

ET0298.97 - 011850006

DECISIONS OF THE BOARDS OF APPEAL

Decision of Technical Board of Appeal 3.3.6 dated 28 May 2001

T 298/97 - 3.3.6

(Language of the proceedings)

Composition of the board:

Chairman: P. Krasa

Members: C. Rennie-Smith

G. Dischinger-Höppler

Patent proprietor/Respondent: UNILEVER PLC

Opponent/Appellant: NV PROCTER & GAMBLE EUROPEAN TECHNICAL CENTER

Headword: Detergent composition/UNILEVER

Article: 99, 107, 108, 110, 113, 116, 133 EPC

Rule: 64, 65 EPC

Keyword: "Admissibility of appeal (no)" - "Party adversely affected not the party filing Grounds of Appeal" - "Commercial interest insufficient to remedy deficiency in admissibility"

Headnote

I. If the Notice of Appeal is filed by an adversely affected party but the Grounds of Appeal are filed by a natural or legal person who, although having economic

connections with that adversely affected party, is not itself that party, the appeal cannot be held admissible. (See reasons, points 3.2 and 3.3)

II. No provision having been made in the Implementing Regulations pursuant to Article 133(3), last sentence, EPC, the EPC does not currently allow the representation of one legal person by the employee of another economically related legal person. (See reasons, point 4)

III. Save in the limited situation of a transfer of the right to oppose a European patent (or to appeal or continue an opposition appeal) together with the related business assets of the opponent's business, a commercial interest in revocation of such patent is not a requirement for being an opponent. Nor is possession of such a commercial interest sufficient to allow a successor in business to take over and conduct opposition or opposition appeal proceedings in the absence of evidence of a transfer of the right to do so together with the related business assets of the opponent. (See reasons, point 12.2)

IV. (a) In the absence of such evidence, the transfer of an opponent's business assets to two separate persons cannot give either of them the right to take over and conduct opposition or opposition appeal proceedings. (See reasons, point 7.6)

(b) When such evidence is present, only the transferee established by such evidence can acquire such a right. (See reasons, point 7.6)

Summary of facts and submissions

I. In this decision, which concerns the admissibility or otherwise of an appeal purportedly conducted at different times by different members of a group of companies, the word "appellant" is used only as a convenient term to denote the possible or putative appellant, and the abbreviations used for the various companies referred to are those provided in the affidavit referred to in paragraph IX below.

II. European Patent No. 351 937, entitled "Detergent compositions and process for preparing them" and based on application No. 89 304 210.1, was granted on 9 February 1994 to the joint proprietors Unilever plc (for the Contracting State GB) and Unilever NV (for the Contracting States CH, DE, ES, FR, IT, LI, NL and SE).

III. Opposition was filed on 7 November 1994 by NV Procter & Gamble Technical Center SA ("ETC NV"). The Opposition Division, in a decision dated 14 January 1997, maintained the patent in amended form. ETC NV filed a Notice of Appeal, dated 5 March 1997 and received on 13 March 1997, against this decision. The Notice of Appeal was signed by P G Mather ("Mr Mather") on behalf of ETC NV and referred to Authorisation No. 2049 (and also, separately and in error, to No. 2048). The appeal fee was paid on 13 March 1997.

IV. Grounds of Appeal were subsequently filed by a fax dated 21 May 1997. They were set out on the letterhead of BVBA Procter & Gamble Europe SPRL ("Europe BVBA"), signed by Mr Mather and referred again to Authorisation No. 2049. The heading, after citing the appeal, application and patent numbers and the names of the proprietors, stated:

"Appellants SPRL Procter & Gamble Europe BVBA (formerly Procter & Gamble European Technical Center)"

The fax also included three copies of a letter dated 7 May 1997, also set out on the letterhead of Europe BVBA, addressed to "Directorate General 5.1.1" of the European Patent Office, headed "Re: General Authorisation No. 2049" and stating:

"At the time the above General Authorisation was given, the company giving the authorisation was indicated to be "Procter & Gamble European Technical Center NV" residing at Temselaan 100 - B-1853 Strombeek-Bever.

"As of 1 April 1997, the functions of the Patent Department of Procter & Gamble European Technical Center NV have been transferred to the new legal entity: "BVBA Procter & Gamble Europe SPRL", residing at the same address. BVBA Procter &

Gamble Europe SPRL therefore becomes the authorising company for General Authorisation 2049.

"Please find attached our notary's attestation concerning this transfer. Kindly let us know which additional documents, if any, you would need to record this transfer."

None of the three copies of this letter included in the fax was accompanied by that attestation.

V. Apart from the heading of the Grounds of Appeal and the copies of that 7 May 1997 letter, nothing was said in the Grounds of Appeal about the fact that they were being filed by a different company to that which had conducted the opposition and, more recently, filed the Notice of Appeal. No reference to the apparent discrepancy was made in subsequent written submissions by either party prior to the Board's communication referred to in paragraph VI below. After the Grounds of Appeal were filed, all subsequent submissions on behalf of the appellant were made by a professional representative all of whose letters, both prior and subsequent to the Board's communication, have referred in their headings to the patent "opposed by The Procter & Gamble Company". Shortly before the oral proceedings, which were held on 10 January 2001, the respondents (proprietors) changed professional representatives.

VI. In the absence of any explanation of or submissions about the apparent discrepancy, which could clearly go to the admissibility of the appeal, the Board alerted the parties in advance of the oral proceedings that this matter would have to be resolved in those oral proceedings. A communication dated 3 January 2001 was sent by fax and registered post to the parties on 5 January 2001. After summarising the matters referred to in paragraphs III to V above, the communication concluded as follows:

"It is accordingly unclear which company is the appellant. Indeed it is unclear whether there has been any change in the identity of the appellant or not. As to the circumstances in which an opposition may be transferred, see Decision G 4/88 (OJ

1989, 480). Further, it is unclear which company the present representative of the appellant represents.

"These matters will need to be resolved at the beginning of the oral proceedings. The appellant's representative should ensure he is able to produce an Authorisation from the actual appellant to the Board's Registrar before the oral proceedings commence."

That last paragraph of the communication reflected inter alia Article 1(3) of the Decision of the President of the EPO of 19 July 1991 (OJ 1991, 489).

VII. Both the appellant's representative and Mr Mather (in his case on the letterhead of yet another company, NV Procter & Gamble Services Company SA - "Services") faxed replies to this communication. Both referred to the French and Flemish versions (using either "SA" or "NV" respectively) of the name of ETC NV, the representative suggesting Europe BVBA was only another such version of the name of ETC NV. Otherwise these faxes dealt only with the matter of the professional representative's authorisation. The respondents did not reply to the communication.

VIII. After the oral proceedings were opened, the appellant's representative was invited to say which company is the appellant. He submitted that it was ETC NV which had changed its name to that of Europe BVBA. On being referred by the Board to the different bank account and VAT numbers on the letterheads of ETC NV and Europe BVBA, as used for the Notice of Appeal and Grounds of Appeal respectively, and to the letter of 7 May 1997 which referred to Europe BVBA as a "new legal entity", the representative then submitted (after an adjournment to take instructions by telephone) that there had in fact been a transfer of business from ETC NV to Europe BVBA in 1997 following which ETC NV had ceased to exist and that there had subsequently been a further such transfer to yet another company. He had however been unable to obtain any more detailed instructions and requested an adjournment in order to file evidence explaining the exact position. The respondents requested that, in the event of such an adjournment, their costs of the oral proceedings be paid by the opponent. The Board did not however order an adjournment but, after directing that evidence be

filed by 24 January 2001 to show that the party now claiming to be the appellant is adversely affected by the decision of 14 January 1997, closed the oral proceedings.

IX. Under cover of a faxed letter of 24 January 2001, the appellant's representative filed an approved and signed but unsworn affidavit of Mr Mather, which referred to three exhibits which were not enclosed, and informed the Board that the sworn affidavit and exhibits would follow as soon as possible. This was subsequently done by a letter dated 15 February 2001 and received on 16 February 2001 which enclosed the sworn affidavit and three exhibits (numbered PGM1, PGM2 and PGM3) which are copies of original documents in Flemish relating to company reorganisations together with translations into English. The letter of 24 January 2001 contained a number of arguments and requests on the issue of admissibility which are summarised in paragraphs XI and XII below.

X. The relevant facts appearing from Mr Mather's affidavit can be summarised as follows (references to paragraphs being to paragraphs of the affidavit).

Mr Mather identifies four companies, namely:

1. ETC NV, the company which opposed the patent and filed the Notice of Appeal. This company changed its exact name and corporate status to BVBA Procter & Gamble European Technical Center SPRL in June 2000 (paragraphs 1 and 20 and exhibit PGM3).

2. Europe BVBA (whose date of incorporation is not known but is described in the 7 May 1997 letter as a new legal entity), to which on 28 March 1997 various functions and, on 1 April 1997, various employees (including Mr Mather himself) of ETC NV were transferred (paragraphs 1, 6 and 17 and exhibit PGM2).

3. NV Procter & Gamble Eurocor SA ("Eurocor"), incorporated on 7 January 1997, to which on 28 March 1997 other functions and personnel of ETC NV were transferred "with retroactive effect". The meaning to be given to those words is not explained in Mr Mather's affidavit but it appears from exhibit PGM1 (filed out of time), which is a

company report documenting the transfer, that the acts of ETC NV from 1 July 1996 onwards in relation to the transferred activities were considered to be the acts of Eurocor "in bookkeeping terms". ETC NV has, since the incorporation of Eurocor, owned one share in Eurocor. (Paragraphs 1, 12, 13 and 15 and exhibit PGM1).

4. Services, to which in June 2000 certain functions of Europe BVBA, including the patent department but otherwise unspecified, were transferred (paragraphs 1 and 7).

Mr Mather explains that all these companies have the same registered address (Temselaan 100, B-1853 Strombeek-Bever, Belgium); that the various personnel employed at that address have done much the same jobs despite the reorganisations and changes of employers in 1997 and 2000; and that from 1994 to March 1997, the major operating company conducting most of the business at this address was ETC NV (paragraphs 2, 5 and 11).

Of himself, Mr Mather says he qualified as a European Patent Attorney in 1995 and has worked continuously in the Procter & Gamble patent department since 1992. As appears from his account of the various corporate changes, his employer changed from ETC NV to Europe BVBA on 1 April 1997 and from Europe BVBA to Services in June 2000. As regards authorisations, he says he was authorised under No. 2049 as an employee of ETC NV until 2 September 1997 when that authorisation was amended, with effect from 18 August 1997 (the purported backdating is not explained), to delete him as an employee and add him as a professional representative. He has throughout been part of a patent department servicing various Procter & Gamble companies, the work of which has, in his words, "remained substantially unchanged" despite the changes of employer. (Paragraphs 3, 4, 7 and 8.)

