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Datasheet for the decision of 14 July 2016

Case Number: T 1663/13 - 3.3.09

Application Number: 06291197.9

Publication Number: 1886585

IPC: A23L2/60, A23L1/29, A23L1/30, A23F3/40

Language of the proceedings: EN

Title of invention:
Improved beverage

Patent Proprietor:
Unilever PLC
Unilever N.V.

Opponent:
ALLIED PATENTS B.V.

Headword:

Relevant legal provisions:
EPC Art. 104(1)
EPC R. 88(2)
RPBA Art. 16(1), 16(2)

Keyword:
Request for postponing oral proceedings (rejected)
Apportionment of costs - non-attendance at oral proceedings (allowed)

Decisions cited:
T 0490/05, T 1617/12, T 0784/14

Catchword:

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Case Number: T 1663/13 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 14 July 2016

Appellant: (Opponent)	Allied Patents B.V. P/O Box 13136 NL-3507 LC Utrecht (NL)
Representative:	Hoeben, Ferdinand Egon Allied Patents B.V. Postbus 1551 1200 BN Hilversum (NL)
Respondent: (Patent Proprietor 1)	Unilever PLC Unilever House Blackfriars London Greater London EC4P 4BQ (GB)
Respondent: (Patent Proprietor 2)	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Askew, Sarah Elizabeth Unilever PLC Unilever Patent Group Colworth House Sharnbrook Bedford MK44 1LQ (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 15 May 2013 rejecting the opposition filed against European patent No. 1886585 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	M. O. Müller
	E. Kossonakou

Summary of Facts and Submissions

I. This decision concerns the apportionment of costs relating to the appeal filed by the opponent against the decision of the opposition division to reject the opposition against European patent No. 1 886 585.

II. With its notice of opposition, the opponent had requested revocation of the patent in its entirety on the grounds under Article 100(a) EPC (lack of novelty and inventive step) and Article 100(b) EPC.

III. The opposition division summoned for oral proceedings to be held on 12 December 2012 (communication of 8 June 2012). On 11 December 2012, the opponent informed the opposition division that it would not be attending the oral proceedings, which were then cancelled.

IV. In its decision, which was issued in writing on 15 May 2013, the opposition division rejected the opposition and, in view of the fact that the opponent had informed the EPO only at a very late stage that it would not be attending the oral proceedings, decided that the proprietor's request for apportionment of costs was justified and ordered that its travel and accommodation costs be borne in full by the opponent.

V. On 25 July 2013, the opponent filed an appeal. With the statement of grounds of appeal, submitted on 16 September 2013, the opponent requested that the decision under appeal be set aside and that the patent be revoked, and that otherwise oral proceedings be appointed. The opponent did not appeal the opposition division's decision on the apportionment of costs.

VI. With letter of 20 January 2014, the proprietor filed its response to the statement of grounds of appeal, and requested that the appeal be dismissed or that the patent be maintained on the basis of any of the first to sixth auxiliary requests filed with the same letter.

VII. In its preliminary opinion issued on 23 July 2014, the board observed that the opponent's statement of grounds of appeal merely repeated its arguments presented in the notice of opposition, without in any way addressing the decision under appeal. As a result, the appeal did not appear sufficiently reasoned as required by Article 108 EPC, and would therefore most likely have to be held inadmissible. In view of this, if oral proceedings were held, they would most likely be confined to the admissibility of the appeal. The board specifically asked whether the opponent's request for oral proceedings was maintained, and set a time limit of two months for filing any reply to its communication.

VIII. With fax dated 24 September 2014, the opponent requested a two-month extension of the time limit for replying to the board's communication, which was granted. However, instead of providing a response within the extended time limit, the opponent requested a further extension (fax dated 1 December 2014), which was refused.

IX. On 18 December 2014, having received no reply from the opponent either on the merits of the case or to its question as to whether the request for oral proceedings was maintained, the board issued a summons to oral proceedings to be held on Monday, 27 July 2015.

