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D E C I S I O N
of 11 October 1994

Case Number: T 0690/93 - 3.2.2

Application Number: 87306605.4

Publication Number: 0255319

IPC: D21F 11/00

Language of the proceedings: EN

Title of invention:

Improvements in electromagnetic interference shielding

Applicant:

The Wiggins Teape Group Limited

Opponent:

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Headword:

-

Relevant legal provisions:

EPC Art. 29(1), 29(3)(a), 108, 112(3), 122(2),(3)

EPC R. 65

Keyword:

"Missing Statement of Grounds"

"Restitutio - late payment of fee"

"Principle of good faith"

Decisions cited:

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Catchword:

-

Case Number: T 0690/93 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 11 October 1994

Appellant: The Wiggins Teape Group Limited
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Representative: Bridge-Butler, Alan James
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Decision under appeal: Decision of the Examining Division of the European Patent Office dated 5 March 1993 refusing European patent application No. 87 306 605.4 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Seidenschwarz
Members: J. Kollar
J. Van Moer

Summary of Facts and Submissions

- I. European patent application No. 87 306 605.4 was filed on 27 July 1987 claiming priority of 31 July 1986 of the British application 8 618 736.
- II. The Examining Division refused the application, by decision of 5 March 1993, considering the amended claims infringed Article 123(2) EPC.
- III. The Applicant (Appellant) lodged an appeal on 4 May 1993 and paid the appeal fee on the same day.
- IV. A letter was filed by telefax on 22 July 1993 which included a further letter dated 5 July 1993 alleged to "set out the written Statement of Grounds" and effectively doing so.

In the letter of 22 July 1993, the Appellant admitted late filing of his Statement of Grounds and requested the appeal to be allowed to proceed. The Statement of Grounds had been meant to be dispatched on 5 July but had fallen behind a desk until it was discovered there on 22 July 1993.

- V. By letter of 17 September 1993 the Appellant was informed that the appeal had been referred to the Board of Appeal 3.2.2.
- VI. Further to a telephone call from the European Patent Office on 23 September 1993, the Appellant paid on the same day, without any comment in the confirming letter, the fee for restitutio in integrum.

VII. In a communication of 28 February 1994, the Board considered that:

- the Statement of Grounds had been filed late;
- the letter of 22 July 1993 was a request for restitutio in integrum;
- the time limit set out under Article 122(2), (3) EPC had expired on 22 September 1993;
- the request for restitutio in integrum was inadmissible since the fee thereto had been paid late;
- the Board had no intention to apply case law as, e.g. J 13/90 - Castelton.

VIII. The arguments developed by the Appellant in writing and at the oral proceedings of 11 October 1994 can be summarized as follows as far as regards admissibility.

According to a first argument, the letter of 22 July 1993 was not to be seen as a restitutio request but as a explanation in good faith justifying the appeal to be prosecuted. That letter did not mention explicitly that it was intended to be a restitutio request and, logically, no restitutio fee was paid with it. The fact that a fee was paid later on 23 September 1993 was only due to the phone call on that day.

In any case, the letter issued by the Registry of the Board on 17 September 1993 meant, to "any English speaking reader", the request to prosecute had been accepted.

According to a second argument, analysing the letter of 22 July 1993 as a restitutio request, the fee paid on

23 September 1993 was to be considered having been paid in due time.

Indeed, firstly, the phone call of 23 September 1993 assured the Appellant that if he paid immediately "all would be well".

Secondly, in conformity with the line of case law exemplified by J 13/90 the EPO has the obligation to warn of impending losses of rights and if necessary to set a new period in which the deficiency can be corrected.

IX. The Appellant's requests were:

1. to allow the appeal to proceed;
2. alternatively, to grant re-establishment of rights;
3. to set aside the decision under appeal and to grant a patent on the basis of: Claim 1 filed with the letter of 22 July 1993, Claims 2 to 12 filed with the letter of 11 November 1992, description: pages 5, 6, 8 to 12 as originally filed, pages 1, 7, 7a as filed with the letter of 25 September 1991, page 3 as filed with the letter of 11 November 1992 and drawings as originally filed.

Reasons for the Decision

1. It is one of the powers and duties of the Board to establish the legal definition of the facts of the case. In this context, the Board has no doubt that the

letter of 22 July 1993 is a restitutio request (cf. T 14/89; OJ EPO 1990, 432, point 3).

2. However the Board is willing to consider all arguments.

2.1 If the letter of 22 July 1993 is not a restitutio request the consequence is the inadmissibility of the appeal due to the undisputed late filing of the Statement of Grounds, (Article 108 EPC and Rule 65 EPC) since no legal remedy is at hand.

The letter issued by the Board's Registry on 17 September 1993 is in no way a decision but the usual information given to the party about which Board is to hear the case.

