Court
issued on 15/10/2024

HEADNOTES
Leave to appeal under Rule 220.2 RoP, other than in the case of an appeal together with an appeal against the decision, must be expressly granted by the CFI and cannot be presumed.

KEYWORDS
Leave to appeal

APPELLANT (INTERVENER IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Photon Wave Co, Ltd, a company governed by Korean law, having its registered office at 52, Jugyang 763 beon-gil, Wonsam-myeon, Cheoin-gu, Yongin-si, Gyeonggi-do, 17166 Republic of Korea (hereinafter referred to as "**Photon Wave**"),

represented by Dorothea Hofer, Andreas Oser, Peter Klein, Patent attorneys (Prüfer & Partner mbB Patentanwälte Rechtsanwälte),

RESPONDENT (CLAIMANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Seoul Viosys Co, Ltd, a company governed by Korean law, having its registered office at 65-16, Sandan-ro 163 beongil, Danwon-gu, Ansan-si, Gyeonggi-do, 15429, Republic of Korea (hereinafter referred to as "**Seoul Viosys**"),

represented by Pauline Debré, Member of the Paris Bar (Linklaters LLP).

PATENT AT ISSUE:

EP 3 404 726

DECIDING PANEL:

Klaus Grabinski, President of the Court of Appeal,
Emanuela Germano, judge,
Emmanuel Gougé, Judge-Rapporteur.

LANGUAGE OF PROCEEDINGS

French

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- □ Procedural order of the Paris Local Division of 24 July 2024 in the main proceedings ACT_588685/2023
- □ Reference: ORD_41423/2024
  ACT_588685/2023
  UPC_CFI_440/2023

THE PROCEDURE

1. By Statement of appeal dated 02 August 2024, Photon Wave appealed against order ORD_41423/2024 issued on 24 July 2024 by the Paris Local Division of the Court of First Instance.

2. Seoul Viosys submitted its statement of defence dated 05 September 2024 and filed an application for inadmissibility for failure to comply with procedural requirements, on the grounds that the appeal had not been granted by the Court of First Instance.

3. By order of the Judge-Rapporteur of 16 September 2024, Photon Wave was invited to submit its written observations on Seoul Viosys' application for inadmissibility.

4. On 24 September 2024, Photon Wave responded to the Statement of response on the application for inadmissibility raised by Seoul Viosys, and made further submissions on matters not addressed by the Court in its aforementioned order.

GROUNDS FOR THE ORDER

5. In accordance with the provisions of Article 73 of the Agreement on a Unified Patent Court ("UPCA") and Rule 220.2 of the Rules of Procedure ("RoP"), orders other than those referred to in Rules 220.1 and 97.5 RoP, may be either the subject of an appeal together with the appeal against the decision or may be appealed with the leave of the Court of First Instance.

6. It follows from these provisions that the leave to appeal referred to in Rule 220.2, other than in the case of an appeal together with an appeal against the decision, must be expressly granted by the CFI and cannot be presumed. Unless this is the case, leave to appeal the order is not granted, without prejudice to a possible request for discretionary review under Rule 220.3 RoP or the possibility of appealing the order together with an appeal against the decision to be taken.

7. In the present case, the Court of First Instance simply recalled, by using general terms at the end of the operative part of the impugned order, that the said order "is subject to appeal under the conditions laid down by the provisions of R. 220.2 RoP".

8. In so doing, the Court of First Instance limited itself to referring, for information purposes, to the provisions of the RoP applicable to proceedings before the Court of Appeal (Part 4 of the RoP), in particular Rule 220 on appealable decisions, without granting the parties leave to appeal its order. In this sense, and contrary to Photon Wave's contention, the CFI's order complies with the document entitled "General Template for Decision – UPC CFI" (version relating to orders), available on the Unified Patent Court website, which contains a generic phrase relating to the conditions under which an appeal may be lodged.

9. If the Court of First Instance had decided to "grant leave to appeal" – per the wording of Article 73 UPCA – it would have expressly granted such leave by adopting wording consistent with that provision, stating for example that "leave to appeal is granted".

10. That is not the case here. The Court of First Instance, in the order under appeal, did not grant leave to appeal, contrary to Photon Wave's assertions which, without justification, incorrectly states in its Satement of grounds of appeal that the appeal "was allowed".

11. Consequently, in the absence of leave to appeal granted by the Court of First Instance, the appeal is inadmissible, as the Court of Appeal has already indicated in its order of 14 March 2024 (Abbott v Dexcom, UPC_CoA_5/2024, PR_APL_189/2024).

12. In addition, as this is a formal matter falling in principle within the scope of the examination referred to in Rule 229 RoP, and after allowing Photon Wave and Seoul Viosys to submit their written observations, it is not necessary to hear the parties at an oral hearing.

13. It follows from the foregoing that the appeal is declared inadmissible without there being a need to rule on the other requests.

FOR THESE REASONS,

the Court of Appeal declares the appeal inadmissible.

Issued in Luxembourg on 15 October 2024.

Klaus Grabinski
President of the Court of Appeal

Emanuela Germano
Judge

Emmanuel Gougé
Judge-Rapporteur