X. On Friday, 24 July 2015, the opponent withdrew its request for oral proceedings and its appeal (fax

received at 14.04 hrs). On the same day, the board cancelled the oral proceedings.

XI. Since the opponent has withdrawn its appeal, the board will continue to refer to the parties as the proprietor and the opponent.

XII. With letter dated 5 August 2015, the proprietor requested

- fixing of the amount of costs ordered by the opposition division in accordance with Rule 88(2) EPC;

- an apportionment of costs in the appeal proceedings, requiring the opponent to bear in full the non-recoverable travel expenses incurred due to the cancelled oral proceedings, as well as the attorney costs for preparing for them;

- fixing of the amount of costs incurred in the appeal proceedings in accordance with Rule 88(2) EPC.

The proprietor's letter contained several documents regarding costs incurred during the opposition and the appeal proceedings, including:

K1: Evidence of the costs paid for the booked flights of Ms Askew from London to Munich and back;

K2: Evidence of the costs paid for the booked flight of Mr van den Brom from Amsterdam to Munich; and

K3: Evidence of the costs paid for the booked flight of Mr van den Brom from Munich to Amsterdam.

XIII. By its communication dated 5 November 2015, the board informed the parties of its preliminary opinion on the proprietor's requests on apportionment of costs, and in particular that it appeared to be equitable for the opponent to bear the cost of four working days' preparation time for the oral proceedings before the board, plus the proprietor's travel expenses in full. The amount of these costs was considered to be 8506.73 € and 277.58 £.

XIV. With letter dated 15 January 2016, the opponent's representative gave reasons for his "actions and lack thereof" during the appeal proceedings and requested that

- the proprietor's request for apportionment of costs incurred during the appeal proceedings be refused;

- subsidiarily, that only hotel and travel costs be apportioned (NB: hotel costs were only an issue in the opposition proceedings, so in the following only travel costs are addressed),

- also subsidiarily, that only 0.85 days for preparing the oral proceedings be apportioned; and

- that the opponent be asked to make further submissions if the above requests were to be refused.

XV. By its communication dated 28 January 2016, the board summoned the parties to oral proceedings to be held on 14 July 2016, and by subsequent communication dated 25 April 2016 observed that the apportionment of costs *per se* and the actual amount to be paid, if apportionment of costs were granted, would be discussed during the oral proceedings.

XVI. With its letter dated 9 June 2016, the proprietor announced that it would not be attending the oral proceedings and requested that the opponent be ordered to pay 8506.73 € and 277.58 £ in line with the board's preliminary opinion.

XVII. On 13 July 2016, the registrar of the board contacted the opponent's representative by telephone to inquire whether he would be attending the oral proceedings on the next day. Subsequently, by fax dated 13 July 2016, the opponent requested that the scheduled oral proceedings be postponed.

Reasons for the Decision

1. Since the only appealing party has withdrawn its appeal, the present decision is confined to the issue of the late-filed request for postponement of the oral proceedings and the apportionment of costs.

2. Request for postponement

2.1 In the light of the history of the file, the registrar of the board phoned the opponent's representative on 13 July 2016 to query whether he would be attending the oral proceedings scheduled for the next day.

Following this telephone conversation, the opponent's representative informed the board by fax that he was unable to attend the oral proceedings and requested that they be postponed.

2.2 He gave the following reasons for this request:

"I have two reasons [for not attending the oral proceedings], one coming from the same reason ... that prevented me last year to attend, the other being a medical one ... , emanating from the first one" (insertion in square brackets by the board).

2.2.1 No evidence whatsoever was provided, e.g. a medical certificate, to support these grounds for postponement. Since the request is thus entirely unsubstantiated, it is not allowable.

2.2.2 Furthermore, according to the notice of the Vice-President of Directorate-General 3 of the European Patent Office dated 16 July 2007 concerning oral proceedings before the boards of appeal of the EPO (OJ EPO 2007, Special Edition No. 3, 115), a precondition for a request for postponement to be allowable is that it is filed as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen. This precondition is not met in the present case. As acknowledged by the opponent's representative, the reasons that prevented him from attending the oral proceedings were, or followed on from, an event that occurred at least as early as last year. Also for this reason, the request to postpone the oral proceedings is not allowable.

