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D E C I S I O N
of 29 November 1996

Case Number: J 0048/92 - 3.1.1
Application Number: 88302811.0
Publication Number: 0289141
IPC: C09D 11/00

Language of the proceedings: EN

Title of invention:
Thermochromic jet ink

Applicant:
VIDEOJET SYSTEMS INTERNATIONAL, INC.

Opponent:
-

Headword:
Due care/VIDEOJET II

Relevant legal provisions:
EPC Art. 86(2), 122

Keyword:
"Due care (no)"

Decisions cited:
J 0002/86, J 0003/86, J 0021/91, J 0022/92, J 0024/92,
T 0030/90, T 0111/90

Catchword:



Case Number: J 0048/92 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 29 November 1996

Appellant: VIDEOJET SYSTEMS INTERNATIONAL, INC.
2200 Arthur Avenue
Elk Grove Village, Illinois (US)

Representative: Goddin, Jeremy Robert
The General Electric Company plc
GEC Patent Department
Waterhouse Lane
Chelmsford
Essex CM1 2QX (GB)

Decision under appeal: Decision of the Examining Division of the EPO
dated 27 August 1992 refusing the request for re-
establishment of rights into the period for
paying the fourth year renewal fee with surcharge
on European application No. 88 302 811.0.

Composition of the Board:

Chairman: J.-C. Saisset
Members: S. C. Perryman
B. J. Schachenmann

Summary of Facts and Submissions

- I. European patent applications Nos. 88 301 690.9 and 88 302 811.0 were filed in the name of the appellant on 26 February 1988 and 30 March 1988 respectively. The fourth year renewal fees due on No. 88 301 690.9 in February 1991, and on No. 88 302 811.0 in March 1991 were paid neither in the normal period nor, with a surcharge, in the six months extension period provided for by Article 86(3) EPC.
- II. The ultimate parent company of the appellant and of the appellant's US parent company had a patent department located in Chelmsford, England. A professional representative who was the manager of the Chelmsford patent department was at the relevant time entered as representative of record for both European patent applications. Renewal fee matters were dealt with in this Chelmsford patent department by an Administrative Section.

Responsibility for instructions regarding the applications lay with an in-house US patent attorney ("in-house attorney") of the US parent company of the appellant, which attorney was in contact with those concerned in the appellant. The in-house attorney communicated with the Chelmsford patent department either directly, or via an outside firm of US patent attorneys who were prosecuting equivalent US patent applications ("US prosecuting attorneys").

No notifications concerning the need for the payment of fourth year renewal fees either in the normal period or, with a surcharge, in the six months extension period provided for by Article 86(2) EPC if the

applications were to remain in force, were sent to the in-house attorney or the US prosecuting attorney by the Administrative Section.

The notification sent to the appellant care of the representative of record by the European Patent Office on each application on Form 2522 stating that the fourth yearly renewal fee had not been paid but could still be paid with a surcharge in the six month extended period, was in each case on receipt in the Chelmsford patent department passed directly to the Administrative Section, and there considered and then filed away as requiring no action, without being referred to the professional representative responsible and without being communicated to the in-house attorney or the US prosecuting attorney.

On 31 October 1991 the Administrative Section sent the in-house attorney by telefax a letter concerning the fact that they had received renewal reminders on another application and on a patent, and that although they were not responsible for renewal fee payments, they would be grateful for confirmation whether these "patents" had been renewed or whether they had been abandoned so that they could update their computer records. The response of 1 November 1991 to this by the in-house attorney indicated that he considered that on European applications in the application stage, the fees were being handled by the prosecuting attorney. As this was not the basis that the Administrative Section was working on, the clerk concerned contacted the professional representative in the Chelmsford patent department then having direct responsibility for these applications on 4 November 1991. On the same day the EPO notice under Rule 69(1) EPC dated 31 October 1991 to the effect that application 88 302 811.0 was deemed abandoned was received and given to the professional

representative. The latter immediately investigated the status of all the European patent applications being dealt with by the Chelmsford patent department on behalf of the appellant and its US parent company, and then telephoned and corresponded with the in-house attorney. By the 12 November 1991 it had emerged that inter alia the fourth year renewal fees on the applications subject of the appeals should have been paid.

