KATHER · AUGENSTEIN
RECHTSANWÄLTE

Higher Regional Court Düsseldorf

I-2 W 8/18

Order of 25 April 2018

Operative Part

I.

Following the complaint subject to a time limit of the defendant's intervener, the order of the 4c Civil Chamber of the Regional Court Düsseldorf from 15 February 2018, in the version of the order of the same Court from 19 March 2018, is annulled, in so far as the Regional Court partially rejected the defendant's intervener's request for inspection of files.

II.

The case shall, to the extent of the annulment, be referred back to the Regional Court, which shall again decide on the intervener's further-reaching request for inspection of files, taking into account the observations in this order.

III.

The decision on the costs of the appeal proceedings is also transferred to the Regional Court.

IV.

A further appeal shall not be admissible.

V.

The appeal value is fixed at EUR 400,000.00.

Grounds

The complaint subject to a time limit by the defendant's intervener is admissible and substantiated. The contested decision by which the President of the Senate refused the defendant's intervener's request to access certain files and statements in the submissions of the plaintiff and the defendant, requested by the submission dated 29 December 2017, cannot be upheld.

[...]

I.

The intervener's complaint subject to a time limit is under Sec. 567 para. 1 No. 2 Civil Code of Procedure (ZPO) and apart from that admissible.

[...]

II.

The intervener's complaint subject to a time limit also has preliminary success on the merits.

1.

Pursuant to Sec. 299 para. 1 ZPO, each party has a right to inspect the files of its own proceedings. This right is subject to no further conditions. The claim serves to guarantee the right to be heard, because the party is only able to fully and adequately defend herself if she has full knowledge of the contents of the files submitted to the Court. The intervener is equivalent to the 'party' (Baumbach/Lauterbach/Albers/Hartmann, loc. cit., Sec. 299 para. 4; MünchKommZPO/Prütting, loc. cit., Sec. 299 para. 10; Musielak/Voit/Huber, loc. cit., Sec. 299 para. 2; Prütting/Gehrlein/Deppenkemper, ZPO, ed. 7, Sec. 299 para. 3; Stein/Jonas/Thole, loc. cit., Sec. 299 para. 11; Zöller/Greger, loc. cit. Sec. 299 para. 2; Wieczorek/Schütze/Assmann, ZPO, ed. 3, Sec. 299 para. 18; Bacher in: BeckOK ZPO, loc. cit., Sec. 299 para. 18). Although he himself does not become a party in the formal sense, the intervener may carry out procedural acts with the same effect as if the main party itself had acted (Sec. 67 ZPO). He is, therefore, also entitled to the right to information in the form of inspection of files pursuant to Sec. 299 para. 1 ZPO (MünchKommZPO/Prütting, loc. cit., Sec. 299 para 10).

a)

As according to Sec. 299 para. 1 ZPO the parties may demand inspection of the files of their proceedings - subject to no further conditions (Bacher in: BeckOK ZPO, loc. cit., § 299 marginal 24) and no restrictions (Wieczorek/Schütze/Assmann, loc. cit., § 299 marginal 2; Stein/Jonas/Thole, loc. cit, § 299 marginal 12) -, the party concerned shall take precautions against the disclosure of its trade or business secrets by a submission of facts, by ensuring that a confidentiality agreement has been concluded with the party entitled to inspect the documents covering its confidentiality interests. Any plaintiff or defendant who submits at an early stage without appropriate security precautions, therefore, accepts that his secrets become known to the opponent unprotected via the inspection of the files.

Contrary to the opinion of the Regional Court, a possible interest of the party in maintaining secrecy is fundamentally irrelevant for the opponent's right to inspect the files pursuant to Sec. 299 para. 1 ZPO (cf. Bacher in: BeckOK ZPO, loc. cit., Sec. 299 para 17.1; Prütting/Gehrlein/Deppenkemper, loc. cit., Sec. 299 para. 1; Wieczorek/Schütze/Assmann, loc. cit., Sec. 299 para. 18). When submitting pleadings and other documents, the party must therefore expect them to be made available to the other parties of the proceedings (Bacher in: BeckOK ZPO, loc.cit., Sec. 299 para. 17.1). The principle of the right to be heard enshrined in Art. 103 para. 1 German Constitution requires that every party to the proceedings is able to make observations on the entire submissions of the opposing party submitted to the court for decision. This presupposes that the opponent's means of attack or defense are made fully accessible (OLG München, NJW 2005, 1130; Senate, Order of 24 September 2008 - 2 W 57/08, BeckRS 2009, 09220; see also Senate, Order of 14 December 2016 - I-2 U 31/16, BeckRS 2016, 114380). Accordingly, the opposing party has a fundamental right to inspect all documents (Wieczorek/Schütze/Assmann, loc.cit., Sec. 299 para. 18). If the party believes that it can lodge a claim for secrecy protection, it must therefore first ensure that a confidentiality agreement is concluded with the opposing party (see also Kühnen, loc. cit., Chapter E para. 441).

