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File Number: T 369/91 - 3.3.1

Application No.: 82 200 602.9

Publication No.: 0 066 915

Title of invention: Detergent composition containing performance additive and copolymeric compatibilizing agent therefor

Classification: C11D 3/37

D E C I S I O N  
of 15 May 1992

Proprietor of the patent: THE PROCTER & GAMBLE COMPANY, et al

Opponent: 01) Unilever PLC / Unilever N.V.  
02) S.A. Camp  
03) CIBA-GEIGY AG

Headword:

EPC Articles 108 and 122 EPC; Article 107 EPC

Keyword: "Late-filed Statement of Grounds of Appeal (ranking as CROSS-Appeal)" - "Restoration of rights under Article 122 refused" - "Freedom of Cross-Appellants rights under Article 107 EPC to make requests considered in light of G 2/91"

Headnote



Case Number : T 369/91 - 3.3.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.1  
of 15 May 1992

Other party :  
(Opponent)

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Decision under appeal :

Interlocutory decision of the Opposition Division  
of the European Patent Office dated 11 March 1991  
concerning maintenance of European patent  
No. 0 066 915 in amended form.

Composition of the Board :

Chairman : K.J.A. Jahn  
Members : J.A. Stephens-Ofner  
R.W. Andrews

## Summary of Facts and Submissions

- I. By its decision of 11 March 1991, the Opposition Division maintained patent No. 0 066 915 in a form amended in accordance with the Patentee's subsidiary request, made on 25 June 1990 following oral proceedings, which took place on 23 April 1990. The Patentee, (Proctor & Gamble Co. of Cincinnati, Ohio, U.S. and Proctor & Gamble European Technical Centre of Strombeek Bever (BE)), had originally requested the maintenance of the patent as granted, in response to oppositions launched by (1) Unilever plc, London (GB) and Unilever N.V., Rotterdam (NL); (2) S.A. Camp, Barcelona (ES) and (3) CIBA Geigy AG, Basle (CH). The ground for the refusal of the Patentee's original main request was lack of inventive step.
- II. On 8 May 1991, CIBA Geigy (03) appealed against the said decision, asking for the revocation of the patent in its entirety. The Statement of Grounds of Appeal was duly filed on 22 July 1991.
- III. The other two opponents, Unilever plc (01) and S.A. Camp (02) did not appeal.
- IV. By Notice of Appeal dated 20 May 1991, the Patentee in effect cross-appealed against the said decision, once more requesting the maintenance of the patent as granted.
- V. By letter dated 31 July 1991, received on 2 August 1991, that is to say well after the expiry of the inextensible time limit for the filing of the Statement of Grounds of Appeal (22 July 1991), the Patentee filed his Statement of Grounds of Appeal and, at the same time, requested that either his Notice of Appeal of 20 May 1991 be deemed to constitute a valid Statement of Grounds of Appeal, or that his rights in respect of the missed time limit for filing

the Statement of Grounds of Appeal be re-established, pursuant to Article 122 EPC.

- VI. The above-mentioned letter did set out in full the grounds on which the application for restoration was based. The application fee was also paid within the prescribed time limit, so that the requirements of Article 122(3) EPC were met.
- VII. The grounds for re-establishment under Article 122 EPC were, in essence, that the failure to observe the four month inextensible time limit for the filing of the Statement of Grounds of Appeal (Article 108 EPC) was caused by an omission to enter the case into the computerised reminder system operated by the Patentee's professional representatives, as well as by an additional mis-use of the manual reminder system that still operated in tandem with the computerised one. These twin mistakes form the basis of the Applicant's (cross Appellants) implied submission that the failure to observe the time limit in question was due to an isolated mistake made by his professional representatives, in the context of a normally satisfactory reminder system and that, in accordance with the Boards' established jurisprudence (J 02/86 OJ EPO, 1987 362) all due care required by the circumstances has been taken, and therefore the basic requirement of Article 122(1) EPC was satisfied.
- VIII. In the course of elaborating on the circumstances in which the twin failure of the computerised and manual reminder systems took place, the Applicant for restoration explained that in the firm of his professional representatives computerisation has been introduced gradually throughout the 1980's, and that oppositions were the last category of cases to be fed into this system and, further, that oppositions contested on behalf of Patentee