- III. After collecting evidence as to how the failure to pay had come about, applications for re-establishment under Article 122 EPC were filed in respect of each of the applications on 9 December 1991 together with the unpaid fees and surcharges. To show what had occurred, the applications contained seven pages of explanation and were accompanied by copies of twelve pages of correspondence as evidence.

The applications for re-establishment attributed the failure to pay the renewal fees entirely to a misunderstanding between the in-house attorney and the Administrative Section, referring to the fact that on 29 January 1991 the Administrative Section had sent by telefax to the in-house attorney a letter with a heading "Patents in Great Britain and Europe" asking for annuity instructions for the period February to July 1991 as these had not been received. The in-house attorney replied by letter 31 January 1991 (received 18 February 1991) under the same heading that they had centralized the monitoring and payment of annuities of all of the patents by engaging the services of a US annuities firm, and that he had previously discussed with the manager of the Chelmsford patent department their intention to do this. The Administrative Section took this as applying also to European patent applications, whereas the in-house attorney intended

that the Administrative Section would continue to be responsible for annuities on pending European patent **applications** and send reminders regarding payment of such annuities to the US prosecuting attorney. Due to this misunderstanding the Administrative Section understood that the US annuities firm were responsible for monitoring and paying such annuities and took no action in the absence of any subsequent instructions from the in-house attorney.

The notices received under Article 86(2) EPC were not referred to the professional representative responsible because the Administrative Section understood that the US annuities firm was responsible for monitoring and payment and no information had been given the Chelmsford patent department about which patents and patent applications were being abandoned by non-payment of annuities. Similarly the EPO notice under Rule 69(1) EPC dated 8 October 1991 in respect of 88 301 690.0 was received on 10 October 1991 and merely placed with the other reminders by the Administrative Section as they concluded that the application had been deliberately abandoned by the US annuities firm.

- IV. The application for re-establishment in particular emphasized (page 3, second paragraph) that decisions regarding annuity payments on patents and patent applications were taken by the in-house attorney on a periodical basis on the basis of manual records kept by the staff of the appellant under the close supervision of the in-house attorney, and the Administrative Section were not required to send reminders to the in-house attorney regarding annuities falling due, but did on their own initiative operate an overview procedure to ensure that the in-house attorney's instructions were received in good time and were comprehensive.

V. In each decision under appeal, the Examining Division found that the failure to pay the fees had occurred because the US attorney had not exercised all due care in making clear what he required from the Chelmsford patent department as to renewal reminders, and as to what should be done with communications, and that accordingly the requirements of Article 122 EPC for re-establishment had not been met.

VI. An appeal was filed in each case by letter dated 23 October, received 26 October, 1992, with a request in each case to reverse the decision under appeal and to consolidate the two proceedings, and the appeal fees were paid.

Grounds of Appeal extending to twenty seven pages were filed by telefax on 7 January 1993. Extensions of time were requested and granted in which to file evidence in support. By 2 February 1994 evidence in the form of affidavits by the in-house attorney, by the former manager of the Administrative Section and by a patents renewal clerk in the Administrative Section was on file.

VII. In communications in each case dated 25 February 1994, the Board stated inter alia that in accordance with the appellant's request under Article 9(2) of the Rules of Procedure of the Boards of Appeal in each appeal, the Board proposed to deal with the two appeals in consolidated proceedings. Further it was indicated that while the provisional conclusion of the Board was that the decisions of the first instance could not be upheld on the grounds therein stated, the Board nevertheless tended to the opinion that the applicant had not made out a case that the failure to pay the respective renewal fees in time was in spite of all due care required by the circumstances having been taken, and

gave an indication of the areas where it was still not clear exactly what had happened.

VIII. In response to this communication, the appellant filed a supplementary statement of grounds of appeal and further evidence in the form of second affidavits by the in-house attorney and the patents renewal clerk, and an affidavit by the manager of the Chelmsford patent department.

IX. The evidence showed inter alia that in a letter dated 2 January 1990 the manager of the Administrative Section wrote the in-house attorney under the heading "Payment of Annuities due on UK Patents" it was stated:

"I confirm receipt of your fax dated 1st December with reference to payment of annuities during the period January 1, 1990 to June 30, 1990.

I note that European Patent applications Nos. 88 301 690.9 and 88 302 811.0 do not appear on your list of instructions, but according to our records, renewal fees are due by 26 February and 30 March. Could you please let me have your instructions on these cases as soon as possible.

