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D E C I S I O N
of 23 September 1999

Case Number: T 0486/99 - 3.3.4

Application Number: 95941693.4

Publication Number: 0806898

IPC: A23D 9/00

Language of the proceedings: EN

Title of invention:

Margarine fat blend and plastic w/o emulsion spread comprising this fat blend

Applicant:

Unilever N.V., et al

Opponent:

-

Headword:

Re-establishment/UNILEVER

Relevant legal provisions:

EPC Art. 108, 122, 134

Keyword:

"All due care - no"
"Assistant not properly supervised"
"Satisfactory monitoring system - no"
"No independent cross-check"

Decisions cited:

T 0035/83, T 0130/83, T 0166/87, T 0309/88, T 0828/94,
J 0005/80, J 0002/86, J 0003/86, T 0009/86

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0486/99 - 3.3.4

D E C I S I O N
of the Technical Board of Appeal 3.3.4
of 23 September 1999

Appellant: Unilever N.V.
Weena 455
3013 AL Rotterdam (NL)

Representative: Sikken, Antonius H. J. M.
Unilever N.V.
Patent Division
P.O. Box 137
3130 AC Vlaardingen (NL)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 2 October 1998
refusing European patent application
No. 95 941 693.4 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairwoman: U. Kinkeldey
Members: D. Harkness
W. Moser

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examining Division of the EPO posted on 2 October 1998, by which European patent application No. 95 941 693.4 was refused.
- II. The appellant (applicant) filed a notice of appeal by telefax received on 11 December 1998 and paid the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 9 April 1999 in response to a telephone reminder of a Formalities Officer of the EPO on 8 April 1999.
- III. On 2 June 1999, the appellant applied for re-establishment of rights and paid the appropriate fee. Furthermore, grounds, facts and evidence supporting the application for re-establishment of rights were filed at the same time.
- IV. In an annex to the summons to attend oral proceedings, which were held on 23 September 1999, the appellant was informed that during these proceedings the issue of *restitutio in integrum* pursuant to Article 122 EPC only would be discussed.
- V. The appellant's submissions in writing and during oral proceedings were in essence as follows:
 - (A) Office organisation:
 - (i) Five secretaries assist the professional representatives before the EPO. The secretaries do not work for the same representative all the

time; rather, there are frequent changes. Mrs H assists the appellant's representative on Monday and Tuesday and Mrs A on Thursday and Friday. On Wednesday, he receives support from any of the secretaries, except Mrs A and Mrs H. On Monday, both secretaries, Mrs A and Mrs H, are in the office. This common working day is an opportunity for sharing information on pending and completed secretarial tasks.

- (ii) The appellant's representative writes letters on the PC and delivers them to the secretary by e-mail, or places them in a specific common "mailbox" directory (electronic mailbox) that is accessible both by the representative and the secretary.
- (iii) The appellant's representative warns his secretary, in the form of an oral warning or of a yellow attention note attached to the file, that a letter has been placed in the mailbox for final processing. Secretaries working with the representative check the mailbox for new letters generally a few times a day.
- (iv) The final processing of the letters, ie. giving them the address information and reference numbers, having them printed, submitting them to the appellant's representative for approval and his signature and actual sending out of the signed letters, is done by the secretary. The representative does not consistently check whether the final processing is actually accomplished.

(v) The secretaries have been instructed to remove processed final draft letters from the mailbox.

(B) Handling of EPO deadlines:

(i) After reception of a communication from the EPO, the mail is opened by a first employee and it is written down in the EPO post book that this communication has been received.

(ii) Then, a second employee checks whether a computer updating is required. If yes, 'COMP' is marked on the communication, and a third employee does the updating of the computerised system (IPSS). At the same time a Yellow Card is created by the third employee containing the case number, the deadline and the action to be performed.

(iii) Every day a journal containing all IPSS updates is printed, and a fourth or a fifth employee makes sure that the proper updating has been done.

(iv) Then, the communication from the EPO is sent to the secretary of the representative concerned with the 'due stamp' on it showing the date by which the action has to be done. The third employee is responsible for indicating the date on the communication.

(v) The secretary gives the communication to the representative concerned for handling.

(vi) In parallel, every two weeks, diary lists are

issued, based on IPSS, containing all the deadlines each representative has to comply with within the next three months. Every two weeks, each representative sends to the section handling all formalities his diary list from which he has marked off the actions he has done, and a new diary list is issued.

- (vii) The Yellow Cards are a manual failsafe system. They are created when IPSS is updated. Then, the Yellow Cards are put into boxes by due date, and every day the Yellow Cards relevant to the actions which are due in five days are checked. If an action is marked off on IPSS, the Yellow Card is also marked off and no further actions are taken. If, however, the action is not marked off, the representative concerned and his Group Manager are immediately informed for immediate action. The third employee is responsible for the implementation of these measures.

(C) Handling of the system in the present case:

The deadline for filing the statement setting out the grounds of appeal was present on the diary of the appellant's representative in December 1998. On 28 January 1999, ie. five days before the deadline, the Yellow Cards had been checked, and it had been noticed that, according to IPSS, the action had not yet been done. The representative updated his diary list on this day, and IPSS was updated accordingly. But no further actions were taken.