Mr Mather makes clear that he gave the appellant's representative the information supplied to the Board at the oral proceedings on 10 January 2001 and that the information in his affidavit is more accurate and complete as he has in the interim examined various company documents and interviewed various company lawyers. He

says he now knows of the various company reorganisations which have taken place as described above. (Paragraphs 5 and 9.)

XI. The appellant's arguments as to admissibility, contained in the representative's letter of 24 January 2001, can be summarised as follows.

1. ETC NV properly filed the Notice of Appeal, had the proper status (that of an adversely affected party) at the time the Grounds of Appeal were filed, is still (although now renamed) in existence, and has a continued interest in revocation of the patent in suit as a shareholder in Eurocor. When the Grounds of Appeal were filed, Mr Mather who signed them had an authorisation from ETC NV. More generally, those working at "the Temselaan site" always had an interest in such revocation and all that has changed has been an internal reorganisation and changes of their employers' names. ETC NV should therefore be seen as continuing to be the person adversely affected by the decision under appeal. The appeal is therefore admissible in accordance with Article 110(1) EPC whereby the Board has no longer to consider the admissibility but only the allowability of the appeal.

2. Eurocor and Europe BVBA have each acquired an interest in revocation of the patent in suit by reason of the reorganisations and one or both of those companies should become co-appellants.

3. There is no basis in the EPC for an appeal, if admissible when the Notice of Appeal was filed, becoming retrospectively inadmissible merely because of a change in the status of the appellant, provided the "Appeal" is then supported by proper "Grounds" (quotation marks as used in the appellant's submissions).

4. The first indication the appellant received that there was a potential objection under Rule 65(1) EPC was the Board's communication of 3 January 2001. This was misread by the appellant as referring to authorisations and the actual discrepancy only became apparent at the oral proceedings on 10 January 2001. Rule 65(2) EPC gives the Board a discretion to make any necessary correction on an appropriate application by 24 January 2001, the letter of that date being such an application.

XII. As regards admissibility, the letter of 24 January 2001 contains a number of requests. The main request is for the appeal to proceed in the name of ETC NV. If the main request is not allowed, the appellant's first auxiliary request is that the appeal proceed in the names of ETC NV and Europe BVBA; the second auxiliary request is that the appeal proceed in the names of ETC NV and Eurocor; and the third and final auxiliary request is that the appeal proceed in the name of one or more companies identified in Mr Mather's affidavit. Each of the main and auxiliary requests also seeks a declaration that the appeal is admissible. The appellant requests further oral proceedings before any other decision on admissibility than allowance of one of those requests. As regards allowability, the appellant requests that the decision under appeal be set aside and the patent revoked. Finally, the appellant requests oral proceedings before any other decision than revocation.

XIII. The respondents request that the appeal be dismissed.

Reasons for the decision

Articles 107 and 108 EPC

1. Article 107, first sentence, EPC, states "Any party to proceedings adversely affected by a decision may appeal". Article 108, first and third sentences, EPC, requires a Notice of Appeal and Grounds of Appeal to be filed within, respectively, two months and four months of the date of notification of that decision. It follows beyond any doubt from these provisions that, since no one else is entitled to do so, each of the Notice of Appeal and Grounds of Appeal can only be filed within the stipulated time limits by a party which is adversely affected by the decision in question.

2. In the present case the Notice of Appeal was filed by ETC NV, the company which had previously filed opposition. Since the opposition was to the patent as a whole and the decision of the Opposition Division was to maintain the patent in amended form, the Notice of Appeal was clearly filed by an adversely affected party. Since the time limits in Article 108 EPC were complied with, there is only one issue to be decided as

regards admissibility namely, were the Grounds of Appeal filed by a party which was adversely affected by the decision of 14 January 1997?

Prima facie admissibility

3.1 There can be no doubt that, on the facts as they appear from the file and the evidence now before the Board, this question must be answered in the negative. The Grounds of Appeal were set out on the letterhead of Europe BVBA which, as Mr Mather's affidavit makes clear, is a different company from ETC NV. Although signed, like the Notice of Appeal, by Mr Mather it is equally clear from his affidavit that he was employed by ETC NV when the Notice of Appeal was filed on 13 March 1997 and by Europe BVBA when the Grounds of Appeal were filed on 21 May 1997. While it is not known when Europe BVBA came into existence, the copy letter of 7 May 1997 enclosed with the Grounds of Appeal refers to it as "the new legal entity". The Grounds of Appeal refer in their heading to the appellant as Europe BVBA adding the words "(formerly Procter & Gamble European Technical Center)", that is ETC NV. While those words might, in the absence of any evidence to the contrary and as was indeed at first suggested at the beginning of the oral proceedings, have indicated a mere change of company name, it is (as just mentioned) clear from Mr Mather's affidavit that ETC BV and Europe BVBA are two different companies (or "entities", to use the language of the 7 May 1997 letter, or "parties", to use the language of Article 107 EPC).

3.2 Although Mr Mather's evidence in his affidavit must be accepted, since he makes clear it corrects the information given at the oral proceedings and is provided after consulting records and lawyers, the difference between the two companies is clear on the face of the Notice of Appeal and the Grounds of Appeal. Not only are the company names on the printed letterheads different but so are the bank account numbers and, as Mr Mather's affidavit also confirms, the company registration and VAT numbers. Further, nowhere in the evidence which has now been filed pursuant to a direction of the Board designed to establish which company claims to be the appellant, is it suggested the Grounds of Appeal were filed other than by Europe BVBA.