..."

In reply using the same heading "Payment of Annuities due on UK Patents" the in-house attorney wrote in a letter dated January 18, 1990:

"Thank you for your facsimile dated 2nd January, 1990 concerning the above referenced subject. Would you please place European patent application Nos. 88 301 690.9 and 88 302 811.0 on your rolls for future maintenance and pay the upcoming renewals due on 26 February and 30 March, 1990...."

With reference to this letter the in-house attorney stated in paragraph 5 of his first affidavit:

"...I specifically asked [the Chelmsford patent department] to ensure that European patent applications 88 301 690.9 and 88 302 811.0 be placed "on your rolls for future maintenance." In doing so, I understood that [the Chelmsford patent department] would be responsible for paying future maintenance fees and would keep me advised regarding the deadlines within which I should obtain instructions from the Appellant."

X. In the affidavit of the manager of the Chelmsford patent department the following paragraphs appear:

"7. I understand that whatever instructions are received not to pay a maintenance fee on a European patent application, a Notice under Article 86(2) will eventually be issued by the European Patent Office drawing attention to the non-payment of the fee by the due date. Although such notices are addressed to the specific Professional Representative, they were, at the relevant time, always routed direct to the Administrative Section as they held all records of annuity instructions and payments. The Administrative Section then checked the Article 86(2) Notice against their records to ensure that everything was in order. If so, the Administration Section would not be expected to waste the valuable time of the professional Representative by informing him or her that nothing was amiss and the Notice would therefore be filed away. On the other hand, if the check indicated that something was amiss, e.g. a non-payment had occurred contrary to the applicant's instructions, I would have expected the Article 86(2)

Notice to be referred to me and/or the Professional Representative together with full details so that appropriate action could be taken.

8. In late 1990, probably during the month of December, I had a telephone conversation with [the in-house attorney] who told me he had transferred responsibility for all annuities to [US annuities firm]. I advised [the in-house attorney] that this action was not in accordance with the normal procedures for [the UK ultimate parent company], but I agreed that, since the transfer had already taken place, responsibility should stay with the US annuities firm, pro tem.

9. As a result of this telephone conversation I understood that [the Chelmsford patent department] would not receive any further instructions to pay any annuities. I remember notifying the Administrative Section of this development.

10. Up to the receipt of D4 [the letter of 31 January 1991 from the in-house attorney] on 18 February 1991 the Administrative Section of [the Chelmsford patent department] only paid annuities on the specific instructions of the [in-house attorney]. These instructions were issued every six months.....At no time was I or, so far as I am aware, the Administrative Section of [the Chelmsford patent department], asked to provide any reminders about which patents or patent applications were due for renewal or the deadlines for doing so."

"14. At no time was there any discussion or correspondence with [the in-house attorney] regarding Notices and Communications sent to me as Professional

Representative which I would have assumed should continue to be dealt with in the usual manner."

XI. Oral proceedings took place on both cases together on 29 November 1996. On behalf of the appellant it was argued essentially that:

- The system used by the Chelmsford patent department for monitoring renewal fees was a satisfactory system, the data on the applications concerned had been correctly entered on the computer data base for renewals, and but for the unfortunate misunderstanding in February 1991 between the Administrative Section and in-house attorney, which led the Administrative Section to believe that the renewals were being dealt with elsewhere, the system would have ensured due payment of the renewal fees. The misunderstanding was an isolated mistake in an otherwise satisfactory system, for which isolated mistake the appellant should not be penalized. All due care required by the circumstances had been exercised and the appellant should be granted re-establishment.

- The UK parent company patent department had some 7500 patents on which renewal fees were monitored, and 475 pending European applications so that many Article 86(2) EPC notices were received, which was a very substantial work load. Any system which could cope with this had to be classified as normally satisfactory. Decisions as to renewals were assiduously noted and always carried out. If no decision was given they had power to pay fee being the parent company.

- As appeared from exhibits S3 and S4 the computer system had generated renewal reminders concerning

these applications, but these were marked "taken out of our hands" when the misunderstanding between the Administrative Section and the in-house attorney occurred.