2.3 The opponent's representative further argued that he had assumed that the case was closed and therefore had only recently become aware that oral proceedings had been scheduled.

However, this assertion does not withstand scrutiny.

With its communication of 5 November 2015, the board had already informed the parties of its preliminary opinion about the apportionment and fixing of costs. The opponent's representative replied to this communication with its letter dated 15 January 2016; he was thus aware that the issue of costs was still outstanding and that the case was not closed as regards this issue.

Furthermore, the opponent's representative was also aware of the summons to oral proceedings scheduled for 14 July 2016. This was issued on 28 January 2016 and an acknowledgement of receipt was signed by the opponent's representative on 3 February 2016.

Lastly, with its communication dated 25 April 2016, the board informed the parties that the issue of costs would be discussed during these oral proceedings.

The assumption that the case was closed and the claim of only recently becoming aware of the scheduled oral proceedings thus do not hold in view of the facts of the case.

2.4 The opponent's representative additionally argued that the oral proceedings should be postponed in order to give the parties time to communicate. This reason is not amongst those mentioned in the aforementioned Vice-President's notice, which makes it effectively irrelevant. It is also unfounded, since the opponent has

had almost one year to discuss the sole outstanding issue of costs with the proprietor.

2.5 Therefore, the board decided to reject the request to postpone the oral proceedings.

3. The proprietor's request for fixing the amount of costs apportioned by the opposition division

The proprietor's request for fixing the amount of costs incurred in opposition proceedings has to be dealt with by the opposition division in accordance with Rule 88(2) EPC (see Guidelines, D.II-7 for the exact procedure to be followed). Thus, this request has to be filed with the opposition division.

4. The proprietor's request for apportionment of costs in the appeal proceedings

4.1 The proprietor requested that costs incurred for preparing the oral proceedings before the board, including its travel expenses, be borne by the opponent. The opponent requested - as a main request - that this request be refused or, subsidiarily, that only travel costs be apportioned.

4.1.1 As set out above, the opponent waited until the last working day before the oral proceedings scheduled for 27 July 2015 to withdraw both its request for oral proceedings and its appeal, thus rendering the oral proceedings unnecessary, so that they were cancelled.

This in itself is not necessarily a reason for apportioning costs. For instance, in T 490/05, no costs were apportioned against a proprietor which had withdrawn its request that the appealed decision be set

aside, which amounted in substance to a withdrawal of its appeal, one day before the scheduled oral proceedings. In that decision, the board held *inter alia* that an apportionment of costs would not be equitable, since the advantages for the opponent of the proprietor's withdrawal of the appeal outweighed the costs arising due to the lateness of the withdrawal; furthermore, the withdrawal of a party's appeal was an expression of the principle of party disposition which should not be restricted, even implicitly, by the threat of an apportionment of costs.

The present board fully supports these principles and has applied them in cases where the proprietor withdrew its approval of the text of the patent prior to scheduled oral proceedings (see e.g. decisions T 1617/12 and T 784/14).

4.1.2 However, the present case is not simply about withdrawing an appeal on the last working day before scheduled oral proceedings. In the present case

- the opponent did not follow the board's direction to declare whether it maintained its request for oral proceedings in view of the board's negative opinion on the admissibility of the appeal, but instead twice requested an extension of time limit without filing any substantive reply;

- the opponent waited till the last working day to withdraw its appeal and its request for oral proceedings, even though it had known the board's negative opinion for one year and despite the fact that the summons was issued 6 months before the scheduled date for oral proceedings, thus giving it more than enough time to consider withdrawal, and

- the very same pattern of behaviour had already occurred during the opposition proceedings, where again the opponent withdrew its request for oral proceedings on the last working day before the oral proceedings, leading the opposition division to apportion costs against it.

