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**Datasheet for the decision
of the Enlarged Board of Appeal
of 25 November 2014**

Case Number: G 0001/13

Appeal Number: T 0022/09 - 3.3.07

Application Number: 99906328.2

Publication Number: 1058580

IPC: B01J 33/00, B01J 23/75,
C07C 1/04, B01J 37/02

Language of the proceedings: EN

Title of invention:
Process for producing fischer-tropsch catalysts

Patentee:
Sasol Technology (Proprietary) Limited

Opponent:
Formalities Bureau Limited

Headword:
Fischer-Tropsch Catalysts/SASOL TECHNOLOGY II

Relevant legal provisions:
EPC Art. 99(1), 112(1), 121 and 122

Rule 152(8) EPC

Keyword:

"Admissibility of referral (yes)"
"Opponent company ceasing to exist under national law"
"Retrospective restoration of opponent company to existence
under national law"

"Recognition by EPO of retrospective restoration of opponent company to existence under national law (yes)"

"Opposition proceedings to be continued by restored opponent company (yes)"

"Admissibility of appeal (yes)"

Decisions cited:

G 0001/97, G 0003/97, G 0003/99, G 0002/04, G 0001/12
T 0635/88, T 0525/94, T 0353/95, T 0015/01, T 1091/02,
T 0477/05, T 0480/05

"Peaktone Ltd v. Joddrell" Court of Appeal (England and Wales), [2012] EWCA Civ 1035

Catchword:

The questions referred to the Enlarged Board of Appeal are answered as follows:

1. Where an opposition is filed by a company which subsequently, under the relevant national law governing the company, for all purposes ceases to exist, but that company is subsequently restored to existence under a provision of that governing national law, by virtue of which the company is deemed to have continued in existence as if it had not ceased to exist, all these events taking place before a decision of the Opposition Division maintaining the opposed patent in amended form becomes final, the European Patent Office must recognize the retroactive effect of that provision of national law and allow the opposition proceedings to be continued by the restored company.
2. Where, in the factual circumstances underlying Question 1, a valid appeal is filed in due time in the name of the non-existent opponent company against the decision maintaining the European patent in amended form, and the restoration of the company to existence, with retroactive effect as described in Question 1, takes place after the expiry of the time limit for filing the notice of appeal under Article 108 EPC, the Board of Appeal must treat the appeal as admissible.
3. Not applicable.

Case Number: G 0001/13

D E C I S I O N
of the Enlarged Board of Appeal
of 25 November 2014

Appellant: Formalities Bureau Limited
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Representative: Bawden, Peter Charles
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Respondent: Sasol Technology (Proprietary) Limited
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Representative: Kador & Partner
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Referring Decision: Interlocutory decision of the Technical Board
of Appeal 3.3.07 of the European Patent Office
of 21 June 2013.

Composition of the Board:

Chairman: W. van der Eijk
Members: K. Garnett
A. Klein
R. Moufang
R. Murphy
U. Oswald
G. Weiss

Summary of Facts and Submissions

I. By interlocutory decision of 21 June 2013 in case **T 22/09** (OJ EPO 2013, 582), Technical Board of Appeal 3.3.07 referred the following points of law to the Enlarged Board of Appeal for decision under Article 112(1)(a) EPC (hereafter "the referred questions"):

1. Where an opposition is filed by a company which is dissolved before the Opposition Division issues a decision maintaining the opposed patent in amended form, but that company is subsequently restored to the register of companies under a provision of the national law governing the company, by virtue of which the company is deemed to have continued in existence as if it had not been dissolved, must the European Patent Office recognize the retroactive effect of that provision of national law and allow the opposition proceedings to be continued by the restored company?

2. Where an appeal is filed in the name of the dissolved company against the decision maintaining the patent in amended form, and the restoration of the company to the register of companies, with retroactive effect as described in question 1, takes place after the filing of the appeal and after the expiry of the time limit for filing the appeal under Article 108 EPC, must the Board of Appeal treat the appeal as admissible?

3. If either of questions 1 and 2 is answered in the negative, does that mean that the decision of the Opposition Division maintaining the opposed patent in amended form automatically ceases to have effect, with

the result that the patent is to be maintained as granted?

II. The essential facts of the case leading to the referral are as follows:

- (a) On 2 November 2004, notice of opposition against European patent No. 1058580 was filed by Formalities Bureau Ltd ("FBL"), a company incorporated under the laws of the United Kingdom.
- (b) On 27 September 2005, and while the opposition proceedings were still pending, FBL was struck off the UK register of companies and on 4 October 2005 it was "dissolved" by publication of an official notice in the London Gazette. As a matter of UK law it thereby ceased to exist. The grounds for this administrative act were that FBL had not filed the requisite statements with the Registrar of Companies, thus giving the Registrar reason to believe that FBL was no longer in business or in operation.
- (c) Opposition proceedings in the name of FBL nevertheless continued to be conducted by its previously authorized professional representative, Mr Peter Bawden, as if FBL continued to exist. On 29 October 2008, the Opposition Division issued an interlocutory decision whereby, account being taken of the amended claims filed by the proprietor, the patent and the invention to which it related were found to meet the requirements of the EPC.