- Article 86(2) EPC notices were routed to the Administrative Section, as the primary question was whether action was required. If the file was an active file the Article 86(2) EPC notice would be taken to the European representative to look at as a matter of urgency. If records showed "dropped" the clerk took no action. The clerk followed instructions slavishly. As a renewals clerk, the person concerned did not recognize the correct category for notices on these applications where she had no information as to whether they were "dropped" or "active", and filed them away under the impression that nothing was required as the matter was "out of our hands".
- The understanding of the renewals clerk that nothing need be done, was in fact close to that of the manager of the Chelmsford patent department after his telephone conversation with the in-house attorney.
- As a result of this incident the system had been changed, every Article 86(2) EPC notice now going first to the renewals clerk in the Administrative Section and then with her comment to the European representative.
- It should be taken into account that the in-house attorney was having to make a major reorganisation in the organisation of his renewal payments, as his secretary who had been there eighteen years had left, and there was similarity here to the situation in decisions J 21/92 and J 24/92 where reestablishment was allowed.

- The two lapsed applications were part of a group of eight on which the renewal fees had not been paid.
- There was no need to give the renewals clerk specific instructions, it was expected that in unusual circumstances she would refer to the professional representative.
- The way the matter was dealt with was not what normally happened with the UK ultimate parent company. It frequently happened that they buy or sell patent portfolios - but then a schedule would be provided listing in detail patents and applications.
- The in-house attorney used due care in asking in his letter of January 1990 that the applications be placed on the Chelmsford patent department's rolls for maintenance. But for the later misunderstanding this would have ensured that the renewal fees would be paid. This was an isolated mistake, and did not negative due care.
- It was not conceivable that this kind of mistake could occur, so that taking further precautions could not reasonably be demanded.
- Relying on decisions J 22/92, and T 111/92, the principle of proportionality should be taken into account. Losing the applications was too harsh a penalty for the single misunderstanding which caused the failure to pay. The applications were important to the appellants as part of their business, and they had already suffered a severe penalty by the time and cost of the procedure.

- Regarding the requests for referral of questions to the Enlarged Board, if the decision of the first instance were to be found wrong, and yet the same result be reached on other grounds this would be quite alien to how people operate in the UK. (In answer to a question from the Board it was indicated that no cases or textbooks were relied on for this proposition.) In order not to deprive the applicant of his right to appeal, the Board should allow the appeal and remit the case to the department of first instance for further prosecution, or else at least refer the questions of law forming the first auxiliary request to the Enlarged Board (see point XII. below).

- The Board appeared to be interpreting the requirement of "all due care" in Article 122(1) EPC as requiring a higher standard of care than was considered appropriate in decision T 30/90 which refers to "all due care" as meaning all reasonable care, that is to say, the standard of care that the notional reasonably competent patentee/applicant/representative would employ in all the relevant circumstances. Accordingly it was requested to refer the question in the second auxiliary request to the Enlarged Board (see point XII. below).

XII. At the end of the oral proceedings the representative of the appellant requested in each case to reverse the decision of 27 August 1992 to refuse the application filed 9 December 1991 for re-establishment of rights in respect of the time limit under Article 86(2) for payment of the renewal fee for the fourth year concerning European patent application 88 301 690.9,

respectively 88302811.0, together with reversal of the decision to deem the patent application withdrawn on 2 September 1991, respectively 1 October 1991.

As a first auxiliary request, to refer to the Enlarged Board of Appeal the questions contained in the letter dated 27 November 1996 submitted at the oral proceedings:

In a case where an application under Article 122(1) EPC for Restitutio in Integrum has been refused by the department of first instance on a first set of grounds and the applicant has lodged an Appeal under Article 106(1) EPC and the Legal Board of Appeal has issued a provisional conclusion that the decision of the first instance could not be upheld on the grounds therein stated, can the Legal Board of Appeal uphold the decision of the first instance on entirely different grounds by exercising under Article 111(1) EPC any power within the competence of the department of first instance thereby depriving the applicant of the right to appeal under Article 106(1), or should the Legal Board of Appeal allow the Appeal and remit the case to the department of first instance for further prosecution as also provided by Article 111(1) EPC.

If the case has been remitted by the Legal Board of Appeal to the department of first instance for further prosecution under Article 111(1) EPC, does the department of first instance have the power subsequently to refuse re-establishment of the applicant's rights on different grounds.

