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D E C I S I O N
of 10 July 2000

Case Number: T 0445/98 - 3.2.1

Application Number: 89307376.7

Publication Number: 0352968

IPC: B66B 29/08

Language of the proceedings: EN

Title of invention:
A moving walkway

Patentee:
LODERWAY PTY. LIMITED

Opponent:
Ms Takako Matsumoto

Headword:
Existence of the appeal/LODERWAY

Relevant legal provisions:
EPC Art. 108, 122
EPC R. 64, 65(1), 67

Keyword:
"Appeal deemed to have been filed (no)"
"Reimbursement of the appeal fee (yes)"

Decisions cited:
G 0001/86, G 0002/97, J 0019/90, J 0025/92, J 0041/92, J 0004/96, T 0275/86, T 0371/92, T 0690/93, T 0861/94, T 0460/95

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0445/98 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 10 July 2000

Appellant: (Opponent)
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Respondent: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 9 February 1998 rejecting the opposition filed against European patent No. 0 352 698 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: F. A. Gumbel
Members: S. Crane
J.-C. Saisset
P. Alting van Geusau
V. Di Cerbo

Summary of Facts and Submissions

I. By decision taken on 9 February 1998 the Opposition Division rejected the opposition to European patent No. 0 352 968. The Opponent filed a notice of appeal against this decision by facsimile received in the EPO on 28 April 1998. The appeal fee was paid on 7 April 1998. The statement of the grounds of appeal was filed on 19 June 1998.

II. Considering that the time limit for filing the notice of appeal expired on 20 April 1998, the present Board, by a communication dated 19 June 1998 gave its provisional opinion that, according both to the provisions of the European Patent Convention and the case law of the Boards of appeal, the appeal could not be deemed to have been filed because the notice of appeal was filed after the time limit laid down in Article 108 EPC. Moreover, it was pointed out that according to Article 122 EPC as interpreted in decision G 1/86 of the Enlarged Board of Appeal (OJ EPO 1987, 447), an opponent in appeal proceedings is precluded from having his rights re-established in respect of late filing of the notice of appeal. Finally, the Board explained that such a conclusion might lead to the reimbursement of the appeal fee.

III. In response to this communication the Opponent filed observations where she acknowledged that the two months term for filing an appeal is inextensible and expired on 19 April 1998. She stated that the original of her notice of appeal dated 19 March 1998 seemed not to have reached the EPO. She further remarked that the appeal fee was paid on 7 April 1998 by using the Form 1010 and alleged that this Form could be regarded as fulfilling

the requirements for a notice of appeal according to Article 108 EPC and Rule 64 EPC. In her view, this is supported by the decision T 275/86. She quoted also J 25/92 as to the question of protection of the legitimate expectation which should apply in the present case. Relating to the existence of the appeal, she implicitly requested that the appeal be deemed to have been filed in due time and explicitly that a question be referred to the Enlarged Board of Appeal.

IV. The Patentee did not take position on these issues.

Reasons for the Decision

1. As it is clear from the summary of facts and submissions, the existence of an appeal is the preliminary issue to be decided upon by the Board.

1.1 According to Article 108 of the Convention: "Notice of appeal must be filed in writing at the European Patent Office within two months after the date of notification of the decision appealed from. The notice shall not be deemed to have been filed until after the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed."

1.2 In the present case it is not disputed that the notice of appeal was faxed on 28 April 1998, i.e. after the time limit of two months and 10 days which expired on 20 April 1998 and not 19 April, this day being a Sunday. However, it is alleged that it was a copy of the original notice of appeal which was faxed, suggesting that the original was sent earlier so that

the EPO should have received it in due time. The Board cannot follow this suggestion since it is not supported by any offer of evidence. Furthermore, the sending of a fax after the expiry of the time limit whereas the written original was sent in due time would be contrary to the common practice and, prima facie, does not make sense.

Nor does the Opponent dispute that Article 122 EPC is not applicable in the case in suit.

