

A Christmas tale. The General Court shows that even judges have a heart.

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“Dura lex sed lex” (it’s harsh but it’s the law) is a principle that usually does not admit exceptions. Unless of course one can make recourse to the “restitutio in integrum”, which, however, is a remedy not so easily obtainable, save perhaps around Christmas, as shown in the decision by the General Court in Forbo Financial Services AG, v. EUIPO, case T-3/20, decided on 16 December 2020 (not available in English yet).

This Christmas’ tale goes like this. Forbo opposed a EUTM application and the opposition was rejected on 12 February 2019. Forbo timely appealed, but filed the grounds of appeal only on 26 June 2019, i.e. 14 days after the 12 June 2019 deadline as per art. 68(1) of Regulation 2017/1001. With the grounds, Forbo also filed a request for restitutio in integrum claiming that the lawyer who represented it had been unable to timely file the grounds because of a serious illness contracted by him in an unforeseeable manner. In support of this assertion, Forbo submitted two solemn declarations, one made by the lawyer and the other by his spouse.



The request for restitutio in integrum was rejected by the Board of Appeal which said that the lawyer had not been shown to have complied with the diligence imposed by the circumstances. Even though, in exceptional cases, a sudden illness could justify restitutio in integrum, the Board held that the lawyer had not provided sufficient evidence of his claims, since his solemn declaration and that of his wife had only limited probative value, and there was no medical certificate.

In addition, a sudden illness could only constitute an unforeseeable reason if it was so serious that the person concerned was unable to take the appropriate steps to enable the time limits to be met, such as alerting a colleague (or have the spouse do so). Finally the Board noted that there was insufficient evidence that no colleague could sign and send the brief containing the grounds of appeal, or that such brief had already been finalized and approved by the appellant so that the alleged illness was the sole cause for not meeting the time limit.

The General Court, however, annulled this decision. It criticized the Bo



ard for finding that the “solemn declarations” had little probative value. Even though it recognized that it had often held that a statement made in the interest of its author had limited probative value and must be supported by additional evidence, it still found the Board was not entitled “*to consider as a matter of principle that such a statement is per se devoid of any credibility*” as the probative value whether taken in isolation or in combination with other evidence, depends in particular on the circumstances of the case (at §52).

Interestingly, the Court found that a lawyer was a legal professional who had the duty to exercise his functions in compliance with deontological rules and ethical standards, which prevented him, inter alia, from deliberately misleading the authorities and, in particular, the judge. Moreover, if a lawyer were guilty of a false statement made in solemn form, he would not only expose himself to criminal

sanctions, but would also compromise his professional reputation and cast serious doubt on his probity. Therefore, a solemn declaration made by a lawyer constitutes, in itself, a solid proof of the elements contained therein, if it is unequivocal, free of contradictions and consistent, and there is no factual element that could call into question its sincerity. Finally, lawyers are vindicated!

But what about the fact that the lawyer might have a personal interest in the granting of restitutio in integrum to the appellant, since it was he who had missed the deadline? Well the Court dismissed this argument holding that the Board had failed to take account of the fact



- which in the Court's view was the heart of this case - that the incident having caused the deadline to be missed fell within the private sphere of the lawyer and that he was the person best placed to provide information about that incident and, in particular, about his symptoms and ailments suffered.

One might surmise that almost always requests for restitutio in integrum are caused by events outside one's control, but the issue is not whether the event happened, but what was, under the circumstances, the reasonable duty of care - but its' Christmas and we are all good.

Happy Holidays !!