As a second auxiliary request, to refer to the Enlarged Board of Appeal the questions submitted in the handwritten form at the oral proceedings:

In Article 122(1) EPC does the level of "all due care" mean all reasonable care, that is to say, the standard of care that the notional reasonably competent patentee or applicant or professional representative would employ in all the relevant circumstances.

Reasons for the Decision

1. The appeal in each case is admissible.

2. In each case the renewal fees for the fourth year were not paid due to a misunderstanding in February 1991 between the in-house attorney responsible on behalf of the appellant for instructing payment of the renewal fees, and the Administrative Section of the UK ultimate parent company's Chelmsford patent department responsible for actually making the payment of renewal fees on the appellant's European patent applications. The in-house attorney expected to be notified by the Administrative Section of any such fees due, whereas due to the February 1991 misunderstanding the Administrative Section thought that someone else had responsibility for payment of the renewal fees, and as a result neither notified the in-house attorney of the fees due, nor passed on the notifications from the European Patent Office concerning the possibility of paying such fees with a surcharge in an extended period. As a result the in-house attorney, acting for the appellant, was unable to observe the time limit for payment of these renewal fees. The misunderstanding, the cause of this non-compliance, was removed some time between the 4 and 12 November 1991. Applications for re-establishment were filed in writing on 9 December 1991, well within two months of the removal of cause of

non-compliance. The applications for re-establishment thus fulfil the requirements of Article 122(2) EPC.

3. At the time of the failure to pay the renewal fees the two applications were not integrated into any system for the payment of renewal fees. On the evidence the Board accepts that the in-house attorney believed (see IX above) that he had given the Chelmsford patent department instructions to notify him of renewal fees due, but this was not at any time the understanding of the Chelmsford patent department.

Prior to the misunderstanding of February 1991 the Administrative Section did not send a preliminary notification indicating that renewal fees were due and requesting instructions for payment, but rather the Administrative Section were merely monitoring receipt of instructions and querying their absence, see letter of 29 January 1991 (see III above).

After the misunderstanding in February 1991 the Administrative Section considered that renewals had been taken out of their hands. The Administrative Section thereafter gave no notification of renewal fees due, no longer queried the absence of instructions and filed away notifications from the European Patent Office, which if sent on to the in-house attorney might have alerted him to the need for payment. Viewed objectively there was after the misunderstanding no arrangement at all in operation for informing the in-house attorney of renewal fees that needed to be paid on the applications to maintain them in force.

4. Even viewed subjectively, from the point of view of the European professional representative of record on the applications, the manager of the Chelmsford patent department, that the in-house attorney had transferred

the responsibility for renewals also for these European patent applications to someone else, no consideration was given (see point IX above citing paragraph 14 of affidavit) to whether the system operated by the Chelmsford patent department would operate under these conditions. The standing instructions were that notices from the European Patent Office regarding renewal fees were to be referred to the Administrative Section. But if renewals had, as believed, been taken out of their hands, these notices were not of concern to the Administrative Section but would be of concern to the in-house attorney or whoever was dealing with the renewals. The question of whether the system that the Chelmsford patent department had been operating satisfactorily when they had responsibility for renewals, would also operate when someone else had responsibility for renewals was not considered, but it arose from the instructions that the in-house attorney was believed to have given. In these circumstances due care can only be considered to have been used if the existing system was in fact satisfactory.

5. According to the existing system, notices from the European Patent Office regarding renewals were referred to the Administrative Section. The patents renewal clerk concerned knew that responsibility for renewal had been taken out of the hands of the Chelmsford patent department. From her point of view as renewals clerk it would be understandable that she treated this as something that needed no action by the Administrative Section, and that she should not waste the valuable time of the professional representative by informing him that nothing was amiss (see in point X above cited paragraph 7 of affidavit). The evidence makes clear that she was extremely conscientious, but also expected to follow instructions precisely. However the Board can only consider the fact that according to

the system the notice could be filed away without being shown to a professional representative as a serious defect of the system when applied to an application where responsibility for renewals lay elsewhere. Such notices should have been brought to the attention of the professional representative. The Board further considers that any reasonably competent professional representative would have realized that the notice needed to be forwarded to the in-house attorney or to whoever was appointed by the in-house attorney to look after renewals.

