



UPC - Court of Appeal  
UPC\_430/2024  
App\_42818/2024

**Decision**  
**of the Court of Appeal of the Unified Patent Court given on 26 July**  
**2024**

NOTE:

An application for suspensive effect in relation to an order of the Tribunal not to extend the time limit for the submission of a party's submission (in this case, a rejoinder) set out in the Rules of Procedure may be admissible.

KEYWORDS:

Suspensive effect; extension of time to file rejoinder

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

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DEFENDANT/APPELLANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

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represented by lawyer Christophe Ronse (ALTIUS Advocaten) OCTROOY TO

WHICH THE DISPUTES REGARD

European patent 2331036

PROCESS STEEL

Dutch

DECIDING JUDGE

Klaus Grabinski, president of the Court of Appeal and legally trained judge

ORDER OF THE COURT OF FIRST INSTANCE APPEALED AGAINST

□ Decision of the Court of First Instance of the Unified Patent Court, Brussels local division, of 19 July 2024, in infringement proceedings ACT\_581538/2023 Reference numbers: ACT\_581538/2023 UPC\_CFI\_376/2023 App\_41533/2024 ORD\_42503/2024

FACTS AND REQUESTS OF THE PARTIES

1. The plaintiff and defendant (hereinafter: plaintiff) brought an action for infringement of European patent 2331036 against the defendants and claimants (hereinafter: defendants) before the local division of the Court of First Instance of the Unified Patent Court in Brussels. The defendants filed a statement of reply and the plaintiff filed a statement of reply on 18 June 2024.
2. In an application filed on 24 June 2024, the defendants objected to certain parts of the reply and asked the judge-appellant to refuse the extension on the basis of equivalence, not to accept newly introduced facts and to reject the new (amended) claims. In the alternative, the defendants requested that the time limit for their r e p l y be extended until 18 August 2024.
3. In his order of 8 July 2024, the judge-appellant dismissed the main application but extended the deadline for the defendants' reply to rejoinder to 1 August 2024.
4. At the request of the defendants and after hearing the claimant, the panel of the Brussels local division ruled on 19 July 2024:
  - I. r e j e c t the pre-alert request to suspend the deadline for submitting the rejoinder by one or two months from 24 June until a final substantive decision on the procedural request is taken,
  - II. reject the request for partial reassessment of the Judge Rapporteur's final decision of 8 July 2024 as unfounded and confirm the Judge Rapporteur's decision in all its parts,
  - III. reject the request for an additional deadline for the submission of the rejoinder and maintain the date of 1 August 2024 for the submission of the rejoinder,
  - IV. grant leave to appeal the panel's decision,

- V. stay the decision on the order to pay the costs of the application dated 24 June 2024 and the request for reassessment dated 16 July 2024 until the final decision in the main case.
5. On 23 July 2024, the defendants appealed against the panel's order and filed an application for a stay of proceedings under Rule 223 of the *Rules of Procedure of the Unified Patent Court* ("the Rules of Procedure or RoP"), requesting "the Court of Appeal/Standing Judge":
    - I. suspend, pending the appeal proceedings, the period for filing the rejoinder from 24 June, being the date of filing of its general application, until the date of the final substantive decision, by two months if Part I of the primary application is rejected and by one month if Part I of the primary application is granted,
    - II. extend to 30 August, or at least a period to be determined by the Court in good faith, the time limit for filing the rejoinder, in the event that the application for a stay of proceedings (the application for suspension of proceedings) is rejected,
    - III. refusing the plaintiff infringement on the basis of equivalence in accordance with part (i) of the defendants' primary application of 24 June 2024; and
    - IV. order the plaintiff to pay the costs of these proceedings or reserve judgment on the costs of these proceedings until judgment in the main action.

#### GROUNDS FOR THE DECISION

##### *Request I*

6. The defendant's application for suspensive effect under I is admissible.
7. Article 74(1) of the *Agreement on a Unified Patent Court* (hereinafter UPCA) and Rule 223 RoP empower the Court of Appeal, and, in cases of extreme urgency, the permanent court, to grant suspensory effect to a contested decision or order in exceptional circumstances. Such exceptional circumstances could arise, for example, where the appeal would become futile or largely ineffective if the contested decision was not granted a suspensive effect, because the effects of the implementation of the contested decision cannot be effectively reversed if the decision is later set aside (see UPC\_CoA\_301/2024, decision of 19 June 2024, para 6 f.).
8. In the present case, the defendants seek a stay of operation in respect of the decision of the Court of First Instance not to extend the time limit for the reply to the rejoinder

to extend until a final decision is taken on the defendants' application to refuse the plaintiff infringement on the basis of equivalence.

9. This request for suspensory effect is admissible, as the request under I to extend the time limit for submitting the rejoinder would become meaningless.
10. It is also extremely urgent as the deadline for the defendants' reply to rejoinder expires in five calendar days.
11. However, the defendants' request for suspensive effect under I is unfounded.
12. The defendants argue that, prior to the expiry of the time limit for their rejoinder, they should know whether or not the claim of an infringement based on equivalence first raised by the plaintiff in its reply is admissible under rule 263 RoP, because only then would they have to respond to that aspect in their rejoinder. If they had to respond without knowledge of the relevant Court of Appeal judgment, the rejoinder would also have to address that aspect. This would entail the risk that the costs associated with such an extended submission would not be necessary if it was later found that the allegation was inadmissible from the outset.
13. Given the defendants' arguments, there is no ground to grant suspensive effect as requested.
14. In accordance with the Rules of Procedure, the parties submit their pleadings in the written procedure without knowing how their contentions will be assessed by the Court of First Instance or the Court of Appeal. This carries the risk that some of their submissions will not be relevant to the outcome of the case.
15. It must also be taken into account that the decision of the Court of First Instance not to reject contentions raised by the claimant for the first time in its reply in relation to an infringement of the patent in question on the basis of equivalence is not manifestly erroneous in view of the procedurally-evolutive course of the present case, but also patent litigation under the Rules of Procedure in general.
16. It should also be noted that in the proceedings before the Court of First Instance, the Judge-Rapporteur granted the defendants a 2-week extension of the deadline to file their rejoinder until 1 August 2024.
17. For these reasons, it is not decisive in the present case that application sub II (the action against the Tribunal's decision not to extend the time limit for the reply to the rejoinder) can become meaningless as a result of the decision not to grant the defendants the suspensive effect they sought.

*Requests II, III and IV*

18. Since requests II to IV relate to the substance of the appeal, it is not for the permanent judge of the Court of Appeal to decide them. Therefore, these requests are referred to the competent chamber of the Court of Appeal.

*Failure to hear claimant*

19. Since the decision on application sub I does not affect the claimant and given the high urgency of the case, it was not necessary to hear him prior to this order. The claimant will be heard in the further course of the appeal proceedings in accordance with the Rules of Procedure.

DECISION

- I. The request for suspensive effect under I is rejected.
- II. Requests II, III and IV are referred to the competent chamber of the Court of Appeal.

This decision was taken on 26 July 2024.

**Right**

**KLAUS STEFAN  
MARTIN  
Grabinski**

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Klaus Grabinski: President of the Court of Appeal and permanent  
judge