- (d) On 29 December 2008 notice of appeal was filed in the name of FBL, again acting by Mr Peter Bawden.
- (e) Shortly before oral proceedings in the appeal, scheduled for 6 September 2012, the proprietor and respondent (hereafter "the proprietor") discovered that FBL had ceased to exist. At the oral proceedings, the proprietor requested *inter alia* that the appeal be declared inadmissible; FBL requested *inter alia* that the proceedings be suspended. In the event the Board of Appeal ordered the proceedings to be continued in writing to enable the FBL to file submissions relating to the admissibility of its appeal.
- (f) On 26 September 2012, an application was filed with the UK High Court to restore FBL to the UK register of companies. The stated purpose of this was to enable FBL to continue the opposition appeal proceedings before the Board of Appeal. On 5 December 2012 an order was made by the UK High Court restoring the name of FBL to the register of companies. The effective date of the restoration of FBL to the register was 8 December 2012, the date when the UK court order was delivered to the UK Registrar of Companies. As a matter of UK law, FBL was thereby deemed to have continued in existence as if it had not been dissolved or struck off the register, i.e., as if it had never ceased to exist.
- (g) On 13 December 2012 the proprietor *inter alia* filed a request for the "revocation" of the Opposition Division's interlocutory decision on

the ground that the opposition proceedings had lapsed when FBL ceased to exist. Alternatively, as an auxiliary request, the proprietor requested that the appeal filed in the name of FBL be declared inadmissible.

- (h) The Technical Board subsequently decided to refer the above questions to the Enlarged Board of Appeal.

III. The referral decision

- (b) The Technical Board observed that the question whether a legal entity such as a company exists is to be determined by the law under which it was created, in FBL's case, the law of the United Kingdom.
- (c) The Board further noted that although the opposition was admissible when it was filed, the opposition proceedings could have been terminated at any point between the date when FBL was dissolved and the date of the decision under appeal, on the ground that the sole opponent had ceased to exist. The Board also observed that since FBL did not legally exist at the time when the appeal was filed in its name, or at any point during the two-month period referred to in Article 108 EPC for filing a notice of appeal, the appeal could have been rejected as inadmissible under Rule 101(1) EPC on the ground that it did not comply with Article 107 EPC. Having ceased to exist, the company could not have been a party to the proceedings, still less a party adversely

affected by the decision of the Opposition Division.

- (d) The Board considered that there was no clear answer in the EPC or in the case law of the EPO Boards of Appeal to the question whether these defects could be cured retroactively by virtue of a provision of national law which restored FBL to the register and deemed it never to have been dissolved.
- (e) The Board considered that the question involved a point of law of fundamental importance, within the meaning of Article 112(1) EPC, inasmuch as it concerned the system of remedies provided for in the EPC, the acquisition and retention of the status of party to proceedings before the EPO and the relationship between the EPC and national law. A decision on that question was necessary since without it the Board could not determine whether there was a proper basis for the continuation of the opposition proceedings by FBL and whether the appeal was admissible.
- (f) The Board further considered that if the defects could not be cured retroactively as a result of the restoration of FBL to the UK register of companies under UK law, it would be necessary to decide whether that had the consequence that the decision of the Opposition Division automatically ceased to have effect and that the opposed patent was thereby maintained as granted. It was appropriate to refer that question also to the Enlarged Board of Appeal.

- IV. In letters dated 5 December 2013 and 5 March 2014, the proprietor set out its position on the referral. FBL likewise set out its position on the referral in a letter dated 31 December 2013.
- V. On 9 December 2013, in response to an invitation from the Enlarged Board pursuant to Article 9 of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA), the President of the European Patent Office filed his comments on the referral.
- VI. In response to an invitation to third parties to file statements in accordance with Article 10(2) RPEBA, the Enlarged Board received two *amicus curiae* briefs. The first was dated 27 December 2013 and filed by the International Federation of Intellectual Property Attorneys (hereafter "FICPI"); the second was dated 1 January 2014 and filed by a professional representative.
- VII. On 13 May 2014, the Enlarged Board of Appeal issued a communication drawing attention to some potentially relevant legal issues. The Enlarged Board raised doubts whether the questions referred indeed raised a point of law of fundamental importance and whether the existing case law of the Boards of Appeal did not already point to a solution to the procedural issues which had arisen and therefore whether it was necessary to answer the questions referred. Both the proprietor and FBL filed responses to this communication, dated 15 July 2014 and 22 July 2014 respectively.

VIII. The arguments of the proprietor can be summarised as follows:

The questions referred raise a point of law of fundamental importance because they relate (a) to the relation of procedural European patent law on the one hand and national law on the other and (b) to an important principle that at any time during opposition proceedings it must be clear who the opponent is. In the present case it was not clear who, after FBL ceased to exist, was the opponent, if indeed anyone was. Further, there are in principle a large number of different constellations of laws which are similar to UK law in the present respect.

The existing case law of the Boards of Appeal, particularly as regards the circumstances in which a universal successor of an opponent may continue opposition proceedings and, indeed, what constitutes a universal successor, does not provide a solution to the procedural issues which had arisen.

The answer to the referred questions should be in compliance with the EPC and as far as possible consistent with the case law of the Boards of Appeal, both of which in fact provided a clear answer to the referred questions.