clients whose applications had originally been handled by another firm of professional representatives were the very last ones to be computerised. The manual system, which the computerised one replaced almost entirely by the end of the 1980's, thus, in effect, became a left-over repository of oppositions handled on behalf of new clients, i.e. clients whose patents had been obtained by another firm of professional representatives. The Applicant's professional representative went on to state that "for Oppositions where our client is the Patentee and where we have been responsible for the prosecution of the application to grant, the computer treats the opposition as a continuation of the prosecution process, so that there is an existing record on the computer... Oppositions handled for clients who are Patentees, but where we were not responsible for the prosecution, are few and far between."

The Applicant then went on to explain that whereas the computerised system generated daily reminders of due dates, the manual one produced only a single reminder, some three weeks before the due date of any particular 'action' that had to be taken in an opposition or an appeal.

The Applicant's professional representative also submitted that because of the co-existence of the two reminder systems, and in particular of the eventual preponderance of the use of the computerised one, he was used to, and therefore expected, to receive daily reminders. Because the case now under appeal had been logged into the manual system, on receiving a reminder of the due date for the filing of the Statement of Grounds of Appeal (22 July 1991), he wrongly assumed that this reminder came

from the computerised one, and thus confidently expected to receive further daily reminders. The due date was, in consequence, allowed to pass.

- IX. The Applicant concluded his explanation by stating that on making a routine check of his files on 29 July 1991, his professional representative became aware of the procedural omission, and took prompt remedial action, resulting in the filing of his application for restoration, and of the concomitant Statement of Grounds of Appeal, on 2 August 1991.

#### Reasons for the Decision

1. The application for restoration meets all the relevant requirements of Article 122 EPC, and is therefore admissible.
  
2. The Applicant's first request is that his Notice of Appeal of 20 May 1991, which by virtue of the prior filing by (03) of his Notice of Appeal ranks as a Notice of Cross Appeal, should be treated as a valid Statement of Grounds of Appeal, fulfilling all the relevant requirements of Article 108 and of Rules 55(c) and 66(1) EPC. Although the Notice does make brief reference to section 'V' of the decision of the Opposition Division, in which it was held that the main request lacked inventive step, as well as to section 'IX' of the said decision, these brief references do not, in the Board's judgement, fulfill the stringent requirements of Rules 55(c) and 66(1) EPC, namely, that a valid Statement of Grounds of Appeal must set out in full not only the grounds on which the appeal is based, but also the facts, evidence and arguments relied upon by the Appellant. The presence of the word "indication" in Rule 55(c) does not mean that a mere hint or allusion to

such facts, evidence and arguments suffices: on the contrary, as was explained in decision T 326/87 "Polyamide compositions DUPONT", Headnote published in OJ 9, 1991, paragraph 2 and 2.1.2 of the reasons, Rule 55 (c) requires at the least a clear indication to the patent proprietor of the case he has to answer. This requirement extends to appeals by virtue of Rule 66 (1) EPC. Accordingly, the Applicant's above mentioned request is refused.

3. Turning to the Applicant's second request for the restoration of his rights in respect of the date of filing the Statement of Grounds of Appeal (ranking as a Statement of Ground of Cross Appeal), it is evident that his professional representative did take prompt and effective action immediately after the removal of the cause of non-compliance on 29 July 1991, the date on which he first became aware of the relevant procedural omission. The Board also has considerable sympathy with the submission that the parallel operation of computerised and manual systems, where the former produced daily whilst the latter only a single reminder, was inherently likely to confuse the attorneys who relied on the reminder system as a whole. Accordingly, the Board is prepared to accept, and so finds, that an isolated (and justifiable) mistake on the part of the attorney responsible for handling this appeal did take place.