4.1.3 In the light of these circumstances the board considers it equitable to apportion costs in accordance with Article 104(1) EPC in conjunction with Article 111(1) EPC and Article 16(1)(c) and (d) RPBA, both for preparing the oral proceedings and for travel.

4.1.4 The representative argued that due to personal circumstances he was "quite overburdened" and "increasingly able to only react to things that were operational and necessary". He went on to explain that "In light of this motivation, and the reasons leading to remaining completely silent was that this was beyond my capabilities to react upon in the situation; definitively not malicious".

The board does not find the representative's arguments convincing.

Withdrawing the appeal required very little effort on the opponent's part. The opponent actually achieved this with a letter dated 24 July 2015 containing one single sentence: "Due to reasons of a personal nature, I herewith indicate to withdraw the request for oral proceedings and the appeal". It is not credible to the board that the opponent's personal circumstances were such that he had no time to draft this single sentence earlier than one working day before the date scheduled for the oral proceedings.

Furthermore, the opponent's assertion that he was not behaving maliciously is beside the point. The board's view is that an apportionment of costs is equitable not necessarily on the basis of an abuse of procedure (Article 16(1)(e) RPBA) but, as set out above, in view of acts or omissions prejudicing the timely and efficient conduct of oral proceedings (Article 16(1)(c) RPBA) and due to failure to comply with a direction of the board (Article 16(1)(d) RPBA).

4.1.5 The opponent furthermore argued that the appeal had been filed to give an outside "protégé to be patent attorney" (i.e. a trainee patent attorney) the chance to test his arguments but that this had never been feasible since the appeal had been deemed inadmissible, an issue only the opponent's representative could deal with.

The board fails to see how this argument can support the opponent's case as regards the apportionment of costs. No matter whether work is done by a professional representative or by a trainee under his supervision, there is an obligation to avoid acts or omissions prejudicing the timely and efficient conduct of oral proceedings and to comply with the board's directions.

4.1.6 Lastly, the opponent argued that the proprietor had filed its request for apportionment of costs late, since it did not file it during the oral proceedings scheduled for 27 July 2015. But these oral proceedings were cancelled when the opponent withdrew its appeal. In fact, the proprietor submitted its request for apportionment of costs with its letter dated 5 August 2015, i.e. just seven days after the date of the communication cancelling the oral proceedings and thus at the earliest possible point in time.

4.1.7 The above conclusion (point 4.1.3) that it is equitable to apportion the costs incurred by the proprietor for preparing the oral proceedings before the board and for travel expenses remains valid. The opponent's request that no costs or only travel costs be apportioned is thus rejected.

4.2 The opponent also requested subsidiarily that only the costs for 0.85 days of preparation time be apportioned.

4.2.1 In its letter of 5 August 2015 (second table on page 5), the proprietor initially claimed 7.5 days for preparing the oral proceedings, including time for familiarising himself with the commercial context of the case, the patent and its claims, the prosecution history, the opposition history and decision, the grounds of appeal and the cited prior art. As explained in the board's communication of 5 November 2015, these activities were not part of preparing for the oral proceedings before the board and thus do not give rise to costs that are to be apportioned to the opponent. Thus, the only costs that can be taken into account are those arising out of actual preparation for the appeal hearing, namely twice 0.5 attorney days for studying the preliminary opinion of the board and reviewing relevant case law, and twice 1.5 attorney days for final preparation for the hearing (see table on page 5 of the proprietor's letter dated 5 August 2015), i.e. four days in total.

4.2.2 To justify its request that only 0.85 days be apportioned, the opponent argued as follows:

> "The proprietor provided a statement that twice 0.5 days were used for studying admissibility, at least partly, as it said (especially regarding

admissibility). However, 3.5 days were argued to be spent regarding substantive aspects and as indicated less one day regarding admissibility. Thus, at maximum the same ration of the 3 days of preparation could be awarded, viz. 1/3.5 x 3 = 0.85 day of the 4 day as yet awarded.

Also the results of this mostly theoretical aspect of the work became part of the experience of the staff that the proprietor benefits from, as opposed to when outside attorneys would have been hired.