6. In these circumstances the Board holds that the failure to pay the renewal fees did not occur despite all due care being used, and the appeals must be dismissed. This conclusion makes it unnecessary to consider whether the misunderstanding that arose between the in-house attorney on the one hand and the Administrative Section and the manager of the Chelmsford patent department on the other hand as to who should be doing what as regards renewal fees, or the failure to use schedules detailing the patents and applications concerned when indicating a transfer of responsibility for renewals, were also events where all due care had not been used.

7. In view of the appellant's arguments it should also be stated that in these circumstances the Board does not consider that the established jurisprudence of the Boards of Appeal that Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2 and 3/86, OJ EPO 1987, 362) can be applied. Here there was a major system fault, not an isolated procedural mistake.

8. The facts here are substantially different from those in the cases J 0021/92 and J 0024/92 both of 16 March 1995 relied on by the appellant. In those cases there was a reorganisation of their respective renewals systems independently by the US applicant and his US attorney, and two Article 86(2) EPC notices duly sent by the European representative to the US attorney did not come to attention of the US applicant. In those special circumstances due care was found to exist. The Board sees no such special circumstances here. That the in-house attorney was having problems organizing his renewals did not directly affect the system operating in the Chelmsford patent department.

9. Nor do the decisions T 0111/92 of 3 August 1992 and J 0022/92 of 15 December 1994 concerning the principle of proportionality assist the appellant in this case. As already stated in point 3.4 of decision J 0011/93 of 6 February 1996, it must be borne in mind concerning the principle of proportionality that it only applies in borderline cases, in support of other grounds already substantiating to a certain extent the allowance of the appeal. Usually it has been applied where a time limit has been missed by one or two days due to some miscalculation. Here the Board considers that there has been a major system fault, which cannot be excused by reliance on the principle of proportionality.

10. The questions to be referred to the Enlarged Board in the first auxiliary request are based on false premises. The practice of the Boards of Appeal differs from English practice only in that, in common with the situation in the majority of Contracting States to the European Patent Convention, it is normal practice to allow in new evidence on appeal. However it is common also in English practice for an appellate court to take

a different view of the facts or the law from that taken in the decision under appeal, and yet to affirm the decision under appeal on different grounds. The right to an appeal is met even where the first instance and the Board of Appeal come to different conclusions on different reasons. Here in fact the Board and the first instance agree that a failure to pay despite using all due care has not been made out, the difference is merely in the legal appreciation of the facts before them.

11. Whereas there may be cases where the Board would regard a remittal to the first instance for the latter to consider the case anew as appropriate this is not such a one. The main reason for the different view taken by the Board is that it has very much fuller evidence before it, which in part contradicts what was said in the application for re-establishment, compare for example points IV for what is said in the application for re-establishment and point IX for what is said in the evidence. In dismissing the appeal without remitting the matter to the first instance, the Board is following standard practice of the Boards of Appeal, and a referral of the first question of the first auxiliary request to the Enlarged Board is not necessary. An answer to the second question of the first auxiliary request would only be relevant to the outcome of this case if the Board were minded to refer the previous question, or to remit the case to the first instance. As the Board is not so minded, no referral of this second question is appropriate.
12. The Board does not consider that the meaning it attributes to "all due care" implies any higher standard of care than that applied in decision T 0030/90 of 13 June 1991 where in point 3 it was stated:

"The crucial question for deciding upon the allowability of this application for restoration is whether or not the conduct of the Appellant himself and/or of his representatives throughout the whole period following the issuance of the decision under appeal amounted to the exercise of "all due care required by the circumstances". By "all due care" in this context is meant all reasonable care, that is to say, the standard of care that the notional reasonably competent patentee/applicant/representative would employ in all the relevant circumstances."

The Board thus sees no need to refer the question put in the second auxiliary request to the Enlarged Board.

Order

For these reasons, it is decided that:

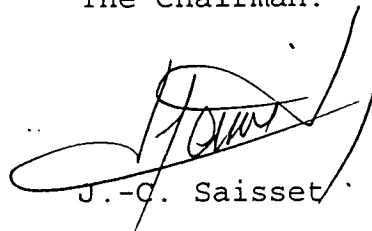
1. The requests for referral of questions to the Enlarged Board of Appeal are refused.
2. The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



J.-C. Saisset