(D) Historical facts:

- (i) Mrs A started working for the appellant's representative only from January 1999 onwards.
 - (ii) On 28 January 1999, the appellant's representative completed the statement setting out the grounds of appeal, placed it in the mailbox and signed off his diary list with pending actions.
 - (iii) Mrs A did not inspect the mailbox. She knew that the delivery of new draft letters into the mailbox is accompanied by a warning of the representative concerned. In contrast to Mrs H, who monitors the content of the mailbox by inspecting it a few times a day, Mrs A relied on the warnings for a new delivery. In the present case, the warning was either omitted or lost or had not been noticed. Not even on Friday, 29 January 1999 did Mrs A notice the presence in the mailbox of the draft letter in question.
 - (iv) When taking over secretarial duties from her colleague the following Monday, Mrs H had understood that the secretarial work was done at least with respect to sending letters.
 - (v) On the secretary's diary list the action "filing grounds of appeal due 2 February 1999" showed a sign off by Mrs A. She was unable to explain why she had signed off, while the draft letter was not processed.
- (E) Circumstantial facts:

Mrs H is a very able and experienced patent secretary and has worked satisfactorily and without interruption for the appellant's representative since March 1991. Also Mrs A has several years of experience as a patent secretary, and she was well instructed and supervised. Thus, the appellant's representative had no reason to doubt the ability of Mrs A to properly carry out the routine task of final processing the draft letter containing the statement setting out the grounds of appeal.

(F) Requirements of all due care:

- (i) The system of placing final draft letters for secretarial processing in an electronic mailbox in combination with a warning is a proper working practice. For at least five years it has worked satisfactorily.
- (ii) The incidental omission, which occurred very shortly after a change of working circumstances must be considered an isolated unfortunate mistake in a well organised and supervised patent department.

(G) Conclusion:

The principles as laid down in decisions T 35/83 of 22 December 1983, T 130/83 of 8 May 1984 and T 309/88 of 28 February 1990, where re-establishment of rights was decided, fully apply to the present situation.

Reasons for the Decision

1. The appeal does not comply with Article 108 EPC because the statement setting out the grounds of appeal has not been filed within the time limit laid down in Article 108, third sentence EPC.
2. The application for re-establishment of rights complies with Article 122(2), (3) EPC; it is admissible.
3. When an applicant is represented by a professional representative (Article 134 (1) EPC), an application for re-establishment of rights under Article 122 EPC cannot be acceded to unless the authorised representative himself or herself can show that he or she has taken the due care required of an applicant by Article 122 (1) EPC (cf. J 05/80 [OJ EPO 1981, 343], point 4 of the reasons).

However, if the representative has entrusted to an assistant the performance of routine tasks, the same strict standards of care are not expected of the assistant as are expected of the applicant or the applicant's representative (cf. J 05/80, point 6 of the reasons). Hence, a culpable error on the part of the assistant made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has himself or herself shown that he or she exercised the necessary due care in dealing with the assistant. In this respect, it is incumbent upon the representative to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision over the work (cf. J 05/80, point 7 of the reasons).

Furthermore, when considering an application for re-

establishment of rights, it has to be kept in mind that Article 122 EPC is intended to ensure that in appropriate cases the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (cf. J 02/86, J 03/86 [OJ EPO 1987, 362]).

4. On 28 January 1999 the appellant's representative completed the draft letter containing the statement setting out the grounds of appeal and placed it in the electronic mailbox. On the same day the Yellow Cards were checked and it was noticed that, according to IPSS, the action "filing grounds of appeal" had not yet been done. The representative then updated his diary list by marking off the action in question on 28 January 1999, and IPSS was updated accordingly. The representative must assume the whole responsibility for this updating. Given the fact that the updating brought about by the representative had taken place before the letter was printed and duly signed by the representative, and before the actual sending out of the letter, the measures taken by the representative in this context may not be considered to be in keeping with the requirement of 'all due care' pursuant to Article 122 (1) EPC.

5. The posting of a letter prepared and signed by the representative is a typical routine task which the representative can entrust to an assistant. However, in the present case, the letter had not even been printed, let alone reviewed and signed by the appellant's representative. On the other hand, the reviewing and signing of the printed letter within the non-extensible time limit pursuant to Article 108 third sentence EPC,

could not be entrusted to Mrs A or Mrs H; rather, it had to be done by the representative himself. Furthermore, in view of the lack of experience of the newly engaged Mrs A and the fact that the statement setting out the grounds of appeal is to be considered an important submission, the representative should have checked before the end of the time limit in question, ie. 12 February 1999, whether the letter had actually been printed and submitted to him for approval and his signature. From all this it follows that the representative failed to exercise reasonable supervision over the activity of Mrs A.

6. The appellant's representative used the system for monitoring time limits established in the patent department of the appellant, a large firm. In a large firm where a large number of dates has to be monitored at any given time, it is normally to be expected that at least one effective and independent cross-check is built into the system (cf. J 09/86 of 17 March 1987, T 828/94 of 18 October 1996). In the Board's judgement, the system for monitoring time limits of the appellant did not include such a cross-check. The premature updating by the representative of his diary list resulted in the action "filing grounds of appeal" being deleted on the Yellow Card concerned and in the IPSS, and there was no effective and independent cross-check built into the system to show the inconsistency between the updated Yellow Card and IPSS, on the one hand, and the factual situation, on the other. Consequently, the system cannot be considered to be normally satisfactory.

7. The question whether a particular arrangement used in a

particular office to ensure that procedural acts are completed in due time satisfies the requirement of "all due care" has to depend on the individual circumstances of each case (cf. T 166/87 of 16 May 1988). In the Board's judgement, decisions T 35/83 of 22 December 1983, T 130/83 of 8 May 1984 and T 309/88 of 28 February 1990, which have been cited by the appellant, are of no relevance because the factual and legal situation underlying each of these decisions is too different in comparison with the circumstances pertaining to the present case.

8. For the reasons given above, the Board comes to the conclusion that, in the present case, the requirement of 'all due care' within the meaning of Article 122 (1) EPC is not satisfied. Thus, the application for re-establishment of rights has to be refused.
9. Since the application for re-establishment of rights is refused, the appeal has to be rejected as inadmissible.

Order

For these reasons it is decided that:

1. The application for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairwoman:

U. Bultmann

U. Kinkeldey