Any proprietor is expected to expect costs of opposition, which is included in the general work of employees. There was no work for het *[sic]* department very specific for this case, nor costs beyond the accepted costs above."

The board is unable to follow the logic of the opponent's calculation, and in particular does not see anything wrong with the costs claimed by the proprietor for four days of preparation for the oral proceedings.

Furthermore, the argument that in-house attorneys are expected to address any issue as part of their everyday work, thus incurring no extra costs, or that they acquire useful in-house knowledge through dealing with unusual issues, thereby creating "added value" for the company compared to outside attorneys, is irrelevant.

The opponent furthermore argued that "It is accepted that personal annoyance at the side of the proprietor played part in this case, which could have been prevented by a simple contact request as well."

This argument is not persuasive either and appears rather misplaced. The proprietor could not foresee that the opponent would not attend the oral proceedings; after all it was informed of that only one working day before the scheduled date. There was thus no reason at all for the proprietor to contact the opponent. The onus actually was on the opponent to contact the proprietor.

The opponent lastly argued that "In case a proprietor is at least partly interested in procedural aspects, this should not be apportioned onto others."

This argument is inappropriate. The criteria for apportioning of costs are entirely unrelated to whether a party is interested in the work for which costs are to be apportioned.

4.3 In summary, the request to apportion the costs of four working days for preparing the oral proceedings of 27 July 2015, and the related travel expenses, is justified.

5. The proprietor's request for fixing the amount of costs to be apportioned in appeal proceedings

5.1 According to Article 16(1) RPBA the board may, on request, order a party to pay some or all of another party's costs. Pursuant to Article 16(2) RPBA the costs ordered to be paid may *inter alia* be expressed as a specific sum, in which case the board's decision is a final decision for the purposes of Article 104(3) EPC. The costs are to be limited to those necessarily and reasonably incurred (Article 16(2), last sentence, RPBA). K1, K2 and K3 show that the proprietor incurred travel expenses

- for Ms Askew's flights from London to Munich and back: 273.08 £ and 4.50 £, i.e. **277.58 £**;

- for Mr van den Brom's flight from Amsterdam to Munich: **266.53 €**; and

- from Munich back to Amsterdam: 378.91 € + 7.50 € + 93.98 € / 2, i.e. **240.20 €**.

5.2 As set out in point 4.2 above, the proprietor's attorneys spent four days (twice 0.5 and twice 1.5 days) preparating the oral proceedings before the board, at an attorney cost of 2000 € per day, i.e. **8000 €** in total.

5.3 The board considers the travel expenses of 277.58 £ and 506.73 € sufficiently proven. Furthermore, the board considers it reasonable that attorney costs of 8000 € were incurred in preparing for the oral proceedings.

5.4 In view of the above, the amount to be paid by the opponent to the proprietor is **8506.73 €** and **277.58 £**.

6. The request to be asked to make further submissions

6.1 The opponent requested in its letter dated 15 January 2016 that it be asked to make further submissions if his requests as regards apportionment of costs were refused.

6.2 The opponent has had the opportunity to comment on the board's preliminary opinion on the apportionment of costs. There is no obligation on the board to offer a party a second opportunity to provide comments.

6.3 In fact, subsequent to the opponent's letter, namely with its communication dated 28 January 2016, the board scheduled oral proceedings for 14 July 2016. It has thus

given the opponent the opportunity to make further submissions, albeit orally. The board has therefore actually granted the opponent's request. That the opponent chose not to use this opportunity because it declined to attend the oral proceedings is irrelevant.

Order

For these reasons it is decided that:

1. The costs incurred by the respondent/proprietor for preparing the oral proceedings of 27 July 2015, corresponding to four working days, and the related travel expenses are to be borne in full by the appellant/opponent.

2. The amount of the costs to be paid is fixed at 8506.73 € (eight thousand five hundred and six euros and seventy-three cents) and 277.58 £ (two hundred and seventy-seven pounds sterling and fifty eight pence).

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated