

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 28 January 2016**

Case Number: T 0251/15 - 3.2.06

Application Number: 08425396.2

Publication Number: 2130965

IPC: D06F33/02, D06F37/30, D06F39/08

Language of the proceedings: EN

Title of invention:
Pulley electric motor for a washing machine, actuation system
for a washing machine and washing machine

Patent Proprietor:
Askoll Holding S.r.l.

Opponent:
Hanning Elektro-Werke GmbH & Co. KG

Headword:

Relevant legal provisions:
EPC Art. 108, 112(1), 122
EPC R. 112

Keyword:

Admissibility of appeal - appeal fee (not paid) - appeal
deemed not to have been filed
Re-establishment of rights - request admissible (no)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

G 0001/86, T 0210/89, T 0323/87, T 0128/87

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0251/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 28 January 2016

Appellant: Hanning Elektro-Werke GmbH & Co. KG
(Opponent) Holter Strasse 90
33813 Oerlinghausen (DE)

Representative: Ostermann, Thomas
Fiedler, Ostermann & Schneider
Patentanwälte
Klausheider Strasse 31
33106 Paderborn (DE)

Respondent: Askoll Holding S.r.l.
(Patent Proprietor) Via Industria, 30
36031 Povolaro di Dueville (Vicenza) (IT)

Representative: Botti, Mario
Botti & Ferrari S.r.l.
Via Cappellini, 11
20124 Milano (IT)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 22 December 2014 rejecting the opposition filed against European patent No. 2130965 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: W. Ungler
T. Rosenblatt

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Opposition Division rejecting the opposition, posted on 22 December 2014.
- II. The appellant-opponent filed a notice of appeal on 27 January 2015 and paid the appeal fee on 11 March 2015.
- III. By communication of 21 April 2015, received by the appellant, the Registry of the Board informed the appellant according to Rule 112(1) EPC that the appeal was deemed not to have been filed pursuant to Article 108, second sentence, EPC, since the appeal fee had not been paid in due time.
- IV. With letter dated 23 April 2015 the appellant requested re-establishment of rights for paying the appeal fee within the two-month time limit for filing the appeal. He submitted that due to exceptional circumstances the appellant's representative was, in spite of all due care required by the circumstances having been taken, unable to observe the time limit. In essence it was pointed out that after the notice of appeal had been filed, the representative's assistant was instructed to pay the appeal fee within the time limit for filing of the notice of appeal entered in the registry for time limits ("Fristenbuch"), which had been checked by the representative himself. In her affidavit the assistant explained that she noted in the file erroneously a wrong time limit for the payment of the appeal fee.
- V. Furthermore, the appellant requested that the question be referred to the Enlarged Board of Appeal whether the re-establishment into the time limit for filing the appeal is admissible, if the transaction has been made

within the four-month time limit for filing the grounds of appeal (cf. page 6 of the appellant's letter of 23 April 2015: "*Es wird daher beantragt, der Großen Beschwerdekammer auch die Frage vorzulegen, ob eine Wiedereinsetzung in die Frist zur Einlegung der Beschwerde zulässig ist, wenn die Handlung innerhalb der 4-Monatsfrist zur Einreichung der Beschwerdebegründung erfolgt ist.*").

- VI. In the communication annexed to a summons to oral proceedings, the Board informed the parties of its provisional opinion on the case. Neither the appellant nor the respondent provided arguments in response to the Board's preliminary opinion.
- VII. Oral proceedings before the Board were held on 28 January 2016.
- VIII. During the oral proceedings the appellant pointed out in particular that according to G 1/86, Article 122(1) EPC must not be interpreted as excluding the opponent from re-establishment of rights. As regards the time limit for filing the statement of grounds of appeal the Enlarged Board of Appeal had come to the conclusion that an opponent may have his rights re-established under Article 122 EPC. The patent proprietor had a legitimate interest of not being left in uncertainty as to whether an appeal has been filed. This uncertainty no longer existed in the present case after the notice of appeal had been filed. Thus, the payment of the appeal fee after expiry of the two-month time limit of Article 108 EPC, first sentence, but within the four-month time limit for filing of the statement of grounds of appeal and the failure of filing the statement of grounds of appeal in due time, should not be treated differently. As regards the requested referral of a

question to the Enlarged Board of Appeal the appellant admitted that no deviating case law on that question had been found but that the question raised in the interlocutory decision of 24 February 2014, T 2017/12 (G 2/14, cf. also the interlocutory decision of 20 February 2014, T 1553/13 and G 1/14) should be taken into account (the question reads as follows: "*Where a notice of appeal is filed but the appeal fee is paid after expiry of the time limit of Article 108 EPC, first sentence, is this appeal inadmissible or deemed not to have been filed?*"). If the late payment of the appeal fee resulted only in the inadmissibility but not in the invalidity (i.e. "deemed not to have been filed") of the appeal, there would be no reason to exclude opponents from re-establishment of rights since this situation would be similar to the failure to file the statement of grounds in due time.

- IX. The appellant (opponent) requested re-establishment of rights into the time limit for paying the appeal fee. Furthermore it requested that the question be referred to the Enlarged Board of Appeal whether the re-establishment into the time limit for filing the appeal is admissible, if the transaction has been made within the four-month time limit for filing the grounds of appeal.

- X. The respondent (patent proprietor) requested refusal of the request for re-establishment and of the request for referral of a question to the Enlarged Board of Appeal.

Reasons for the Decision

- 1. According to Article 108, first sentence, EPC the notice of appeal has to be filed within two months of

notification of the decision. The second sentence of this provision stipulates that the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.