The filing of an opposition is regulated by the EPC; after an opposition is filed, it passes "into the keeping" of the EPO and it is administered solely in accordance with the provisions of the

EPC. For example, the opposition is not freely transferable and the opponent has no right of disposition over its opposition status (**G 2/04**).

If an opponent ceases to exist, the indispensable requirements for an admissible opposition are thereby removed (**T 525/94**, **T 353/95**, and **T 1178/04**). An opposition must be admissible at all times during the proceedings and its admissibility can be examined, even *ex officio*, at any stage of the proceedings, including during appeal proceedings: **G 3/97**, **G 4/97**, **T 289/91**, **T 28/93**, **T 522/94** and **T 1178/04**. Once an opposition has become inadmissible this cannot be reversed. The opposition cannot be retrospectively reinstated since it occurs within the competence and jurisdiction of the EPO and the EPC provides no remedy or means for its reversal.

As to the case law, whether a non-existing party can remain a party to proceedings is to be determined autonomously by the procedural law of the EPC, not national law; the status as an opponent is governed exclusively by the procedural law of the EPC (**T 15/01** and **T 1421/05**). So far as opposition proceedings are concerned, "... a decision of the EPO on the validity of a patent requires the existence of an admissible opposition." See **G 3/97** and **G 4/97**. Even if originally admissible, opposition proceedings may become inadmissible. The pending opposition of FBL became inadmissible when it ceased to exist.

T 525/94 shows that where a legal person as appellant no longer exists, the appeal becomes inadmissible. **T 477/05** and **T 480/05** are to the same effect. Cases where appeal proceedings have merely been terminated (**T 353/95**, **T 74/00** and **T 2334/08**) do not alter the fact that the termination of appeal proceedings must be based on clear legal statutes or consistently developed case law.

While the English court is able to resurrect a dissolved company it cannot resurrect an opposition which the company filed. The status of opponent was an adjunct of FBL but not integral to the company's legal personality. Thus the order of the English court restored the legal personality of FBL but not any external ramifications and connections extrinsic to the company, such as characteristics only being called into being on the filing of an opposition or of an appeal. In fact the order of the English Court, while it restored FBL to existence, did not say that this was done for any particular purpose and was silent on any issue relating to the appeal or opposition procedure.

Indeed the fact that the UK court may give further directions for placing the company and all other persons in the same position ("as nearly as may be") as if the company had not been struck off (see UK Companies Act 2006, section 1032(3)) makes it clear that there will be some things which the retroactive restoration cannot re-institute. Section 1034 of the same Act, dealing with the

property of a company which ceases to exist, confirms this.

Thus the EPO has jurisdiction over the opposition once filed and the English court does not pretend to regulate matters outside the scope of the UK companies register.

To recognise the retroactive effect of FBL's restoration and the retroactive admissibility of the opposition and the appeal would be to grant FBL a legal remedy which is not provided for by the EPC. It would allow UK law to overrule the EPC. The EPC provides remedies for cases where a party has suffered a loss of rights (e.g. further processing under Article 121 EPC or re-establishment under Article 122 EPC) but these remedies are not applicable in the present circumstances.

One of the ideas behind proceedings at the EPO is to provide a high degree of certainty, particularly by the imposition of time limits in opposition and appeal proceedings: **G 3/97**. Extending a new remedy, particularly one not having any apparent time limits, would be contrary to this principle. It would also be against the principles set out in **G 1/97**, which speaks against the introduction of new remedies. The same applies to the principle that opposition proceedings should be a simple, speedily conducted procedure (**G 2/04**)

So far as the appeal is concerned, Article 107 EPC provides that any party to proceedings adversely affected by a decision may appeal. However, a party which no longer exists cannot do so. Rule 101(1) EPC specifies that any appeal not complying with Articles 106 to 108 EPC must be rejected as inadmissible. At the time of filing the notice of appeal, FBL did not exist and could not sue (or be sued) and was thus not a party to the proceedings. The appeal was inadmissible.

Again, there is no provision in the EPC and no case law of the Boards of Appeal whereby an opposition or appeal which has become inadmissible after an opponent company has ceased to exist can be reinstated.

The non-admissibility of the opposition and the appeal is further demonstrated by the fact that after FBL ceased to exist the authority of its attorney will have lapsed.

The position is effectively the same under German law.

The Enlarged Board should also comment on whether an obligation to inform the EPO about important procedural requirements at the EPO exists, and what the consequences of non-compliance are. The opponent's professional representative must have known that his client had ceased to exist but he did not communicate this to the EPO. A representative must act in good faith towards the EPO and other parties (T 16/05) and so the

answers to the referred questions should make a distinction for this type of case. Had the representative complied with this obligation, the Opposition Division would have forthwith had to have declared the opposition inadmissible.

A further consideration in this regard is that if the proprietor had not discovered that FBL had ceased to exist, FBL would in all probability never have been restored to existence, so that a final decision would have been reached which would have been flawed by a substantial procedural error, namely that the opposition and appeal were inadmissible.

IX. The arguments of FBL can be summarised as follows:

The referred questions are of fundamental importance because it is possible that such issues may arise in the case of companies incorporated under laws of many of the countries belonging to the British Commonwealth. Over 4,000 thousand companies per year are restored to existence in the United Kingdom alone. The interface between national law and the EPC as regards party status may impact on other procedures before the EPO.

The existing case law of the Boards of Appeal concerning the transfer of opposition status to a universal successor is applicable to the present case and adequate to deal with the procedural issues which arise in the appeal.

Legal entities such as companies only exist by virtue of the legal system which governs their incorporation and operation. The status of a legal entity as opposed to a natural person is determined by the national law: **T 353/95** and **T 15/01**. Other provisions of the EPC recognise that national law rather than the EPC governs, for example the substantive entitlement to a patent and the rights of an employee.

It is not in doubt that under UK law the effect of FBL being restored to existence was that it is deemed to have continued in existence as if had not been dissolved or struck off the register of UK companies.

The sole purpose of restoring FBL to existence was to enable it to continue the opposition appeal proceedings.

The EPO must thus accept that, after FBL had been restored to existence, it was at all relevant times in existence. The EPO cannot override national law.

The concept of retroactive effect is not foreign to the EPC. The revocation of a patent takes effect *ab initio*. The same applies in the case of patents which are maintained in amended form.

In other respects the opponent supported the submissions of the President.

A legal entity that does not exist has no capacity to sue or be sued (**G 3/99**) and cannot be or remain a party to proceedings. A party's status must be examined at all stages of proceedings.

The existing practice of the Boards of Appeal when a company ceases to exist is variable: see e.g., **T 525/94** (appeal had become "inadmissible"); **T 480/05** and **T 353/95** (appeal proceedings terminated). There is no settled first instance practice.

Legal entities such as companies only exist and have capacity to act by virtue of the legal system which governs their incorporation and operation. Whether a company has ceased to exist is also governed by the applicable national law. The EPC contains no autonomous provisions governing such legal persons, whether applicants, proprietors or opponents, and so national law must be applied.

The issue is then whether there should be any limits to this principle. The issue should be examined by looking at the different situations which could arise in practice and asking how different interests may be affected by recognition of the retroactive restoration of a company.

Thus there needs to be examined the possible impact of the recognition of the retrospective restoration of a company in different legal situations, regard in this respect also being had to different approaches in other national systems

of law. Different outcomes, depending on different national laws, should be avoided. Arguments for and against limits to following national law need to be examined, particular when taking into account principles regarding acquisition and retention of party status and the principle of legal certainty.

Where the Opposition Division acts in ignorance of the true position, the later retroactive restoration of an opponent company, if acknowledged by the EPO, will confirm what the proprietor, the EPO and the general public had previously understood the position to be, and in accordance with which they have acted. Recognition of the retroactive existence would have no procedural consequences since, by way of the legal fiction, the loss of legal status never took place. Legal certainty will thus be preserved. Only the proprietor will be prejudiced, assuming there was a right to have the proceedings terminated.

Answers to the referred questions should be found which (a) do not depend on the state of knowledge of the opponent company or its representative, (b) do not depend on whether, if the Opposition Division learnt of the opponent's cessation, the opposition proceedings could have been continued under Rule 84(2) EPC, (c) take into account that there may be other opponents in the proceedings, (d) take into account the right to be heard and how the opponent is to be notified, etc., during the period when the company did not exist and (e)

take into account that other legal systems (for example those of Germany and Austria) deal with this kind of situation differently.

As to the possible limits to the principle that in general the EPO refers to national law on questions of the existence or non-existence of a legal entity, it is to be noted that Articles 58 and 60(1) EPC generally defer to national law. The same applies to issues concerning the validity of an instrument of transfer of a European patent application or a European patent (Article 74 EPC; **J 16/05**). On the other hand the acquisition of the procedural status of applicant or proprietor is governed by the EPC. Rule 22(3) EPC in general prevents the retroactive recognition of a change of applicant; the rationale being that at all times it should be clear who the parties to proceedings are. An exception applies in the case of a universal successor to a party which has ceased to exist.

When asking how the disappearance of a company as party and its subsequent retroactive reappearance would be dealt with under the EPC and in practice, it is difficult to find parallels from other types of situations.

"Any person", and thus any legal entity recognised by national law, may file a notice of opposition (Article 99 EPC). However, as opposed to the case of an applicant or a proprietor, an opponent does not have a substantive title but only a procedural status under the EPC. It follows that to a much

greater extent its status is determined by the autonomous law of the EPC. A particular example is that the status of opponent is not freely transferable (**G 2/04**) even though the validity of an instrument of transfer remains a matter of national law. A transfer of opponent status to a universal successor will be recognised by the EPO but what amounts to a universal successor remains a matter of national law. However, these principles provide no answer to the referred questions: here there has never been an opponent other than FBL. The same is true of the rules relating to interruption of proceedings in the case of an applicant or patentee being unable to act (Rule 142 EPC).

Opposition proceedings are designed to be a simple and speedily conducted procedure; hence various time limits and restrictions are imposed (**G 2/04**). While the restoration to life of a defunct opponent may prolong proceedings, this has to be balanced against the interests of the public in having invalid patents revoked. In any event, the EPC already provides for certain procedural delays that are not subject to any time limits (e.g., Rule 142 EPC).