The party who’s secret it is, is not at a disadvantage by this procedure, because he does not suffer any disadvantage from a submisstion omitting his secrets. His general statements in this respect are to be treated as sufficient for procedural purposes and the opponent's contestation in this respect as irrelevant if the latter refuses to conclude a security agreement with the opposing party which is necessary and reasonable for the protection of secrets. In such a case, the party in question is not entirely relieved of its obligation to present its case. However, it is permitted, within the framework of its submissions and explanations, to leave out in detail those circumstances which could endanger its trade secret. It only has to present what it is able to reveal without

endangering its legitimate secrecy interests. In FRAND cases, an unjustifiably refused promise of confidentiality therefore has the consequence that the plaintiff can leave out detailed explanations justifying his license conditions to the extent (but not beyond!) necessary to safeguard his legitimate confidentiality interests. Instead of detailed information, it may therefore be sufficient to merely make suggestive remarks. A chain of arguments that is incomplete for reasons of protection of secrecy must be accepted by the defendant as a sufficient explanation as to why the opponent's license offer is FRAND (see Senate, Order of 18 July 2017 - 2 U 23/17, BeckRS 2017, 118314; Kühnen, loc.cit., Chapter E para. 442). Since such a submission is sufficient under the aforementioned circumstances and the opponent's contestation is irrelevant, the plaintiff does not suffer any disadvantage in the proceedings. In the manner described above, the file inspection procedure is exempt from (possibly difficult) considerations about trade and business secrets, as those considerations - due to Sec. 299 para. 1 ZPO - do not belong thematically into these proceedings.

The same applies, in principle, to the intervener, whose insight-giving accession has already taken place or is reliably foreseeable when the secrets are disclosed. The plaintiff must also take precautions against him to protect his secrets before turning his secrets into the contents of the file.

[...]

f)

If an intervener who has joined the litigation on the infringing party's side and who - unlike the supported main party - is not prepared to make a declaration of non-disclosure which is subject to a sufficient penalty, requests inspection of the files, the granting of inspection depends on whether and to what extent trade or business secrets worthy of protection have been sufficiently substantiated and proven by the opposing party (sic: the other main party). The same shall apply in the event that an intervener is accusable in breach of an undertaken obligation of non-disclosure and/or has seriously renounced that obligation. In the latter case, however, a rejection of the inspection is only possible in so far as the information in question has not already been disclosed to the intervener.

[...]

If the plaintiff's submission concerns license agreements which have already been concluded on the basis of the FRAND declaration of commitment and which are, therefore, also benchmark for the granting of a license to the defendant, protection of secrecy generally requires very special reasoning and justification. The promise to license

in a fair and non-discriminatory manner requires, in principle, the transparency of the licensing conditions for the interested party. How else is the interested third party to find out what the already practiced licensing conditions look like in order to effectively exercise his rights in the infringement process? In any event, in view of his obligation to treat everyone equally, it is not clear what legally justifiable interest the licensor could have in keeping secret from the public his practiced licensing terms and conditions, by virtue of which he owes equal treatment. This is all the more true as various licensing pools (e.g. MPEG) make their license agreements available on the Internet.

2.

In application of those principles of law, the decision of the Regional Court, partially refusing the intervener's request for inspection of the files, cannot be upheld.

[...]

b)

Access to the files would indeed have to be granted to the defendant's intervener in respect of the confidentiality agreement of 21 June 2017/29 June 2017 (Annex AE6) concluded between the parties if the intervener had not "renounced" that agreement. In this respect, however, the Senate considers it reasonable and appropriate for the Regional Court to re-examine this question, taking into account the criteria set out above, and to decide on it again, after the parties have – by taking into account the Senat's annotations - taken a final position on it.

In any event, it cannot be established at this stage that the defendant's intervener clearly does not cast doubt on the confidentiality agreement and its regulatory content.

[...]

3.

The contested order must therefore be annulled in so far as the Regional Court rejected the intervener's request for inspection of files. Under the given circumstances, the Senate makes use of the possibility (Sec. 572 para. 3 ZPO) to refer the case back to the Regional Court for a new decision. The referral back is necessary for further clarification of the facts. At the same time, it gives the participants the opportunity to give a supplementary submission.

[...]

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