3.3 Since it is therefore clear that the Grounds of Appeal were not filed by a party to the opposition proceedings, let alone by a party adversely affected by the outcome of those proceedings, one of the conditions of an admissible appeal is absent and it appears *prima facie* that the appeal cannot be held admissible. The only question which remains is whether this result can be avoided either by finding one of the appellant's arguments on this issue acceptable or by placing some other acceptable construction on the facts as they appear - in either case "acceptable" meaning that, despite the *prima facie* non-compliance with Articles 107 and 108 EPC, those Articles have in fact been complied with in a manner compatible with the law.

3.4 As to the constructions which might be placed on the facts, the Board has considered a number of possibilities, not as such advanced by the appellant, as follows.

4. *Were the Grounds of Appeal filed by Europe BVBA on behalf of ETC NV?*

4.1 This appears impossible for reasons of fact and law. As to fact, apart from the clear distinctions between the two companies appearing on the face of the documents, no attempt was made in the Grounds of Appeal to indicate that one company was acting on behalf of another and indeed the clear intention shown at the time, evidenced by the only meaning which can be ascribed to the word "formerly" in the heading of the Grounds of Appeal and the use of the words "new legal entity", suggests that the opposite was envisaged, namely the replacement of one company by another.

4.2 Those matters of fact apart, Article 133(3) EPC provides:

"Natural or legal persons having their residence or principal place of business within the territory of one of the Contracting States may be represented in proceedings established by this Convention by an employee, who need not be a professional representative but who must be authorised in accordance with the Implementing Regulations. The Implementing Regulations may provide whether and under what conditions an employee of such a legal person may also represent other legal

persons which have their principal place of business within the territory of one of the Contracting States and which have economic connections with the first legal person."

However, the Implementing Regulations have made no such provision which leads to the conclusion that the EPC currently does not allow an employee of one "legal person" to represent as an agent "other legal persons" even when they have "economic connections". In other words, an employee of one company in a group cannot represent another company in the same group.

5. Was Mr Mather entitled to represent ETC NV when filing the Grounds of Appeal but simply used the wrong letterhead by mistake?

This also appears impossible. As Mr Mather confirms in his affidavit, he was not employed by ETC NV when the Grounds of Appeal were filed on 21 May 1997, having been employed by Europe BVBA since 1 April 1997. The letter of 7 May 1997 makes quite clear that both companies viewed the authorisation under which he acted as having been transferred from ETC NV to Europe BVBA on 1 April 1997, a date consistent with his own evidence of a change of employer on that date. If Mr Mather did make a genuine mistake, he would undoubtedly have said so in his affidavit. That he did not seems clear from the only meaning which can in the circumstances be given to the word "formerly" as used in the heading of the Grounds of Appeal and the plain words of the 7 May 1997 letter enclosed with them (see paragraph IV above).

6. Was Mr Mather acting as the European professional representative of ETC NV when he filed the Grounds of Appeal?

6.1 Again, this appears impossible to reconcile with the facts. Not only was he no longer in the employ of ETC NV when the Grounds of Appeal were filed, and not only had both companies expressed the view that his authorisation had been transferred, he was not (on his own evidence) authorised by even Europe BVBA as a professional representative until, at the earliest, 18 August 1997. It cannot even be said he was "constructively" authorised or instructed by ETC NV after 1 April 1997 by virtue of the General Authorisation No. 2049 since that authorisation was seen by both companies

as having been transferred to Europe BVBA on 1 April 1997 - the clearly evinced intention was that from that date his authority came from Europe BVBA.

6.2 Article 1(1) of the Decision of the President of the EPO of 19 July 1991 (OJ 1991, 489) provides that a professional representative whose name appears on the list maintained by the EPO and who identifies himself as such shall only be required to produce a signed authorisation in certain circumstances set out in the Decision. This has no effect on the position in the present case. Even if, when filing the Grounds of Appeal, Mr Mather had identified himself as a professional representative, the question of which company he represented would, on the facts, still have arisen and, on those facts, would have been answered as in paragraph 6.1 above.

7. Was there a transfer of the right to oppose or appeal from ETC NV to another company between the filing of the Notice of Appeal and the filing of the Grounds of Appeal?

7.1 In its decision G 4/88 (OJ 1989, 480), the Enlarged Board of Appeal held in its Order that:

"An opposition pending before the European Patent Office may be transferred or assigned to a third party as part of the opponent's business assets together with the assets in the interests of which the opposition was filed".

It is clear the Enlarged Board was only considering a situation which fulfilled four conditions, namely:

- (a) an opposition is pending
- (b) which is transferred or assigned
- (c) to a third party
- (d) together with the assets in the interests of which the opposition was filed.

The reasons for the limited nature of this possibility of transfer appear clearly from paragraphs 5 and 6 of the Enlarged Board's reasons:

"5. The Enlarged Board considers that it falls outside the scope of the reply to the question at issue to examine whether an opposition could be transmitted or assigned independently of the existence of an interest in instituting the opposition, taking into account the provisions of Article 99(1) EPC.

It only appears to be necessary to examine the situation in which the opposition has been instituted in the interest of the opponent's business or part of that business. In this context the term "business" must be understood in a broad sense as describing an economic activity which is or could be carried on by the opponent and which constitutes a specific part of his business assets.

6. The Enlarged Board considers that, in such a situation, the opposition constitutes an inseparable part of those assets. Therefore, in so far as those assets are transferable or assignable under the applicable national laws, the opposition which is part of them must also be regarded as transferable or assignable in accordance with the principle that an accessory thing when annexed to a principal thing becomes part of the principal thing."