Overall, there is no compelling reason derivable from the nature of opposition proceedings why retroactive restoration of an opponent company should not be acknowledged.

An opponent will not necessarily be able to "re-enter" proceedings years after it has ceased

to exist: Rule 129 EPC provides a means of achieving finality in the case of an opponent company which has ceased to exist.

Various procedures under the EPC place an emphasis on the parties and the public being able to rely on the declarations of parties, e.g. in the case of withdrawal (Rule 139 EPC)

Comparisons with the remedies of further processing or re-establishment under Articles 121 and 122 EPC respectively do not point to a clear solution to the referred questions.

While, for reasons of legal certainty, there should be no doubt at any given time who is entitled to exercise procedural rights (**G 2/04**), the recognition of retro-active restoration of an opponent company does not conflict with this.

XI. The third party submissions of FICPI were that the Office should recognise the retroactive effect under national law. To do so would not be to introduce a new remedy into the EPC. Not to do so would be to usurp national law.

XII. The third party submissions filed by the professional representative can be summarised as follows. The Opposition Division can continue the proceedings in the case of the death or legal incapacity of the opponent, or the withdrawal of the opposition (Rule 84(2) EPC). Thus even with the dissolution of FBL the opposition proceedings could have been continued and the same decision made. The decision has in fact been made and

is not void *ab initio*. The decision of the Opposition Division cannot be overturned. Thus the answers to Questions 1 and 3 are in each case: no. As to Question 2, the appeal was inadmissible when it was filed because FBL did not exist. There are provisions in the EPC dealing with missed time limits but none of them applies to the facts of the present case, so the answer to Question 2 is also: no.

Reasons for the decision

1. Although the nature of the questions which the referring Board wishes to have answered is clear, the reference to a company being "dissolved", while correct as a matter of UK law, is apt to cause confusion because the concept of "dissolution" of a company has different meanings under different systems of law. For example under German law, the "*Auflösung*" (dissolution) of a company is not synonymous with its ceasing to exist. In the context of the referred questions, the Enlarged Board will therefore generally refer to a company as having "ceased to exist". Question 1 also needs some reformulation to make clear at what stage the company is restored to existence. These matters are dealt in the order of the Enlarged Board.

2. *Point of law of fundamental importance*
 - 2.1 The basis of the present referral is that a point of law of fundamental importance arises (Article 112(1) EPC). A point of law is to be regarded as of fundamental importance if its impact extends beyond the specific case at hand and, for example, if it could be

relevant to a large number of similar cases and/or is important not only to the users of the European patent system but also to the Boards of Appeal and the EPO itself. See **G 1/12** of 30 April 2014 (to be published in OJ EPO), points 11 and 12 of the Reasons.

2.2 The referring Board considered that a point of law of fundamental importance was involved since the question concerned the system of remedies provided for in the EPC, the acquisition and retention of the status of party to proceedings before the EPO and the relationship between the EPC and national law. See point 9 of the Reasons.

2.3 The referred questions need, however, to be considered in a wider context:

2.3.1 First, it is to be noted that the referral is concerned with a company which has ceased to exist rather than to a company which is in some form of (often insolvent) liquidation or administration procedure under national law, whereby the company continues to exist although usually subject to limitations on its capacity to act.

2.3.2 More significantly, the present referral needs to be seen in the wider context of the various different systems of national law which govern legal entities. Thus the case before the referring Board relates exclusively to a company which is subject to and governed by UK law. It is in particular concerned with a company that has ceased to exist as a legal entity but which has later been restored to existence using a particular procedure available under UK law, the effect of which is that the company is deemed to have

continued in existence as if it had not ceased to exist (UK Companies Act 2006, section 1028(1)). In addition, UK law provides expressly for what is to happen to any assets or rights which the company possessed immediately before it ceased to exist. Thus all property and rights whatsoever vested in or held on trust for the company immediately before it ceased to exist are deemed to be "*bona vacantia*" ("ownerless goods") and accordingly vest in and accrue to the Crown (i.e., Her Majesty the Queen) and may be dealt with accordingly (section 654(1) of the UK Companies Act 1985, the act in force when FBL ceased to exist). The idea behind "*bona vacantia*" is that under UK law there must always be someone in whom property or rights are vested, in this case the Crown. See Halsbury's laws of England, 5th Edition, Volume 12(1), paragraph 231. The effect of FBL's restoration to existence was that all such property and rights became FBL's once again (see Halsbury's laws of England, 5th Edition, Volume 12(1), paragraph 238).

- 2.3.3 However, under Article 99(1) EPC any person can give notice of opposition to a European patent. Here "any person" includes any legal person or any body equivalent to a legal person by virtue of the law governing it. See **G 3/99** (OJ EPO 2002, 347), point 9 of the Reasons, citing **T 635/88** (OJ EPO 1993, 608), point 2 of the Reasons. Thus any legal entity recognised as such under any system of law anywhere in the world may give such notice, and not just those recognised under the laws of the Contracting States to the EPC. The Enlarged Board is aware that provisions equivalent to the above provisions of the UK Companies Act apply under the laws of the Republic of Ireland: see section

311(8) of the (Irish) Companies Act, 1963, as subsequently amended. The position may also be the same under other systems of law which, for historical reasons, have similarities to the UK system (as also submitted by FBL).

