

EIP

Requirements for an intervention

In the matter of an appeal by Ocado Innovation Limited and applications to intervene by (1) Mathys & Squire LLP and (2) Bristows (Ireland) LLP

Order of Court of Appeal dated 10 January 2024

By Order of 17 October 2023, the Nordic Baltic regional division granted a request under Rule 262.1(b) for inspection of the statement of claim in the case Ocado Innovation Limited v Autostore AS & Others (UPC_CFI_11/2023). Access was deferred for three weeks to give Ocado time to appeal and request suspensive effect. See previous report [here](#). The reason that had been given for requesting access was to see how the claim was framed and the broader public interest for scrutiny and discussion as the court system launches and develops.

Ocado lodged an appeal and an application for suspensive effect and the Court of Appeal granted the request for suspensive effect by Order dated 6 November 2023.

On 22 November 2023, UK-based IP firm Mathys & Squire lodged an application to intervene in the appeal. The reason given for “a legal interest in the result of [the] action” as required by Rule 313.1 RoP was their request for written pleadings and evidence in revocation case UPC_CFI_75/2023 (Astellas v Healios v Ors) before Munich central division, which raised similar issues and had been stayed pending the outcome of Ocado’s appeal.

Subsequently on 22 December 2023, the IP litigation firm Bristows (Ireland) LLP also applied to intervene. They had made an application for access to written pleadings and evidence in infringement case UPC_CFI_239/2023 (Plant_e v Arkyne) before The Hague local division, in order to understand the proper scope and validity strength of the patent in issue. The “legal interest” provided was that there have been divergences in approach

to decisions under Rule 262.1(b) and the outcome of the appeal would have an effect on their own application.

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Ocado made submissions against the application to intervene by Mathys and Squire but did not comment on the later one by Bristows.

Decision

The formal requirements had been met. The question was whether the applicants had established a legal interest in the outcome before the Court of Appeal which was a substantive test that must be met.

The court held that this meant “a direct and present interest in the grant” by the court of the order sought “not an interest in relation to the pleas in law put forward”. The court distinguished between a direct interest in the ruling and an indirect interest in the result of the case by reason of similarities with their own situation. The latter was not sufficient.

The two applications to intervene were inadmissible as they relate only to an indirect interest arising from similarities. Any impact on those cases would only be because of the guiding effect of case law.

Comment

By this decision the Court of Appeal has interpreted the requirement for intervention narrowly and significantly reduced the scope for intervention in future appeal cases. If the Court of Appeal maintains this policy, the risk is that appeals will be decided restrictively, only on the basis of the submissions made by the parties on the particular facts of the case, without the opportunity for third parties to make representations about the wider effect of the legal point at issue.