As was submitted by the Applicant, the switch from a manual to computerised system took place gradually throughout the 1980's. Although such changeovers are troublesome and time-consuming, it is to be expected that the reminder system as a whole will continue to ensure that reminders of all required procedural actions on behalf of all classes of clients are generated and passed on to the attorneys in good time. It follows that a composite reminder system cannot be deemed to be normally



satisfactory, if it does not provide such timely reminders for all classes of clients, that is to say, for clients whose cases had been handled right from the application stage, as well as for those whose cases were taken on only after an opposition had been launched. The legal requirement of "all due care" provided for in Article 122(1) EPC is expressly contingent upon the circumstances in which that care has to be applied: c.f. the reference to "circumstances" in the first complete sentence of the Article. The relevant circumstance in the present case is clearly the process of switching from a manual to a computerised reminder system, and 'due care' means ensuring that whilst both systems are being run in tandem the attorneys responsible for handling all classes of cases are made aware of which system, manual or computerised, has generated a particular reminder. Only in this way would they know precisely when, if at all, they could expect to receive a further reminder.

4. It follows that in the Board's judgment, there was not in operation, at the relevant time, a normally satisfactory reminder system in the context of which the isolated procedural mistake could be excusable on the basis of the jurisprudence of the Boards, as laid down in the cases cited above. Accordingly, the application for restoration of rights in respect of the time-limit for the filing of the Statement of Ground of Appeal is refused, with the consequence that the Applicant's cross appeal is held to be inadmissible (Article 108 and Rule 65 EPC).
  
5. As has been stated in the Summary of Facts and Submissions, the Applicant's letter of 20 May 1991 constitutes a cross appeal by virtue of the prior filing by (03) of a valid Notice of Appeal. The other two Opponents did not file Notices of Appeal and therefore, by virtue of Article 107 EPC (second sentence), they become

parties as of right to the proceedings. For the same reason, the Board's above finding that the Applicant's cross appeal is inadmissible, makes him become a party as of right to the appeal proceedings.

6.1 In order to ensure the future speedy and streamlined conduct of those proceedings, the Board wishes to explain for all parties' benefit the legal consequences of a party being an automatic participant to appeal proceedings by virtue of Article 107 EPC, as distinct from one who is a volitional Appellant or Cross-Appellant, or an Opponent. That there is a clear difference between the rights of these two basic classes of parties has been made clear in a recently issued decision of the Enlarged Board in case G 2/91 (OJ EPO 1992, 206). The Enlarged Board in that case held that a party who was entitled to appeal but who did not do so, and relied merely on the second sentence of Article 107 EPC to secure his automatic participation in the appeal proceedings, did not have any independent right to continue those proceedings in the event that the Appellant 'proper' withdrew his appeal. In the light of this inequality between the rights of "full" or "proper" Appellants on the one hand, and Article 107 EPC participants on the other hand, the lodging of appeals by parties was held to be a meaningful act and not, therefore, one without substance. It followed that the second and subsequent Appellants in the case before the Enlarged Board had no valid ground for asking for the repayment of their appeal fee in circumstances other than those stipulated by Rule 67 EPC. (cf. paragraph 8 of the reasons).

In paragraph 6.1 of its reasons, the Enlarged Board analysed the meaning of Article 107 EPC (second sentence), holding that it did not confer upon a participant to appeal proceedings (who had not lodged an appeal) a legal

position that was independent of the underlying existence of the appeal, but merely guaranteed that such a party could participate in the appeal proceedings. It followed that a party entitled to appeal but who did not do so and relied instead upon Article 107 EPC, second sentence, put himself at the risk of the Appellant's discontinuing the appeal proceedings. This limitation upon the rights of such a party to continue the appeal proceedings was also expressly held to be independent of the question of the rights of the Boards of Appeal themselves to continue appeal proceedings from which the Appellant had withdrawn (cf. Rule 60 paragraph 2 EPC).

6.2 It is therefore abundantly clear that the Enlarged Board decided that "parties as of right" to appeal proceedings do not enjoy the same rights as regards the continuation of the appeal as do "full" or "volitional" Appellants. The Board notes that the Enlarged Board could have expressly stated (but did not), that this inability to continue appeal proceedings was the sole instance of the procedural inequality between the two relevant categories of appeal participants. The Board notes further, that not only did the Enlarged Board remain silent on this point, but that it expressly recognised (without deciding on the point), the possibility that there may be a further instance of this procedural inequality, namely the right of a "participant as of right" to make unrestricted requests, that is to say requests of the self-same scope as those that a "volitional" participant was entitled to make. (Paragraph 6.2 of the reasons, first complete sentence).