In referring to Article 99(1) EPC, the Enlarged Board was clearly mindful that this Article allows "any person" to give notice of opposition within nine months from the publication of the mention of the grant of a European patent. If an opposition could, after its commencement, be transferred unconditionally to a third party, a patent could in effect be opposed out of time by a person who did not exercise his right to oppose within the nine-month opposition period. Any such "trafficking" in oppositions would be contrary to the legislative intent behind Article 99(1) EPC and a threat to the assumption by Contracting States of exclusive national jurisdiction over European patents at the end of the nine-month opposition period.

7.2 The principle thus limited of permissible transfer together with the opponent's relevant assets has been applied, in addition to oppositions *per se*, to the right to

appeal from an adverse decision of the Opposition Division (see T563/89, unpublished, reasons, paragraph 1.1). As regards such a transfer of an opposition appeal after it has been filed, in T659/92 (OJ 1995, 519, see reasons, paragraphs 1 to 3), Board 3.2.2 considered this to be possible but, in the case in question, found that there had not been a transfer of the opposition as "an inseparable part" of the opponent's business assets. There had been a "transfer declaration" relating to certain items of intellectual property including the opposition but not of the relevant business assets to which it related. The Board added (see reasons, paragraph 3.3):

"For business assets to have been acquired by virtue of universal succession with all rights and liabilities, a proper contract with [the opponent] would have been necessary. If the owner of the rights declares unilaterally that he has ceded positions in industrial property and the rights in opposition proceedings relating to a particular right, that cannot of itself effect universal succession by transfer of assets."

The Board shares the view of Board 3.2.2 that it is incumbent on those seeking the substitution by transfer of a new party to demonstrate by appropriate evidence that a transfer which complies with the conditions allowed by the case law has taken place.

7.3 The Board has therefore to consider whether there is in the present case sufficient evidence of the transfer by ETC NV to another company of the right to prosecute the opposition appeal it began (by filing a Notice of Appeal) together with its relevant business assets. As a preliminary point the Board would observe that, if it were so to find, the right transferred would strictly speaking be that of completing the filing of an admissible appeal since, on the facts of this case, any transfer would have had to take place between the filing of the Notice of Appeal on 13 March 1997 and the filing of the Grounds of Appeal on 21 May 1997. In T 659/92 (reasons, paragraph 2), Board 3.2.2 considered, in line with the decisions in G 4/88 and T 563/89, that "rights in a case may be transferred by a party to the proceedings at any stage of opposition appeal proceedings" subject to the condition of an accompanying transfer of related business assets. It appears to be an open question whether "any stage of appeal proceedings" includes the embryonic stage where an indication of intent to appeal has been given (by the filing of a Notice of Appeal) but all the steps required for formal admissibility,

including filing the Grounds of Appeal in time by an adversely affected party, have not been taken; in other words, when an appeal as such has not come into existence but remains a possibility. The Board, without expressing an opinion on this question, will assume it as being answered in the appellant's favour.

7.4 There is evidence in Mr Mather's affidavit of the transfer, on 28 March 1997, of certain functions (referred to by him as "the laundry research functions") of ETC NV to Eurocor and of other functions (described as the "market research and sales management functions relating to laundry (and all patent service) functions") to Europe BVBA, in both cases "with the relevant personnel being transferred from being employed by ETC NV to being employed by" Eurocor or Europe BVBA respectively. Assuming, in the appellant's favour, such a transfer of "functions" and "personnel" amounts to a transfer of "business assets" as envisaged in G 4/88 and the subsequent cases referred to above, an immediate and very real legal difficulty arises - these transfers were on the appellant's own evidence not to one successor in business but two. Rather than identifying a "universal successor" (to use the expression of Board 3.2.2 in T 659/92), it is clear that in this case the business assets in respect of which ETC NV commenced its opposition were by the dual transfers of 28 March 1997 fragmented, some passing to Eurocor and the rest to Europe BVBA. The appellant makes no attempt to relate the opposition to one only of these two groups of assets; on the contrary by its arguments and requests (see paragraphs XI and XII above) it suggests that either the original opponent alone or both the original opponent and either one or both of the transferee companies should be treated as the appellant or "co-appellants". The Board cannot see any way in which this can, as a matter of law, be done.

7.5 On the one hand, if the original opponent has transferred the relevant assets to other companies, it no longer possesses the "business" (that is, the economic activity carried on by it - see G 4/88 at paragraph 5) in respect of which the opposition was brought and thus not having, as the party adversely affected by the decision under appeal, filed the Grounds of Appeal, it cannot in law have any further interest in the appeal. (That it retained a continuing interest in fact in the outcome, for example

through the ownership of shares in one of the transferee companies, is considered below - see paragraph 12.)

7.6 On the other hand, in the absence of any evidence that one transferee only has succeeded to the relevant assets of the business (indeed, with clear evidence that both transferees have each succeeded to part of those assets), the result which would on the appellant's submissions follow, namely that there should be two or more appellants in addition to or substitution for the original opponent, is simply not permitted in law. Any person may oppose a European patent and any party adversely affected by the decision in that opposition may appeal, in both cases provided they pay the appropriate fee and file the necessary written Notice of Opposition or Notice and Grounds of Appeal within the time limits set by the EPC (see Articles 99, 107 and 108 EPC). There is no scope to interpret those provisions as allowing further parties, after expiry of the time limits and without payment of the appropriate fees, to become additional parties. That would clearly be contrary to the intention of the legislature which was to confine the jurisdiction of the EPO after grant to a nine-month opposition period after which European patents fall into the exclusive national jurisdictions of the Contracting States. If a party which does not file opposition in that nine-month period cannot thereafter become an opponent, it clearly cannot do so at the appeal stage when the qualifying condition of participation in the proceedings is no longer "any person" but the much narrower "any party to proceedings adversely affected by the decision" (see respectively Articles 99(1) and 107 EPC). Thus to preserve admissibility the transfer of an opposition, or opposition appeal, must be subject not only to conditions (a) to (d) in paragraph 7.1 above, including the condition that it is accompanied by the transfer of the relevant related business assets of the opponent, but also to the condition that such transfer is to one, and one only, successor party or transferee.