2.3.4 So far as other European national systems of law are concerned, however, for at least two of them the questions raised by the present referral appear to be of no relevance. Thus the Enlarged Board understands that if a company established under German law is removed from the register it only ceases to exist if also it is without assets ("*vermögenslos*"), these two conditions being known as "*Doppeltatbestand*". If this latter condition is not satisfied, a later restoration of the company to the register where a further need to wind up the company or its affairs becomes apparent does not have retroactive effect but rather is of a declaratory nature as to the continuing existence of the company: the company is deemed to have always continued in existence. See the submissions of the President, point 2.4. The Enlarged Board understands also that the status of opponent which a company enjoys in opposition proceedings before the EPO before being removed from the register would be considered as an asset for these purposes or as part of its affairs which would be considered as not having been wound up ("*Auswirkungen auf laufenden Prozesse*"): see *Hachenburg/Ulmer GmbHG*, 8. Aufl., § 74, Rdn 27. Further, although a company which has not ceased to exist but which has been struck off the register is incapable of acting, an authorization given to a representative while the company was still capable of

acting remains valid. See again the submissions of the President, point 2.4.

2.3.5 Again, so far as the Enlarged Board is aware, the position under French law appears to have no direct comparison to that under English law. Thus French law differs from English law in that striking a company off the register of companies (the "RCS") does not, by itself, have any effect in terms of loss of that company's legal personality or, therefore, any bearing on its capacity to act in judicial proceedings. In fact, dissolution of a company is only the first step towards its loss of legal personality, i.e., the point at which the dissolved company ceases to exist. Legal personality persists (for the purposes of liquidation) until all the assets associated with the company have been liquidated, the disposal of all the company's assets and liabilities, by liquidation or transfer, bringing its legal personality to an end so that it ceases to exist. Further, dissolution, as opposed to striking off, is generally irreversible. The existence of an action depends on the legal existence of the person bringing or defending it, the latter being the source of that person's capacity to act in judicial proceedings. Whilst legal personality persists for the purposes of liquidation, only the liquidator can act as legal representative. Acts, including procedural acts, performed by the ex-directors are void.

2.4 Nevertheless, the legal constellation underlying the referred questions may occur in other cases as well. The Enlarged Board takes into account the fact that issues relating to the deemed retroactive existence of a company could arise in situations other than the

present opposition appeal proceedings. Therefore, the Enlarged Board accepts that the reference raises a point of law of fundamental importance.

3. According to Article 112(1)(a) EPC, a referral to the Enlarged Board should only be made if a decision by the Enlarged Board is considered to be necessary. Such a decision is necessary if the referring Board's decision depends on the Enlarged Board's ruling. The Enlarged Board accepts that the referred questions cannot be answered directly and unambiguously by reference to the EPC (see **G 1/12**, point 11 of the Reasons). In the light of the proprietor's submissions, the Enlarged Board further also accepts that it does not clearly follow from the existing case law of the Boards of Appeal that the procedural issues which have arisen in the present case could be solved without answering the questions referred.
4. The referral is therefore admissible.
5. As already indicated, answers to the referred questions cannot be found directly and unambiguously by reference to the provisions of the EPC. The Enlarged Board considers that they must therefore be found by looking at the interrelation of national law and the EPC. As to this, the following factors appear to be relevant:
 - 5.1 Legal entities such as companies exist only by virtue of the national legal system which governs their incorporation, subsequent existence and cessation (the term "national legal system" as used herein and in the following is meant to embrace also regional law in cases involving legal entities such as the Societas

Europaea). So far as the EPC is concerned, the existence or non-existence of a legal entity is exclusively a matter for such national law. See, for example, **T 15/01** (OJ EPO 2006, 153), point 9 of the Reasons. The legal personality of an entity acting in proceedings under the EPC is to be decided on the same basis as before national courts, namely the capacity to sue or to be sued in its own name and on its own account: see **G 3/99**, op. cit., point 9 of the Reasons.

5.2 It is a generally recognized principle of national law and also under the EPC that legal entities which do not exist cannot bring or take part in proceedings. See for example **T 353/95** of 25 July 2000, point 2 of the Reasons.

5.3 Unlike the position of an applicant or proprietor of a European patent, the status of an opponent is a purely procedural status and the basis on which it is obtained is a matter of procedural law governed by the EPC: **G 3/97** (OJ EPO 1999, 245) point 2.1 of the Reasons. While the status of a legal person as such has to be determined by the applicable national law, the right to bring opposition proceedings, to take part in such proceedings before the Opposition Division, to file a notice of appeal and to take part in appeal proceedings and have a legally binding decision issued on its requests are thus all matters subject to and to be determined autonomously by the procedural law of the EPC. See **T 15/01**, op. cit., point 9 of the Reasons.

5.4 The issues raised by the referred questions should be resolved by also taking into account general principles such as equal treatment, legal certainty and procedural

efficiency and by considering the interests of the parties involved and of the general public. See **T 1091/02** (OJ EPO 2005, 14), point 2.4.1 of the Reasons.

