

EIP

Discretionary review or appeal?

Huawei Technologies Co., Ltd v Netgear Inc & Ors (UPC_CFI_9/2023)

Order of Court of Appeal on 11 January 2024 (UPC_CoA_486/2023); Appeal against ORD _588901/2023 dated 11 December 2023

Huawei sued Netgear in Munich Local Division for infringement of a patent relating to transmission of information in a wireless local area network.

Netgear filed a preliminary objection under Rule 19 RoP. The judge-rapporteur informed the parties under Rule 20.2 that this would be dealt with in the main proceeding. Netgear requested review by the entire panel under Rule 333 and for a decision directly on the objection.

The judge-rapporteur considered that there had been neither a decision to allow the objection which could be appealed under Rule 220.1(a) nor an order to reject the objection which could be appealed under Rule 220.2. Further only decisions or orders of the judge-rapporteur are subject to review under Rule 333.1. On the basis of “clear and unambiguous wording” of RoP neither appeal nor review was possible in relation to the indication that the objection would be dealt with in the main proceedings. The judge-rapporteur was free to decide on this approach to spare court resources. Rule 333 was not engaged so the judge-rapporteur could himself decide on Netgear’s request without referring to the panel.

Netgear made a request for review by the Court of Appeal under Rule 220.3.

Decision

The standing judge at Court of Appeal stated the general position as:

“As a general principle, unless provided otherwise, a case management decision or order made by the judge-rapporteur or the presiding judge can only be appealed if such decision or order has first been reviewed by the panel pursuant to Rule 333.1. This follows from the fact that it is only possible to make a request for discretionary review to the Court of Appeal under Rule 220.3 RoP in the event leave to appeal of an order of a panel is refused. Therefore, in such a situation, first a request pursuant to Rule 333.1 must be made in order to obtain a panel decision, which can then – if necessary – subsequently be the subject of an appeal under Rule 220.2 RoP if leave to appeal is granted by the panel, or be the subject of a request for discretionary review under Rule 220.3 RoP if such leave is not granted.”

The judge-rapporteur, on his interpretation of the RoP, had refused to let his decision be reviewed by the panel. This would only be justified if his interpretation was accurate. Without expressing a view on this, the standing judge decided that in the circumstances she would allow Netgear to appeal the judge-rapporteur’s decision not to refer to the panel for review. If that appeal is successful, the panel would then review the judge-rapporteur’s decision to deal with the preliminary objection in the main proceedings.

An appeal hearing has been set for 20 February 2024.

Comment

As both judges and parties’ representatives become familiar with applying the Rules of Procedure of the UPC, resolving a defendant’s request about how its preliminary objection should be dealt with may take some time to progress through the procedural stages.