7.7 It should be added that, despite Mr Mather's affidavit evidence that the business assets of ETC NV were divided on 28 March 1997 between two successor companies with no indication that one only of those companies acquired the relevant business assets related to the opposition, the Board has considered the exhibits to his affidavit

(notwithstanding they were filed out of time) to see whether they identify one of the successor companies as the only transferee of the relevant business.

7.7.1 Exhibit PGM1 is a report of an extraordinary meeting of the board of directors of Eurocor which Mr Mather describes as "showing the transfer of laundry research from ETC NV to Eurocor". PGM1 indeed evidences a transfer between those companies of what is described (in the English translation provided of the original Flemish document) as "a branch of activities containing the totality of asset and liability components, consisting of all activities related to research and developments conducted by the "Research & Development" department established at Strombeek-Bever, Temselaan 100."

7.7.2 Exhibit PGM2 is a notary's attestation (probably the document referred to in the letter of 7 May 1997 - see paragraph IV above) described by Mr Mather as "showing the transfer of market research and sales management functions to Europe BVBA". The relevant text of PGM2 (again, in the English translation provided) records that ETC NV "has brought in a branch into the patrimonium of [Europe BVBA]... This branch consisted between others of the following departments: Human Resources, Advertising, General Administration, Finance & Accounting, Legal, Trademarks, Brand Management, Sales Management, Market-Research, Management Systems, Other Administration and Management Central Eastern Europe."

7.7.3 Exhibit PGM3 is a report of an extraordinary meeting of the board of directors of ETC NV relating to that company's change of name and corporate status in June 2000. It has no bearing on the events in 1997 which gave rise to the admissibility issue.

7.7.4 These exhibited documents do not take the matter any further, indeed if anything they increase rather than decrease the uncertainty as to the exact succession to ETC NV's business. Assuming, as appears likely and in the appellant's favour, "the Research & Development department" referred to in PGM1 can be equated with "the laundry research functions" referred to in the affidavit, this document simply confirms what Mr Mather says about the partial transfer of ETC NV's

business to Eurocor. While the departments listed in PGM2 can similarly be broadly equated to what Mr Mather describes as "market research and sales management functions" transferred to Europe BVBA, the words "between others" suggest yet other unnamed parts of the business were also transferred to Europe BVBA. The totality of the available evidence shows quite clearly the business of ETC NV was on 28 March 1997 divided into research and other "functions" which were transferred to Eurocor and Europe BVBA respectively. None of the evidence suggests a total transfer of the business, or of that part of the business to which ETC NV's opposition related, to one successor company. If it had been possible to identify the opposition as an inseparable part of one or the other parts of the business, that would no doubt have been made clear in the evidence. As T 659/92 makes clear (see paragraph 7.2 above), there must be adequate evidence of the transfer of the opposition and related business assets.

7.8 Accordingly it is impossible to place any construction on the available evidence (including, in the appellant's favour, evidence filed out of time and contrary to the Board's direction) which allows one person, party or entity to be identified as successor to ETC NV in keeping with the legal principles in the case law of the Boards of Appeal relating to transfer of rights of opposition.

The appellant's arguments on admissibility

8. The Board now turns to the Appellant's arguments, as set out in paragraph XI above and will consider each in turn.

8.1 The Appellant's first argument is presented as cumulative. It is said first that ETC NV properly filed the Notice of Appeal and has a continued interest in revocation of the patent as a shareholder in Eurocor - both those facts are correct, the first appearing clearly from the file and the second being apparent from Mr Mather's evidence. However, its continued interest in revocation would suggest ETC NV should have filed the Grounds of Appeal.

8.2 It is then said that, when the Grounds of Appeal were filed, Mr Mather who signed them had an authorisation from ETC NV - that appears incorrect for the reasons given in paragraphs 4 to 6 above but, even if it were correct, the facts clearly show Mr Mather was not exercising such authority when he filed the Grounds of Appeal since that was done by Europe BVBA (see paragraph 3.1 above).

8.3 It is then said those working at the Temselaan site always had an interest in revocation and all that has changed has been an internal reorganisation and changes of their employers' names - this appears from the evidence to be broadly correct but it overlooks the important facts that, first, the reorganisation was not "internal" within the original opponent company (ETC NV) but involved the transfer of that company's business to two different legal entities; and second, that neither of those entities can be identified as the only successor to ETC NV's business.

8.4 The next step in this argument is put in two ways, namely that ETC NV should be seen as continuing to be the party adversely affected by the decision under appeal and alternatively that ETC NV had the proper status to be appellant at the time the Grounds of Appeal were filed. Put either way, this is also as a statement of fact correct. ETC NV clearly was the person adversely affected at the time of the decision, and when the Notice of Appeal was filed, and when the Grounds of Appeal were filed but it was not, as Articles 107 and 108 EPC require, the party which filed the Grounds of Appeal.