6. The Enlarged Board considers that the starting point should be the clearly established principle under the EPC that national law should be referred to in order to determine whether a legal entity exists or has ceased to exist, and has capacity to act (see point 5.1, above). As a first step, therefore, the EPO should clearly follow UK law in the present case at least to the extent that the EPO should recognise that FBL existed and had capacity to act before it ceased to exist and that the same applies after it was restored to existence.
7. As to the next step, the Enlarged Board provisionally considers that the EPO should also follow national law as regards the deemed retrospective existence of such a legal entity. This is merely to apply the general principle that such issues are the exclusive concern of national law.
8. There are of course limits on the extent to which the EPO should follow national law. For example, a provision of national law which purported to confer on a company procedural rights which were contrary to the EPC could not be acknowledged by the EPO. Such matters are the exclusive concern of the EPO and cannot be usurped by national law. An example of the interface between national law and the EPC relates to the transfer of oppositions. While the validity of the contract purporting to transfer the opposition as

between the parties is a matter to be determined by the relevant national law, the procedural status of opponent is nevertheless not freely transferable:

G 2/04 (OJ EPO 2005, 549).

9. The question is then whether any limits should be set on the above deference to national law having regard to the circumstances of the present referral, for example because of any adverse consequences which would follow for the proprietor, other parties to the proceedings, the EPO or the general public. The answer should have regard to the fact that an opponent company may cease to exist and then be restored to life at any stage before, during or after opposition proceedings. The answer should also not depend on the reasons why the opponent company ceased to exist or to what extent its directors or representative could be considered as culpable for this event. The possible effect of the conduct of a party or its representative on proceedings is a different issue which forms no part of the present referral. See point 17, below.
10. So far as the proprietor, the Opposition Division and the referring Board were concerned, until September 2012 all had proceeded on the assumption that FBL existed. To recognise the retroactive existence of FBL would simply be to confirm this assumption.
11. As to the general public, the possibility is remote that an interested member of the public, having inspected the UK Register of Companies and found that FBL no longer existed, would then have relied exclusively on this information in order, for example, to conduct their business. If they had an interest in

the proceedings before the EPO, it is more likely that they would have relied on the information to be found in the EPO register of patents and/or on what information was available from inspection of the public file at the EPO. If they had information from all these sources they might well have been puzzled by what they had learnt, but it is highly unlikely that they would simply have ignored the information available from the EPO.

12. On the other hand, if steps taken in opposition proceedings were to be retrospectively declared a nullity, potentially many years after the filing of the opposition, the previous assumptions made by the proprietor, the EPO and the public would turn out to have been false.

13. A competing interest is of course that of the proprietor. It is argued that to recognise the retroactive restoration of FBL to existence would be to deny the proprietor's right to have had the appeal and opposition proceedings dismissed as inadmissible. The submission, however, begs the question of whether the proprietor had such a right. Certainly, in proceedings before the opposition division a proprietor would have the right to request the bringing to an end of those proceedings by the appropriate means once the non-existence of the opponent company had been discovered. The same applies to appeal proceedings. The Opposition Division or the Board of Appeal, if presented with a counter-request to adjourn the proceedings to enable the opponent company to apply to be restored to existence, would have been faced with the problem that the opponent company at that point did not exist.

Whether the Opposition Division or the Board of Appeal would have adjourned the proceedings, if necessary of its own motion, to enable this to happen would in the Enlarged Board's opinion have been a matter for the exercise of their discretion. (In the present case FBL was restored to existence while the proceedings had been ordered to be continued in writing to enable the FBL to file submissions - see point II(e), above).

14. The Enlarged Board accepts that a proprietor's interest in wishing to bring the opposition proceedings to an end is a legitimate one but concludes that there is no clear balance in a proprietor's favour leading to the conclusion that a company's retrospective existence as a matter of national law should not be acknowledged by the EPO in such circumstances. The ability of the parties, the EPO and the public to have confidence in the public record and the need for certainty are just as important. The Enlarged Board therefore confirms its provisional conclusion (point 7, above).
15. This conclusion does not appear to be out of step with the general position under other systems of national law, in so far as the position is known to the Enlarged Board and can be considered equivalent (see points 2.3.4 and 2.3.5, above).
16. So as concerns the various arguments of the proprietor:
 - 16.1 The Enlarged Board of course accepts the general principles that a legal entity which does not exist cannot be, or cannot remain a party to proceedings; that where an opposition or an appeal is filed by a non-existent company the opposition or appeal will in

principle be inadmissible; that where a sole opponent ceases to exist the opposition division may terminate the proceedings; and that where a sole appellant who was opponent ceases to exist the appeal proceedings should be terminated by the appropriate means. None of these principles, however, can necessarily be extended to deal with the case where an opponent company is restored to existence with retroactive effect under national law. Indeed, this point is at the heart of the referred questions.

16.2 As to the cases cited by the proprietor in support of the proposition that an appeal by a defunct company is inadmissible (**T 525/94** of 17 June 1998, **T 353/95** of 25 July 2000, **T 477/05** of 22 February 2007 and **T 480/05** of 8 March 2007), these were cases where the appellant had apparently ceased to exist with the consequence that the appeal proceedings were brought to an end. Again, however, while they show that the FBL's appeal could have suffered the same fate in the period when it did not exist, they do not help answer the question of what should happen when, under national law, an opponent appellant is deemed always to have existed.

