



UPC Court of Appeal
UPC_CoA_490/2024
APL_47391/2024
App_61227/2024

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 28 November 2024
concerning a decision by default

APPELLANT (AND DEFENDANT BEFORE THE COURT OF FIRST INSTANCE)

■■■■■ – ■■■■■

(hereinafter 'Appellant')

Represented by: Michal Przulski and Joanna Dargiewicz, European Patent Attorneys,
(JD&P Patent Attorneys, Poland)

RESPONDENT (AND APPLICANT BEFORE THE COURT OF FIRST INSTANCE)

Amycel LLC, Watsonville, California, United States of America

(hereinafter 'Respondent')

Represented by Hendrik W.J. Lambers, Daan de Lange, M. Groeneveld, Attorneys-at-law
(Vossius & Brinkhof, Amsterdam, the Netherlands)

PATENT AT ISSUE

EP 1 993 350

PANEL

Second panel,

Rian Kalden, presiding judge and legally qualified judge

Ingeborg Simonsson, legally qualified judge

Patricia Rombach, legally qualified judge and judge-rapporteur

Gabriele Alt, technically qualified judge

Cornelis Schüller, technically qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

□ 31 July 2024, ORD_44133/2024, ACT_23163/2024, UPC_CFI_195/2024

SUMMARY OF FACTS

1. With the appeal, the Appellant is challenging the order of provisional measures by the Local Division The Hague, issued on 31 July 2024.
2. The Appellant paid a fee of € 6600 (60 % of the regular fee of € 11000) and declared that he fulfils the criteria of a micro-enterprise as defined in Title I of the Annex to the Recommendation of EC n° 2003/361 of 6 May 2003.
3. With the case management order issued on 21 October 2024, the Court of Appeal raised doubts as to whether the Appellant is a small enterprise or even a micro-enterprise (R.370.8 RoP). The Court ordered the Appellant *inter alia* to explain in detail and supply documentation showing that he is a micro-enterprise, or a small enterprise as defined in Title I of the Annex to the Recommendation of the European Commission n° 2003/361 of 6 May 2003 (hereinafter 'Title I'). This includes information and evidence regarding the number of employees and annual turnover (see Art. 2 Title I).
4. The Appellant responded with a Statement lodged on 28 October 2024.
5. With the order issued on 7 November 2024, the Court of Appeal considered that the affirmation in the Statement of Appeal referred to in par. 2 above was incorrect, as the Appellant later (in the Statement lodged on 28 October 2024) no longer claimed that he is a micro-enterprise. As a consequence he should have demonstrated that he is a small enterprise. The Appellant had, however, not provided any specific figures or evidence to support his assertion that his turnover in 2023 did not exceed € 10 million and that he did not employ more than 50 persons. Taking the failure to provide the ordered specific information and evidence into account, the Court of Appeal was not convinced that the Appellant is a small enterprise (see R.172.2 sentence 2 RoP, R.370.8(c) RoP). The Court of Appeal therefore ordered the Appellant to pay the remainder of the regular fee (€ 4400) plus an additional 50 % of that regular fee (€ 5500), in total € 9900, within a period of seven days. The Court pointed out that if the total fee (€ 9900) was not paid within the time limit set, a decision by default against the Appellant will be given by the Court pursuant to R.355 RoP (R.370.8(e) RoP).
6. The Appellant neither paid the remainder of the court fee nor the additional (penalty)fee within the time limit set.

REQUESTS OF THE PARTIES

7. With Statement lodged on 14 November 2024 the Appellant requests the Court to waive the additional fee (€ 5500). As an auxiliary request the Appellant applies for legal aid for the court fees insofar as it concerns the additional fee of € 5500.
8. The Respondent requests the Court of Appeal to reject the Appellant's requests, and to give a decision by default against the Appellant, rejecting the appeal (as inadmissible), while granting Respondent's other requests set out in the Statement of Response (to order the Appellant to reimburse the

Respondent's costs of the appeal proceedings and to pay the Respondent an interim award of the Respondent's costs of the appeal proceedings).

SUBMISSIONS OF THE PARTIES

The Appellant submits, summarised and insofar as relevant, as follows

9. The indication that the Appellant is a micro-enterprise was made accidentally, instead of small enterprise, however that does not influence the eligibility for a fee reduction. The mistake was caused because in the EPO practice both types of applicants are treated jointly, and the representative was operating under the assumption, that the Appellant is either a micro-enterprise or a small enterprise.
10. Nevertheless, in the UPCA or RoP, the distinction between both micro-enterprise and small enterprise does not influence the scale of the fee reduction, nor the applicability.
11. The Appellant is a farmer from ██████ and declares that he cannot bear the costs of court fees without incurring financial hardship.