8.5 It follows that the final step in this cumulative argument, that the appeal is therefore admissible and the Board no longer has to consider admissibility in accordance with Article 110(1) EPC, is untenable. An inadmissible appeal cannot be made admissible simply by saying the adversely affected party could have taken the step which would have made the appeal admissible when in fact it did not. The reference to Article 110(1) EPC is at best otiose and in fact fatal to the appellant's argument. Article 110(1) EPC simply says "If the appeal is admissible, the Board of Appeal shall examine whether the appeal is allowable". It follows from the very words of Article 110(1) EPC itself that, the appeal being inadmissible, allowability is not to be examined.

9. The appellant's second argument is that, Eurocor and Europe BVBA having each acquired an interest in revocation by reason of "the transfer of some of the interests that adversely affected ETC NV", one or both of those companies should become co-appellants. The words in which this argument is put expose its inherent flaw - that each of these companies only succeeded to **some** of the interests of ETC NV and the evidence is insufficient to show that either Eurocor or Europe BVBA, which filed the Grounds of Appeal, had at that time succeeded to the opposition together with **all** the relevant business interests of ETC NV of which the opposition was an inseparable part. In any event, there can be no possibility of these companies being co-appellants either with each other or with ETC NV. The reasons in paragraph 7 above apply equally to this argument.

10. It is then, as the appellant's third argument, said that there is no basis in the EPC for an appeal, if admissible when the Notice of Appeal was filed, becoming retrospectively inadmissible merely because of a change in the status of the appellant, provided the "Appeal" is then supported by proper "Grounds". Although, as the use of quotation marks around the word "Appeal" acknowledges, admissibility is strictly speaking not capable of assessment until the Grounds of Appeal have been filed, this statement is otherwise broadly correct. The appellant's difficulty lies with the proviso to its own proposition - that **proper** Grounds of Appeal must be filed. For the Grounds of Appeal to be "proper" they must inter alia be filed in time by an adversely affected party (see paragraphs 1 to 3 above). That did not happen in the present case and this argument offers no suggestion as to how in such circumstances admissibility can be established.

11.1 As to the appellant's fourth and last argument, it is said the first indication the appellant received that there was a potential objection under Rule 65(1) EPC was the Board's communication of 3 January 2001; that this was misread by the appellant as referring to authorisations and the actual discrepancy only became apparent at the oral proceedings on 10 January 2001; and that Rule 65(2) EPC gives the Board a discretion to make any necessary correction on an appropriate application by 24 January 2001, the letter of that date being such an application.

11.2 This argument proceeds from the wholly false assumption that it is for the Board to raise an objection to admissibility. Rule 65(1) EPC states:

"If the appeal does not comply with Articles 106 to 108 and with Rule 1, paragraph 1, and Rule 64, sub-paragraph (b), the Board of Appeal shall reject it as inadmissible, unless each deficiency has been remedied before the relevant time limit laid down in Article 108 has expired."

In the present case the only deficiency was that the Grounds of Appeal were not filed by the adversely affected party. Since they were filed on 21 May 1997 and the time limit in Article 108 EPC expired on 24 May 1997, the appellant had three days in which to remedy the deficiency.

11.3 Rule 65(2) EPC refers to none of the deficiencies mentioned in Rule 65(1) EPC but only to the provisions of Rule 64, sub-paragraph (a), EPC which requires the Notice of Appeal to contain the name and address of the appellant. If the Board notes a deficiency in the name and address in the Notice of Appeal, it shall communicate this to the appellant, invite the deficiency to be remedied within a specified period and, if that is not done, reject the appeal as inadmissible. Nothing in Rule 65(2) is applicable to the present case. No deficiency as to name or address appeared in the Notice of Appeal, so no need arose for the Board to communicate with the appellant under this rule. The wrong person then filed the Grounds of Appeal and the appellant failed to remedy this deficiency within the three days remaining to it to do so.

11.4 There was no obligation on the Board to communicate with the appellant at all as regards the defective Grounds of Appeal but, the appellant having subsequently done nothing about the deficiency, and the respondent having made no submissions on the point, it was only right for the Board to refer to it before the oral proceedings actually took place. That the appellant misread or misunderstood the communication and only realised the deficiency for the first time at the oral proceedings can only be the fault of the appellant. That the Board thereafter allowed the appellant a further fourteen days to file further evidence had nothing to do with Rule 65 EPC but merely reflected the fact that, at the oral proceedings, the appellant's representative could, even after an

adjournment to take instructions by telephone, offer no satisfactory account of the factual events let alone an explanation which showed that an adversely affected party had filed the Grounds of Appeal.

11.5 Thus this final argument begins, as mentioned above, with the false premise that it is for the Board to raise an objection to admissibility and, as developed, contains no more than a mistaken view of the law as contained in Rule 65 EPC. Being misconceived both in its premise and detail, this argument cannot succeed.

Commercial interest in the outcome as a basis of admissibility

12.1 As is apparent from a comparison of what is said above about the appellant's arguments (paragraphs 8 to 11) with the attempts by the Board (paragraphs 4 to 7) to see whether, despite its *prima facie* absence, admissibility could be discerned, the appellant has, in dealing with the problem it faces, failed to distinguish between a deficiency in the formal requirements for an admissible appeal and the existence of an interest in the outcome of an appeal. Much of Mr Mather's affidavit and nearly all the written argument based on it is directed to showing that not only both the original opponent (ETC NV) and the apparent successors to parts of its business (Eurocor and Europe BVBA), but also those employed "at the Temselaan site" (whoever their employer may have been at different times) all had an interest in revocation of the patent in suit. The Board does not doubt such interests (whether deriving from shareholdings or employment or merely a common interest in litigation with competitors, namely the respondents) existed and still exist, but they are irrelevant to the legal question of admissibility of the appeal. Any company in the Procter & Gamble group, or any employee of or shareholder in any such company, could have opposed the patent but those who did not do so within the nine-month opposition period set by the law thereafter lost the right to do so.