16.3 The proprietor referred to the principle that opposition proceedings should be a simple, speedily conducted procedure (**G 2/04**, point 2.1.4 of the Reasons). It is true that the discovery that an opponent company has ceased to exist may, if proceedings are adjourned to allow an application to be made to restore the company to existence, delay the proceedings. However, the time taken to restore FBL in the present case was about three months and in any event took place while the proceedings were adjourned

to allow the parties to file submissions. The Opposition Division and Boards of appeal have a remedy where the delay is unreasonable or amounts to an abuse, namely not to adjourn the proceedings but to bring them to an end.

16.4 The Enlarged Board's conclusion does not mean that national law trumps or overrules the EPC. The EPC and national law (here that of the UK) are not inconsistent with each other in this respect.

16.5 It is true that the EPC provides for various remedies, such as further processing and re-establishment of rights (Articles 121 and 122 EPC, respectively) in cases where a party has suffered a loss of rights. The proprietor refers to **G 1/97** (OJ EPO 2000, 322), point 4 of the reasons, 2nd paragraph, in support of the proposition that the Enlarged Board should be very reluctant to extend the existing codified remedies under the EPC. However, the present case is not concerned with the grant of new procedural remedies but with whether national law should be followed as regards the deemed existence of a company.

16.6 The Enlarged Board's conclusion does not mean that a proprietor in such circumstances is faced with the possibility that a defunct opponent may reappear many years later. Where, for example, an opposition has been rejected as inadmissible because it was filed by an opponent which did not exist, the company will not later be able to deny that the order was notified to it (and thus claim that the order has not yet become final) while, at the same time, claiming that it is deemed always to have existed (see also point 19,

below). As a side-note the Enlarged Board also understands that under UK law as it now stands the possibility of restoring a company to existence is basically only available within the period of six years from the date of the company ceasing to exist (UK Companies Act 2006, section 1030(4)).

16.7 The proprietor has argued that the non-admissibility of the opposition and the appeal is demonstrated by the fact that after FBL ceased to exist the authority of its attorney will have lapsed. First, however, the submission begs the question of the retroactive effect of the company's restoration to existence. Secondly, according to Rule 152(8) EPC a representative shall be deemed to be authorised until the termination of his authorisation has been communicated to the European Patent Office.

16.8 Contrary to the proprietor's submissions, the Enlarged Board does not see that the fact that the order of the English court did not mention why FBL was restored is of any relevance. The same applies to the submission that the UK court may give further directions for placing the company "as nearly as may be" in the same position as if it had not been struck off. No evidence was filed to support these submissions. So far as the Enlarged Board is aware the provision whereby a company is retroactively restored to existence takes effect, as a matter of UK law, exactly in accordance with its wording: see the decision of the Court of Appeal of England and Wales in *Peaktone Ltd v. Joddrell* [2012] EWCA Civ 1035.

17. As to the proprietor's suggestion that the Enlarged Board should also comment on whether an obligation to inform the EPO about important procedural requirements at the EPO exists, and what the consequences of non-compliance are, this does not form part of the referred questions and there is no factual basis for any such "comment". Indeed the referring Board refused to include such a question in the decision, saying (point 11 of its Reasons):

"The respondent has not explained the relevance of the question which it asks the Board to refer to the Enlarged Board of Appeal concerning the parties' obligation to keep the EPO informed about certain matters. In particular, the respondent has not indicated what specific consequences would, in its view, follow in the present case from a failure to comply with such an obligation (were the existence thereof established). The Board does not therefore consider it necessary to refer that question to the Enlarged Board of Appeal."

18. The tenor of the Enlarged Board's answer to Questions 1 and 2 is in each case therefore: yes. In the circumstances Question 3 does not call for an answer. The Enlarged Board has already noted that the referred questions need to be reformulated to refer to a company as having ceased to "exist" rather than as having been dissolved. In addition, in Question 1 the stage at which the company is restored to existence is left unclear and therefore needs some reformulation.

19. Finally, it needs to be made clear that, in circumstances such as these, full effect should be

given to any procedural steps which have been taken place while the opponent company was not in existence. The restored company cannot be placed in a better position than if it had in fact continued in existence all the while.

Order

For these reasons it is decided that:

The questions referred to the Enlarged Board of Appeal are answered as follows:

1. Where an opposition is filed by a company which subsequently, under the relevant national law governing the company, for all purposes ceases to exist, but that company is subsequently restored to existence under a provision of that governing national law, by virtue of which the company is deemed to have continued in existence as if it had not ceased to exist, all these events taking place before a decision of the Opposition Division maintaining the opposed patent in amended form becomes final, the European Patent Office must recognize the retroactive effect of that provision of national law and allow the opposition proceedings to be continued by the restored company.
2. Where, in the factual circumstances underlying Question 1, a valid appeal is filed in due time in the name of the non-existent opponent company against the decision maintaining the European patent in amended form, and the restoration of the company to existence, with retroactive effect as described in Question 1

takes place after the expiry of the time limit for filing the notice of appeal under Article 108 EPC, the Board of Appeal must treat the appeal as admissible.

3. Not applicable.

The Registrar:

The Chairman:

W. Crasborn

W. van der Eijk