The Respondent submits, summarised and insofar as relevant, as follows

12. The Appellant still has not provided any (new) factual or legal basis for the request to waive the additional fee. There is no such basis. The Court's 7 November order is correct on the facts and the law, and the request should therefore fail. Instead of informing with the Court what kind of documents would be satisfactory, the Appellant decided not to file any documentation.
13. The Appellant did not argue/request that he should not pay the remainder of the regular fee. That non-payment alone should result in the Court giving the decision by default as the Court had indicated to do in case of non-compliance.
14. The Appellant's last-minute legal aid request for the additional fee only is a clear attempt to circumvent the Court's decision to order the Appellant to pay this additional fee. This is only confirmed by Appellant not providing any serious substantiation for this request. The legal aid request should therefore fail.
15. The Appellant has not stated, and at least not substantiated, that he is unable to meet the costs of the proceedings, either wholly or in part.

REASONS

Waiver of additional fee of 50 % of the regular fee

16. There is no need to decide whether the order of 7 November 2024 is a case management order that the Court could revoke and modify at any time. The Court sees no reason to set aside the order regarding the additional court fee.

17. According to R.370.8 (d) (ii) RoP the Court may not only order payment of the remainder of the regular fee but also an additional 50 % of that regular fee, if the affirmation provided by the party pursuant to R.370.8(a) RoP is found to be wholly or partially incorrect. The imposition of this addition to the regular fee is normally reasonable, since a party is obliged to verify whether it fulfils the conditions before making a declaration that it meets the criteria of a 'small enterprise' or a 'micro-enterprise'. In the event, that the Court requests specific information, the party should therefore be able to provide the relevant figures and evidence within a few days.
18. There is in this case no justification for waiving the obligation to pay the additional fee in the amount of 50 % of the regular fee. The Appellant declared in the Statement of Appeal and Grounds of Appeal that he fulfils the criteria of a micro-enterprise as defined in Title I. There was obviously no basis for this, since the appellant himself no longer claims that he is a micro-enterprise. The Court of Appeal does not have to decide whether this alone is sufficient to assume that the information is wholly or partially incorrect in the sense of R.370.8 (d) (ii) RoP, because the Appellant also failed to comply with the case management order issued on 21 October 2024, in that he did not provide a correct affirmation of his status as a small enterprise either. The Appellant has not rectified this in his requests and still has not provided evidence to substantiate this status. This behavior leads the Court to conclude that he is not a small enterprise, and his affirmation must thus be held to be incorrect.

Application for legal aid

19. The Application for legal aid is inadmissible. According to R.378A RoP, to be admissible, the application must contain a statement regarding the economic and financial situation of the applicant. The documents named in R.378A.1 (a) to (d) RoP shall be attached. The appellant has limited himself to declaring that he is a farmer from [REDACTED] and that he cannot bear the costs of court fees without incurring financial hardship.
20. It is therefore not necessary to decide whether there can be legal aid for an additional (penalty) fee at all.

Decision by default

21. The Appellant neither paid the remainder of the court fee nor the additional fee in the time limit set. Therefore a decision by default against the party shall be given by the Court of Appeal pursuant to R.357.3, R.355.1 (a) RoP, R.370.8 (e) RoP on request by the Respondent.
22. As the unsuccessful party, the Appellant is required to bear the costs of the appeal proceedings.
23. It is at the discretion of the Court to order the requested interim award of costs as provisional measure. The Local Division limited interim award of costs to the court fees incurred in these proceedings because the proceedings on the merits will have to follow shortly, and the costs can be recovered in the cost proceedings following this action. The Respondent has not presented any arguments that justify granting interim award of costs for other costs than the court fees.

ORDER

The Court orders

- I. The request to waive the additional fee ordered in the Order issued on 7 November 2024 is denied.
- II. The Application for legal aid is denied.
- III. The appeal is closed by a decision of default against the Appellant.
- IV. The Appellant bears the costs of the appeal proceedings.
- V. The hearing date of 5 December 2024 is cancelled.

Issued on 28 November 2024

Rian Kalden
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Rian Kalden, presiding judge and legally qualified judge,

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