6.3 If the rights of the above-mentioned two categories of participants to make requests were identical, then in the case that the Opposition Division had decided to maintain a patent in amended form, and the Opponent had appealed asking for the revocation of the patent, it would be

legitimate for the Patentee, who either deliberately chose not to cross-appeal, or whose cross appeal was held inadmissible, and who by virtue of either of these circumstances became a party as of right to the appeal proceedings, to challenge the decision by asking for the grant of the patent in unamended form.

6.4 Likewise, in the case that the Opposition Division had decided to maintain a patent in amended form, and the Patentee had lodged an admissible appeal by asking for the grant of his patent in unamended form, whilst the Opponent either chose not to cross-appeal or has had his cross-appeal held to be inadmissible, that Opponent could, in the appeal proceedings, legitimately request the revocation of the patent in the same way that he would have been entitled to do had he chosen to and succeeded in, lodging an admissible cross-appeal, containing such a request.

6.5 If, however, such "automatic" participants', (whether they be Patentees or Opponents) rights to make requests were not identical to those of volitional participants, a possibility clearly recognised in paragraph 6.2 of the reasons of the Enlarged Board's decision, that is to say those rights were limited to the issues in an existing appeal, then a request by a Patentee in the circumstances outlined in paragraph 6.3 above, for the grant of his patent in unamended form would be inadmissible. The same would hold true, and for the self same reason, for a request made by an Opponent for the revocation of the patent in the circumstances outlined in paragraph 6.4 above.

Such a limitation of rights to make requests depends as was stated previously on the assumption that in an "automatic" participant's rights to make requests was

restricted to the issues in the appeal proceedings, and that it is these issues that lay down the particular limits ("gewisse Grenzen") referred to by the Enlarged Board in paragraph 6.2 of its reasons.

6.6 Since under the EPC appeal proceedings before the Boards of Appeal are judicial proceedings, whose function it is to decide whether a decision by a first-instance department was, on its merits, correct (see T 52/88 unpublished; T 26/88 OJ 1991, 30, T 611/90 and T 270/90 both to be published), the principal legal issue placed before a Board of Appeal is whether a first instance decision should be upheld or overturned. On the basis that an "automatic" party's right to make requests has to be restricted to any particular sub-issue that may legitimately arise within the bounds of the above-mentioned principal issue, and taking the case of the maintenance by a first instance department of the patent in amended form, an "automatic" Patentee-participant will be restricted in his requests to the principal issue in the appeal, namely, whether the patent should be revoked as a consequence of the appeal being allowed (and the first instance's decision overturned), or whether the first instance's decision should be upheld, and consequently the appeal be dismissed and the patent be maintained as amended. Likewise, an Opponent who was an "automatic" participant to an appeal brought by a Patentee against such a first instance decision will be restricted in his requests to the direct consequences of the first instance's decision being either upheld or overturned: if overturned (Patentee's appeal succeeds) the patent will be maintained as granted, whilst if it is overturned (a Patentee's appeal is dismissed) the patent will be maintained in amended form.

6.7 Although for the reasons stated in paragraph 6.2 of the above-cited decision of the Enlarged Board, the question of the possibility (and by implication the extent) of any limitation on the rights of "automatic" participants to make requests was left open, this Board does expressly find that such participants' rights to make requests are indeed limited, and that the extent of these limits is set by the principal legal issue in the appeal, in the manner explained above.

6.8 In view of the Board's finding that the application for restoration is not allowable, and that, in consequence, the cross appeal is inadmissible, the Applicant's (Patentee's) rights under Article 107 EPC to make requests will be limited to the issues in the appeal as validly lodged by Opponent (03), that is to say, whether the patent should be revoked or granted in amended form.

**Order**

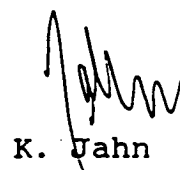
For these reasons, it is decided that:

1. The Application for restoration of rights is disallowed.
2. The Applicant's (Patentee's) cross-appeal is inadmissible.

The Registrar:

  
E. Görgmaier

The Chairman:

  
K. Jahn