

**Decision of Technical Board of Appeal 3.2.5 dated 9 June 1997**

**T 742/96 - 3.2.5**

(Language of the proceedings)

Composition of the board:

Chairman: G. O. J. Gall

Members: H. P. Ostertag

C. G. F. Biggio

**Patent proprietor/Respondent: UNILEVER PLC, et al**

**Opponent/Appellant: Procter & Gamble European Technical Center N.V.**

**Headword: Textile/UNILEVER**

**Article: 112(1)(a), 108 EPC**

**Keyword: "Referral to the Enlarged Board" - "Fee for appeal" - "Principle of good faith"**

*Headnote*

*The following question is referred to the Enlarged Board of Appeal:*

*Are the boards of appeal, in application of the principle of good faith, bound to notify the appellant of a missing appeal fee when the notice of appeal is filed so*

*early that the appellant could react and pay the fee in time, even if there was no indication - either in the notice of appeal or in any other document filed in relation to the appeal - from which it could be inferred that the appellant would, without such notification, inadvertently miss the time limit for payment of the appeal fee?*

### **Summary of facts and submissions**

I. The opponent filed a notice of appeal within the time limit under Article 108 first sentence, EPC against the decision of the opposition division rejecting the opposition, but did not meet the same time limit set for the payment of the appeal fee (Article 108 second sentence, EPC). Consequently, the appellant was notified under Rule 69(1) EPC that the appeal was deemed not to have been filed (Article 108 second sentence, EPC).

II. Thereupon the appellant paid the appeal fee and sought review under Rule 69(2) EPC on the grounds that the notice of appeal was filed more than 5 weeks before the expiry of the period for payment of the appeal fee and that the communication from the registry of the board confirming receipt of the appeal, although sent well in advance of the expiry of the time limit (two weeks before), did not draw attention to the fact that the appeal fee had not been paid. The appellant requested that the principle of good faith be applied to his case, according to which he should have been reminded of the missing payment. He referred to a decision which he alleged concerned a case similar to the present one, where the party was given the opportunity to remedy the deficiency (T 14/89, OJ EPO 1990, 432, concerning non-payment of the fee for **restitutio in integrum** ).

III. The board, in preparing oral proceedings - which were later cancelled at the request of the appellant - referred to J 2/94, in particular to reasons No. 5, that

"the appellant could not expect to be informed of the missing fees, immediately after receipt of his request for re-establishment by the EPO. Whereas the EPO may be obliged, on the basis of the principle of good faith governing the procedure before the EPO (G 5/88, OJ EPO 1991, 137), to give prompt information on a specific query, a party may not expect a warning in respect of any deficiency occurring in the course of the proceedings (J 41/92, OJ EPO 1995, 93, point 2.4 of the reasons".

IV. The appellant, in a further submission, argued that the registry of the board, when confirming the receipt of the appeal well in advance - two weeks - of the expiry of the time limit for payment of the appeal fee, did not draw the attention of the appellant to the missing payment. The communication did not indicate whether or not the appeal was considered admissible and could have been construed as acknowledging that a valid appeal had been filed. The reference in this communication to "an appeal" having been filed carried, in the appellant's view, a strong implication that the appeal was in order, so that the communication was to be considered as ambiguous.

V. In response to the preliminary opinion expressed by the board (point III above) the appellant argued that J 2/94 was in conflict with T 14/89 and requested the board to refer the following question to the Enlarged Board:

"If a party is writing to the EPO to seek restitutio or appeal (or further processing), and if that party's letter does not explicitly refer to that payment, is there a clear deficiency justifying the sending of a warning by the EPO under the principle of good faith?"

### **Reasons for the decision**

1. Article 112(1)(a) EPC empowers the boards of appeal to refer any question to the Enlarged Board of Appeal - either of its own motion or at the request of a party to the proceedings - if it considers that a decision is required on an important point of law which is raised by that question.

2. According to the well-established case law of the boards of appeal and the Enlarged Board of Appeal (eg G 5/88, OJ EPO 1991, 137) the principle of good faith is fundamental to proceedings before the EPO. It is an important point of law justifying referral to the Enlarged Board under Article 112(1)(a) EPC, whether the boards of appeal, in application of that principle, are bound to notify the appellant of a missing fee when the notice of appeal is filed so early that the appellant could react and pay the appeal fee in time, even if there is no indication - either in the notice of appeal or in any other document filed in relation to the appeal - from which it could be inferred that the appellant would, without such notification, inadvertently miss the time limit for payment of the appeal fee. The board therefore agrees in principle the appellant's request as set out under V above.

3. As can be seen from the aforementioned facts of the case the point of law to be decided concerns payment of the fee for an appeal and not the fee for a request for restitutio in integrum. The scope of the question must therefore be restricted accordingly and, without changing it in substance, be phrased in such a way as to define clearly the point at issue.

**Order**

**For these reasons it is decided that:**

The following question is referred to the Enlarged Board of Appeal:

Are the boards of appeal, in application of the principle of good faith, bound to notify the appellant of a missing appeal fee when the notice of appeal is filed so early that the appellant could react and pay the fee in time, even if there was no indication - either in the notice of appeal or in any other document filed in relation to the appeal - from which it could be inferred that the appellant would, without such notification, inadvertently miss the time limit for payment of the appeal fee?