2. Relating to the issue of the principle of the protection of legitimate expectations, the Opponent quoted decision J 25/92 to support her allegation that the EPO's organs should have asked her about her intention to lodge an appeal if there was doubt as to it. However, the Board considers that this decision, which relates to an examination fee plus a surcharge and not to the filing of a notice of appeal, is a specific application of the principle laid down in J 13/90 (OJ EPO 1994, 456) dated 10 December 1992, i.e. the principle of good faith which requires the EPO to warn the applicant of any impending loss of rights if such a warning can be expected in all good faith. A warning can be expected if the deficiency is readily identifiable by the EPO and the applicant can still correct it within the time limit. Following this principle the present Board considers that, because the department which cashes the fee is not the same as the one which receives the notice of appeal, the deficiency was not easy to identify and the time limit between payment of the appeal fee and the expiry of the two months time limit for filing the notice of appeal was too short so that the opponent could not expect in all good faith such a warning.

Moreover, as already stated in many decisions of the Boards of appeal, namely in T 690/93, T 861/94, J 41/92 (OJ EPO 1995, 93) and J 4/96, the principle of the protection of legitimate expectations does not extend so far as to relieve parties of their responsibilities. The Enlarged Board of Appeal in G 2/97 (OJ EPO 1999, 123) saw no justification for the suggestion that the principle of good faith imposes on a board an obligation to warn a party of deficiencies within the area of the party's own responsibility. Thus the attempt of the Opponent to interpret the case law of the boards of appeal in a way contrary to this decision must fail.

3. It has now to be decided whether the payment of the appeal fee using the Form 1010 could be regarded as equivalent to the filing of a notice of appeal. It results from decisions J 19/90 and T 371/92 (OJ EPO 1995, 324) that the sole payment of the appeal fee using this form does not constitute a notice of appeal: "for a notice of appeal to be valid it must at least contain an explicit declaration of the wish to contest a particular decision by means of an appeal. Not until such notice has been formally filed can legal proceedings be instituted, the case be referred to the second instance and the appeal acquire suspensive effect ...". Contradicting this jurisprudence, the opponent quoted decision T 275/86 (not published) which held that the payment form in itself is equivalent to a notice of appeal. However, the Board considers that decision T 275/86 is in this respect an old and isolated decision which is not sufficient to throw doubt on the subsequent consistent and established case law of the Boards of Appeal as it appears from recent, and on this specific aspect properly reasoned,

decisions such as in particular J 19/90 and T 371/92, followed by T 460/95 (OJ EPO 1988, 587). For these reasons the present Board decides that, in the present case, the sole payment of the appeal fee using this form does not constitute *per se* a notice of appeal.

4. Since this point of law has already been decided and the present Board does not see any valid reason to depart from it, the request for referral of a question of law to the Enlarged Board is to be refused.

5. With regard to the consequences deriving from the conclusion under point 3 above, the Board considers that Article 108 EPC distinguishes two stages of the appeal: the first stage relates to the **existence of the appeal** which requires two conditions: the notice of appeal must be **filed in writing** at the European Patent Office within two months after the date of notification of the decision appealed from, and the fee for appeal must have been paid. Only if the appeal fulfils these two requirements of Article 108 EPC is it deemed to have been filed, i.e. the appeal is in existence.

The second stage of appeal, which relates to the issue of **admissibility** can only come into effect where an appeal is in existence. On the contrary where the appeal is deemed not to have been filed, the issue of admissibility does not even arise.

6. The distinction between an appeal not deemed to have been filed and an inadmissible appeal is relevant for the issue of reimbursement of the appeal fee. When, the appeal is deemed not to have been filed the appeal fee must be reimbursed since the purpose of this fee cannot be achieved. On the contrary, when an appeal is

inadmissible it is on principle not possible to repay the appeal fee because Rule 67 EPC states that the reimbursement shall be ordered where the Board of appeal deems the appeal to be allowable.

7. As regards the present case, since one of the two requirements of Article 108 EPC relating to the existence of the appeal was not fulfilled in that the notice of appeal was not filed in due time, the appeal does not exist and the fee paid, in the absence of any legal basis for its payment, must be reimbursed.

Order

For these reasons it is decided that:

1. The appeal is deemed not have been filed.

2. The appeal fee shall be reimbursed.

3. The request for referral of a question of law to the Enlarged Board of Appeal is rejected.

The Registrar: The Chairman:

S. Fabiani F. Gumbel