2. In the present case, the decision under appeal was issued on 22 December 2014 and the time limit specified in Article 108, first sentence, EPC expired on 2 March 2015. Since the appeal fee had not been paid within that time limit (it was paid on 11 March 2015) the appellant was informed - according to Rule 112(1) EPC - by communication from the registrar of the Board of Appeal dated 21 April 2015, that the appeal was deemed not to have been filed pursuant to Article 108, second sentence, EPC. The appellant did not question this finding by applying for a decision on that matter pursuant to Rule 112(2) EPC. Thus, since the above finding became final the appeal is deemed not to have been filed, unless the appellant's request for re-establishment is allowed.

3. Admissibility of the request for re-establishment

- 3.1 Article 122(1) EPC stipulates that the right to re-establishment of rights is available for an applicant for or proprietor of a European patent. However, according to decision G 1/86 (OJ EPO 1987, 447) an appellant as opponent may have its rights re-established under Article 122 EPC if it has failed to observe the time limit for filing the statement of grounds of appeal. It follows from the reasons of the decision that the applicability of Article 122(1) EPC is limited to cases where an appellant-opponent missed the time limit for filing the grounds of appeal (see in particular points 7 to 11 of the Reasons). Thus, an appellant-opponent who misses, as in the present case,

the time limit for filing the notice of appeal and/or for paying the appeal fee, is not entitled to have his rights re-established (cf. T 210/89, OJ EPO 1991, 433; cf. T 323/87, OJ EPO 1989, 343, T 128/87, OJ EPO 1989, 406). In such a case, an appellant-opponent cannot rely on the principle of "equality before the law". His legal position differs from the position of an applicant (or patentee)-appellant (cf. G 1/86, point 5 of the Reasons.)

- 3.2 Having taken into account the arguments presented by the appellant, the Board sees no reason to deviate from the established case law. According to G 1/86, points 8 and 9 of the Reasons, the patent proprietor has a legitimate interest in not being left uncertain as to whether a *legally effective* appeal has been filed within the two-month time limit under Article 108 EPC. By filing the notice of appeal and by paying the appeal fee within the two-month time limit of Article 108 EPC the opponent has *validly* made known his intention of having the Opposition Division's decision set aside. According to Article 108, second sentence, EPC the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Thus, if the appeal fee has not been paid within the two-month time limit of Article 108 EPC, the patent proprietor's uncertainty no longer exists, since no appeal is considered to be in existence and the appeal procedure has not been *validly* set in motion. Thus, the Board does not accept the appellant's argument that the patent proprietor's uncertainty no longer existed in the present case merely due to the fact that the notice of appeal had been filed in time irrespective of the belated payment of the appeal fee. Thus, contrary to the appellant's argument, there is a sound reason that the late payment of the appeal fee and the failure to

file the statement of grounds within the four-month time limit of Article 108, third sentence, EPC are treated differently as far as the issue of re-establishment of rights is concerned. The possibility for opponents to have their rights re-established in cases where the time limit for filing the statement of grounds is missed is based on the existence of a *legally effective* appeal, i.e. on the fact that the appeal procedure has *validly* been set in motion. However, when the appeal fee has not been paid in time, there is no appeal in existence and the patent proprietor has a legitimate interest in being able to rely on the fact that the Opposition Division's decision has become final.

4. Referral of a question to the Enlarged Board of Appeal
- 4.1 Under Article 112(1) EPC, the Board of Appeal, in order to ensure uniform application of the law or if a point of law of fundamental importance arises, and possibly of its own motion, shall refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes.
- 4.2 As shown under point 3.1 above there is established case law on the question at hand which is based on decision G 1/86 of the Enlarged Board of Appeal. Moreover, the appellant admitted during the oral proceedings before the Board that deviating case law had not been found. In addition, the Board finds, as shown under point 3.2 above, that there is no lacuna in the reasoning of the decision G 1/86 which could be filled by answering the question which the appellant requested to have referred to the Enlarged Board of Appeal.

- 4.3 In that context the appellant noted that the question raised in the interlocutory decision of 24 February 2014 in T 2017/12 (G 2/14, cf. also the interlocutory decision of 20 February 2014 in T 1553/13 and G 1/14) should be taken into account. The question whether an appeal is inadmissible or deemed not to have been filed, where a notice of appeal is filed but the appeal fee is paid after expiry of the time limit of Article 108 EPC, first sentence, EPC could be of relevance for the present case (cf. Facts point VIII.).
- 4.4 The Board does not share that view for various reasons. First, the question raised in the aforementioned proceedings does not deal at all with the issue of re-establishment of rights requested by an appellant-opponent. Second, the facts underlying the interlocutory decisions in the above cases are different from the situation in the case at hand. In the present case, there is no pending question whether the appeal is inadmissible or deemed not to have been filed, since the appellant was informed - according to Rule 112(1) EPC - by communication from the registrar of the Board of Appeal dated 21 April 2015, that the appeal was deemed not to have been filed pursuant to Article 108, second sentence, EPC. This finding had become final since the appellant did not apply for a decision on that matter pursuant to Rule 112(2) EPC. Consequently, no appeal is considered to be in existence when the appeal procedure has not been *validly* set in motion, which was the decisive reason in G 1/86 allowing re-establishment of rights into the four-month period (cf. point 3.2).
- 4.5 Thus, the Board came to the conclusion that a referral to the Enlarged Board of Appeal was not justified.

5. Consequently, in view of the above, the Board comes to the conclusion that the request for re-establishment of rights is inadmissible. Thus, the appeal is deemed not to have been filed as noted by communication pursuant to Rule 112(1) EPC dated 21 April 2015.

Order

For these reasons it is decided that:

1. The request to refer a question to the Enlarged Board of Appeal is refused.
2. The request for re-establishment of rights is refused.
3. The appeal is deemed not to have been filed.
4. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated