EIP

Composition of appeal panel and access to documents

Ocado Innovation Limited v Autostore AS & Others (UPC_CoA_404/2023)

Order dated 10 April 2024 (ORD_19369/2024)[1]

A member of the public requested access to documents under Rule 262.1(b) RoP in an action at Nordic Baltic Regional Division which had settled. The judge-rapporteur ordered access to the requested documents with a delay to permit an appeal[2]. The Court of Appeal ordered suspensive effect pending the outcome of the appeal.

Two matters were considered by Court of Appeal. First, could they hear this appeal in a panel of three legally qualified judges without any technically qualified judges. Secondly the Court turned to the substantive issue of whether the member of the public should be given access to the documents.

Decision

~~Panel Composition~~

The Court considered Article 9(1) UPCA which reads:

"Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned. Those technically qualified judges shall be assigned to the panel by the President of the Court of Appeal from the pool of judges in accordance with Article 18 UPCA.

It concluded that this, and Article 9(2) UPCA, are not exhaustive of the composition of panels that could sit and that Article 9(1) allows the Court to sit with three legally qualified members where only matters of a non-technical nature are in dispute.

The Court based this on the several reasons. First, the wording of Article 9(1) itself, the final sentence of which assumes there already is a panel before a technical judge is assigned. Further the reference to "technically qualified judges with qualifications and experience in the field of technology concerned" presupposes there is such a field and that the purpose is to add relevant technical expertise. For a purely legal or procedural matter the addition of technically qualified judges would not serve this purpose.

Secondly, Articles 21(2) and (3) of the Statute of the UPC together with the Rules of Procedure allow for the Court of Appeal to sit in different compositions. For example, article 21(3) allows that "The panel may delegate in accordance with Rules of Procedure, certain functions to one or more of its judges". Rule 254.2 RoP provides that actions for rehearing are assigned to a panel of three legally qualified judges. And there are other rules which provide for delegation by Court of Appeal to a standing judge (Rule 220.4 (together with 345.5 and 345.8), Rule 223.4 and Rule 345.4 or other single judge such as judge-rapporteur (Rules 232.2, 233, 262.1, 314, 332 and 334).

Accordingly, Article 9(1) should not be read in a restrictive way. Furthermore, this is supported by the general principles underlying the UPC Agreement and RoP. Article 41(3) UPCA provides:

"The Rules of Procedure shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost-effective manner. They shall ensure a fair balance between the legitimate interests of all parties. They shall provide for the required level of discretion of judges without impairing the predictability of proceedings for the parties."

And paragraphs 2 to 4 of the Preamble to the Rules of Procedure apply the principles of "proportionality, flexibility, fairness and equity". Allocating technical judges takes time and appeals need to be resolved swiftly. Further, adding technical judges adversely adds to costs.

The Court also considered the origins of the Unified Patent Court and the national traditions that led to the inclusion of technically qualified judges and drew support for its decision from that. It concluded in summary:

"If the subject matter of the appeal proceedings is of a non-technical nature only and there are no technical issues at stake in the proceedings before it, the Court of Appeal may decide the matter without the need to assign two technically qualified judges to its panel of three legally qualified judges. The above is without prejudice to the fact that once

technically qualified judges have been assigned, they will then, as judges, deal with the entire dispute, including the non-technical aspects thereof.".

p3

In the current case the only issue at stake is the proper interpretation of Rule 262 RoP, particularly the meaning of 'reasoned request', accordingly the court can sit in a composition of three legally qualified judges without violating article 6 ECHR (as had been argued by the applicant).

~~Public access to written pleadings and evidence, rule 262.1(b)~~

According to article 10(1) "the register kept by the Registry shall be public." And article 45 provides that "proceedings shall be open to the public unless the Court decides to make them confidential …". Article 52 makes clear that "proceedings" includes the written procedure.

The rule in issue, rule 262.1(b), provides:

"written pleadings and evidence, lodged at the Court and recorded by the Registry shall be available to the public upon reasoned request to the Registry; the decision is taken by the judge-rapporteur after consulting the parties".

The interests of a member of the public requesting access must be balanced against the interests mentioned in Rule 45 RoP including confidential information and personal data. The general interest of justice and public order must also be taken into account, this includes "the protection of the integrity of proceedings".

A reasoned request must not only state what written pleadings and evidence are requested but also the purpose of the request and why access to the specified documents is necessary. The judge-rapporteur can make the balance including but not limited to whether the request is abusive.

A member of the public generally has an interest that written pleadings and evidence are made available. This allows for understanding of the decision rendered, the arguments and evidence and allows for scrutiny of the Court which is important for trust. The Court took the view that such a general interest usually arises after a decision is made, when there is a decision to be understood and the handling by the Court can be scrutinised.

The protection of the integrity of the proceedings, during which the parties make their arguments and the court decides in an impartial and independent manner without influence and interference from external parties, usually is only pertinent during the course of the proceedings. Accordingly, where proceedings have come to an end, as in the present case, the balance will normally favour access. This applies once the first

instance decision has been made even if an appeal is filed.

p4 If proceedings are settled or withdrawn before a decision is made, the integrity of the proceedings is no longer an issue and the balance will usually be in favour of the interest of the public in access (subject to protection of confidential information and personal data).

The court turned to the question of a direct interest rather than a general one, for example validity of a competitor's patent or intention to market a product similar to one which is alleged to infringe. Such an interest may arise immediately before proceedings have come to an end. The Court held "In weighing such a direct interest against the general interest of integrity of proceedings, the balance will generally be in favour of granting access to the written pleadings and evidence of such proceedings." In such circumstances the Court may impose conditions, for example, an obligation to keep documents to which access is given confidential until the proceedings have ended.

In the present case, the interest is of a general nature, there is no suggestion it is abusive, and the proceedings had come to an end by settlement when the Order was made by CFI. The balance of interest therefore favoured allowing access.

Conclusion

It is now apparent that a reasoned request for access to pleadings and evidence made after first instance proceedings have concluded will normally be granted. In the case of ongoing first instance proceedings, a direct interest will need to be shown to weigh in the balance against maintaining the integrity of proceedings.

[1] https://www.unified-patent-court.org/en/node/657

[2] https://eip.com//knowledge_hub/article/upc_grants_access_to_pleadings_for_the_first_time/