No legal ground was submitted or can be found to give the letter any other quality or consequence.

The mother tongue of the reader is here irrelevant.

2.2 If the letter of 22 July 1993 is a request for restitutio, the fee was paid late (Article 122,(3) EPC), with the consequence that the request is inadmissible.

3. Nevertheless as mentioned above the Appellant argued that this request is admissible on the basis of the case law developed in such decisions as:

G 5/88, OJ EPO 1991, 137; J 02/87, OJ EPO 1988, 320;
J 03/87, OJ EPO 1989, 003; J 01/89, OJ EPO 1992, 017;
J 13/90, OJ EPO 1994, 456; J 27/92, OJ EPO 1994, 11;
J 41/92, OJ EPO 1994, 12; T 14/89 OJ EPO 1990, 432.

All these decisions deal, in some way, with the concept known as "the principle of good faith" and some even (especially T 14/89 and J 13/90) require the EPO to give a warning of readily identifiable deficiencies in compliance with that principle.

- 3.1 As for the "principle of good faith", the Enlarged Board of Appeal, in the reasons for its decision G 5/88 (point 3.2) affirmed, although without substantiation, that the "protection of **legitimate** expectations is a general principle of law" and implies that "measures taken by the EPO should not violate the reasonable expectations of parties".

Thus legitimate expectations are defined as reasonable ones.

- 3.2 Though a Board of Appeal is only bound by decisions of the Enlarged Board to the extent provided by Article 112(3) EPC, this Board can accept this definition but it is its view that, in the present case the Appellant could not reasonably expect the Board to warn him of the missing fee.

- 3.3 The Board sees no justification for the suggestion that the above principle imposes on a Board an obligation to warn a party of deficiencies within the area of the party's own responsibility.

- 3.4 Generally considered, the Board takes the view that the only reasonable expectation the parties can have is for the Boards to behave with the care and competence normally required by the circumstances.

3.5 Once a case is within the jurisdiction of the Board, the Board has to avoid any action that could undermine the absolute impartiality it has to maintain between applicant, opponent and public in all proceedings.

It could not be reasonably expected of the Board to depart, in even the slightest way, from this principle of law, which needs no further substantiation.

3.6 Each Board is of course free to decide in any individual case, the level of impartiality it considers to be appropriate or, even, the level of "service" compatible with its status.

3.7 The phone call of 23 September 1993 was made after expiration of the time limit for paying the restitutio fee.

From there on the Appellant could, independently from any delay, pay the fee to **file** correctly a request for restitutio and, in fact had to do so to be entitled to a decision on that ground. The only purpose of the phone call was for the Board to ascertain the true intentions of the Appellant which were certainly not clear as shown later by the development of the case. Thereupon, any decision as to what was to be done next was the Appellant's responsibility.

4. Any obligation to warn of readily identifiable deficiencies pre-supposes identification of all deficiencies in order to select the readily identifiable ones. Such a task would require necessarily a systematical investigation, by all available means and at every level of competence. It

would imply either that every discovered deficiency should be seen as readily identifiable by the fact of its discovery or that an appreciation should be made as to the readily identifiable nature of each one. Even if reliable criterions could be found for that last purpose which is doubtful, a negative answer would lead to the illogical consequence that no warning will be made.

Thus, in the Board's view, said obligation not only lacks legal ground but implies illogical and impractical consequences.

- 4.1 For the sake of completeness, the Board adds that to issue systematically a warning for every readily identifiable deficiency i.e. basically and mainly gross deficiencies would only be to the benefit of negligent or incompetent parties or representatives. There can be no doubt in that context that the provisions of Article 122(3) EPC are extremely clear and simple. It is a consistent feature of the EPC that applications are only deemed to have been filed after payment of the requisite fee.

The parties cannot reasonably expect a Board to issue warnings, at any time, for deficiencies of that fundamental order.

Taking the principle of good faith that far would imply in practice the Boards taking over, systematically, the responsibilities of the parties. That lacks any legal justification and cannot be reasonably expected.

Moreover, in cases like the present, which is concerned with a failure to meet a time limit, it would require the Board to anticipate the true intentions of a party. Failure to pay a fee can be due to an intention still to pay it within the time limit, or a loss of interest altogether.

5. That a staff member of the Board of Appeal told the Appellant by phone that "all would be well" if he paid the restitutio fee is not proven and remains an unsubstantiated allegation.

Moreover, no mention of such a phone call can be found in the letter of 23 September 1993, written in tempore non suspecto.

Finally, even if this assurance was given, it would be without effect since only the Board has the power to decide. (Articles 29, (1) and (3)(a) EPC).

Order

For these reasons it is decided that:

The appeal and the request for restitutio in integrum are rejected as inadmissible.

The Registrar:

The Chairman:

S. Fabiani

H. Seidenschwarz