12.2 Under Article 99(1) EPC "any person" may oppose a European patent: no commercial or other interest whatsoever need be shown. If the opposition fails, the opponent can as an "adversely affected party" appeal under Article 107 EPC: again, no commercial or other interest is required. The conditions of appellant status which

make it narrower than that of opponent status are the need to have been a first-instance party and to be "adversely affected". The only intrusion of commercial interest into the legal position is that produced by the case-law of the Enlarged Board and Boards of Appeal (see paragraph 7 above) which confirms that the transmission of rights to oppose or to conduct an opposition appeal to those replacing, by entire succession in business, the original opponent or appellant is admissible since in this situation all the relevant assets, of which the opposition or appeal rights are inseparable parts, are transferred to the successor company. Without that limiting commercial interest, the conditions of Articles 99(1) and 107 EPC (not in themselves onerous) as to time-limits, fees and grounds for opposition or appeal could be bypassed. The right of transfer is circumscribed by the legal principle expressed by the maxim *nemo dat quod non habet* (no one can give what he does not have). Thus merely demonstrating a commercial interest in the outcome of the proceedings cannot in itself correct a deficiency in admissibility.

The appellant's request for further oral proceedings

13. The appellant's request for oral proceedings before any decision on admissibility other than allowance of one of its requests is misconceived. As a matter of law, the right to oral proceedings is not to two oral proceedings on the same subject (see Article 116(1), second sentence, EPC). Any further oral proceedings on the issue of admissibility would therefore be a matter for the Board's discretion. The appellant has had ample time and opportunity for over three years to prepare and present its arguments and indeed was, at its own request, given the further opportunity following the oral proceedings to submit evidence on the very issues raised at the oral proceedings. Had the further evidence indicated, in accordance with the Board's direction, an adversely affected party or acceptable successor in business as a party claiming to be the appellant, the Board would have invited the respondents to file evidence and/or arguments in reply and further oral proceedings thereafter might have been appropriate. However, since the appellant has not been able to use the "last chance" it asked for to overcome its own inadmissibility difficulty, no further proceedings, whether written or oral, are required. An opportunity for clarification

having been given and no issue requiring further proceedings having resulted, the request is refused (see T547/88, unpublished, reasons, paragraph 2).

The appellant's requests as to admissibility

14.1 As to the requests in the appellant's letter of 24 January 2001 (see paragraph XII above), it is questionable whether these are themselves admissible at all. The Board's direction made at the oral proceedings on 10 January 2001 was to file evidence by 24 January 2001 to show that the party now claiming to be the appellant is adversely affected by the decision under appeal. In other words, the Board required the appellant to show that either the original opponent or some other party demonstrating a sufficient right to replace that opponent could be the appellant. As explained above, that has not been done; instead the evidence and arguments now put forward seek to identify three companies as possible appellants and the requests in the letter of 24 January 2001, expressed to be made on behalf of each of those companies, in effect ask the Board to name one or more of those companies as appellant and/or "co-appellants". In the light of the Board's direction which, as the nature of the requests illustrates, has not been complied with, it is at least arguable that no such requests can be entertained. However, to the extent they can be dealt with at all, the Board holds as follows:

14.2 Main request - that the appeal proceed in the name of ETC NV and be declared admissible.

The Grounds of Appeal not having been filed by ETC NV, the only party adversely affected by the decision under appeal, this request cannot be allowed.

14.3 First auxiliary request - that the appeal proceed in the names of ETC NV and Europe BVBA and be declared admissible.

This request is, as regards ETC NV, no more allowable than the main request for the same reason. As regards Europe BVBA, this company could only become party to the appeal if it could be shown that it, and it alone, had acquired the right to pursue the

appeal together with the related business assets of ETC NV. That not having been shown, it cannot take the place of the adversely affected party. As regards the suggestion that both companies be parties together to the appeal, this is impossible for the reasons in paragraph 7.6 above. This request cannot be allowed.

14.4 Second auxiliary request - that the appeal proceed in the names of ETC NV and Eurocor and be declared admissible.

This request differs only from the first auxiliary request in that Eurocor and not Europe BVBA is put forward as "co-appellant" with ETC NV. For the same reasons as the first auxiliary request, it cannot be allowed.

14.5 Third auxiliary request - that the appeal proceed in the name of one or more companies identified in Mr Mather's affidavit and be declared admissible.

It must follow that, if the earlier requests in the name of each of the companies in question is not allowable either as regards the individual companies or in the combinations sought in those requests, there is no merit in any further combinations which might be considered, even if (which is not the case) "co-appellants" in the sense meant by the request were allowable. Further the request amounts to an attempt by the appellant to abdicate to the Board the election to which it was put by the Board's direction at the oral proceedings on 10 January 2001. The Board knows of no principle of procedure in any legal system which permits a number of putative parties to litigation to ask a tribunal to select one or more of them to be party or parties to a case before it. The request is at the very least vexatious if not an abuse of procedure. In any event, it cannot for the reasons already given lead to the recognition of any party as appellant.

15. Accordingly, the Grounds of Appeal not having been filed by the party adversely affected by the decision of the Opposition Division of 14 January 1997, no sufficient evidence having been produced or argument advanced to show why any other person should take the place of that party in the proceedings, and there being no construction

which can be placed on the facts which can lead to any other conclusion, the appeal must be dismissed as inadmissible.

Order

For these reasons it is decided that:

The appeal is dismissed as inadmissible.