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D E C I S I O N
of 17 January 2005

Case Number: T 0637/04 - 3.2.7

Application Number: 95108433.4

Publication Number: 0745433

IPC: B05C 1/16

Language of the proceedings: EN

Title of invention:

Adhesive printing for disposable absorbent article

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

SCA Hygiene Products AB

Headword:

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Relevant legal provisions:

EPC Art. 106(1), 108

EPC R. 64

Keyword:

"Sole payment of appeal fee - no appeal in existence"

"Reimbursement of the appeal fee - yes"

Decisions cited:

J 0012/82, J 0019/90, T 0631/91, T 0727/91, T 0925/91,
T 0273/93, T 0281/95

Catchword:

-



Case Number: T 0637/04 - 3.2.7

D E C I S I O N
of the Technical Board of Appeal 3.2.7
of 17 January 2005

Appellant: SCA Hygiene Products AB
S-405 03 Göteborg (SE)

Representative: Romare, Laila Anette
Albihns Göteborg AB
Box 142
S-401 22 Göteborg (SE)

Respondent: THE PROCTER & GAMBLE COMPANY
(Proprietor of the patent) One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative: Kremer, Véronique
Procter & Gamble Service GmbH
D-65823 Schwalbach am Taunus (DE)

Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 2 March 2004 rejecting the opposition filed against European patent No. 0745433 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: A. Burkhardt
Members: H. E. Felgenhauer
C. Holtz

Summary of Facts and Submissions

- I. The opposition division on 2 March 2004 issued the decision under appeal, rejecting the opposition against European patent 745433.
- II. On the last day for filing a notice of appeal, 12 May 2004, the appellant/opponent paid an appeal fee. In the accompanying form used for payment, EPO Form 1010, the numbers of the European patent application and the European patent concerned were given, as well as the name and address of the professional representative. In box 16 of the form, the number 011 was given and the words "Fee for appeal" noted beside this box. The amount to be paid was given as 816,00 Euro with "80%" written by hand next to it. A notice of appeal referring to the same patent was received by the EPO on 14 May 2004.
- III. The appellant was notified in a communication of 2 July 2004 from the registry of the board, issued pursuant to Article 108 and Rule 65(1) EPC, that the notice of appeal was not filed in due time. Reference was made to Rule 84a EPC and Article 122 EPC. The appellant submitted observations in response to this communication.
- IV. In a communication to the appellant dated 28 September 2004, the board explained that under the established case law of the Boards of Appeal, the payment of an appeal fee could not in itself constitute a sufficient notice of appeal, referring to Case Law, 4th edition, p. 519, and that it could be expected that the appeal

would be rejected as inadmissible. No observations were filed by the appellant to this communication.

v. The arguments of the appellant may be summarised as follows:

The appellant had indeed filed a notice of appeal in accordance with Article 108 and Rule 65(1) EPC. With reference to the EPO payment form 1010 and the fax transmission report, it was evident that the appropriate appeal fee had been paid from the deposit account of the representative within the time limit for filing the appeal. The payment order contained the relevant application and patent numbers. Indirectly, through the name of the representative, the name of the appellant was also disclosed. With further regard to Rule 64(b) EPC, the case law of the boards of appeal (T 631/91, T 727/91, T 273/92 and further in T 925/91 and T 281/95) had established that the provisions of this rule could be ascertained by the appellant's overall submissions, if the request filed in the appeal proceedings did not make this clear. It was therefore submitted that the payment form filed in writing constituted a validly filed notice of appeal.

Reasons for the Decision

1. The cases cited by the appellant in which the appeal was found admissible are not relevant to the present facts, since they concerned the question whether or not the scope of the appeal could be ascertained from a notice of appeal already filed in due time as well as from the appellant's overall submissions, and thus

whether or not the notice of appeal could serve as grounds of appeal. Instead, the question to be answered in the present case is whether the timely filing of the payment form together with the actual payment of the appeal fee meets the conditions of Article 108, first and second sentence, EPC for a valid notice of appeal.

2. In decision J 19/90 of 30 April 1992, the Legal Board of Appeal concluded that the sole payment of the appeal fee did not constitute a valid means of lodging an appeal, even if the object of the payment was indicated as a fee for appeal, the application number was given and the EPO form for payment had been used (as had previously been accepted as sufficient by the Board in T 275/86).
3. The Legal Board of Appeal in J 19/90 (point 1 of the reasons) arrived at its conclusion based on the premise that a request is necessary, giving as examples the requirement of a request for designation, for examination or for further processing. A request must contain a declaration of a procedural will, without which the EPO cannot act. The Legal Board of Appeal also referred to decision J 12/82 (OJ 1983, 221) in which it had established that the filing of the form for payment could not be considered to contain the necessary request itself.
4. Since the Legal Board of Appeal was of the opinion that it could not be completely ignored that the payment of the fee for any of these acts could be seen as a sufficient declaration by the party in question, it proceeded to examine the legal conditions for a valid notice of appeal (point 2 of the reasons). The board

identified five such conditions, ie a written submission, Article 108, first sentence, EPC, identification of the decision under appeal, of the appellant (cf. T 25/85, OJ 1986, 81), and of the professional representative, and finally an express declaration of a will to appeal. The last condition arose from Articles 106(1) and 108 and Rule 64 EPC.

5. From the text of the EPC relating to appeals, the Legal Board of Appeal concluded that the nature of a declaration of appeal was different to that relating to any of the described examples (cf. paragraph 3 above), in that it was not only the object of an appeal to express a certain procedural will or act, but also to bring the case before a separate instance.
6. Decision J 19/90 has been followed by others to the extent that it has become established case law (see eg Case Law, 4th edition, 2001, p. 519). The present board agrees with this case law and the reasoning behind it. The board would observe that, as filled out in the present case, the form does not express that the party in question wants to appeal, in spite of the fact that the word "appeal" is indicated. It is not sufficient that this could perhaps be construed indirectly as a declaration of a will or as a procedural act, as contested by the appellant. Such declarations must be clear and unequivocal.
7. Accordingly, there is no appeal in existence and the appeal fee shall therefore be reimbursed.

Order

For these reasons it is decided that:

1. There is no appeal in existence.
2. The appeal fee shall be reimbursed.

The Registrar:

G. Nachtigall

The Chairman:

A. Burkhart