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D E C I S I O N
of 5 July 2001

Case Number: J 0021/00 - 3.1.1

Application Number: 97919410.7

Publication Number: WO 97/41399

IPC: F25C 1/14

Language of the proceedings: EN

Title of invention:

New ice cube making unit with various ice cube sizes

Applicant:

Hernandez Maestre, Ana Maria

Opponent:

-

Headword:

National basic fee/HERNANDEZ

Relevant legal provisions:

EPC Art. 122

EPC R. 104(b), 85a

Keyword:

"Legal remedy in case of non-observance of the time-limit pursuant to Rule 85a EPC (none)"

Decisions cited:

G 0003/91

Catchword:

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Case Number: J 0021/00 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 5 July 2001

Appellant: Hernandez Maestre, Ana Maria
Avda. Paises Escandinavos no 18
Residencial Parque Christina
Bloque 20 - 80 F
03540 Playa de San Juan (Alicante) (ES)

Representative: -

Decision under appeal: Decision of the Receiving Section of the European
Patent Office dated 9 August 1999 declaring
European patent application No. 97 919 410.7
deemed withdrawn.

Composition of the Board:

Chairman: J.-C. Saisset
Members: R. T. Menapace
G. E. Weiss

Summary of Facts and Submissions

- I. In the European application No. 97 919 410.0 which originated from International application published under WO 97/41399 and claiming the priority date of 25 April 1996, the national basic fee, the designation fees and the examination fee had not been paid within the applicable time limits laid down in Rule 104b(1) EPC as in force at that time. Consequently the communication pursuant to Rule 85a EPC (EPO Form 1217) and the communication pursuant to Rule 85b EPC (EPO Form 1218) were both dispatched on 8 December 1998. In both forms the applicant was informed that the fees may still be validly paid /the deficiency may be remedied within a period of grace of one month and that re-establishment of rights was not available.
- II. As none of the aforementioned fees was paid in time the communication "Noting of loss of rights pursuant to Rule 69(1) EPC" because of non-payment of the national basic fee and the designation fees was issued on 3 March 1999.
- III. Part of the outstanding fees was paid on 15 March 1999.
- IV. By letter dated 15 April 1999 the applicant asked that the loss of rights be re-considered in view of the fact that the late payment had been due to her health and financial problems. A medical certificate was enclosed according to which she was seriously ill from 18 to 26 February 1999.
- V. By letter received on 3 May 1999 the applicant expressly requested a decision under Rule 69(2) EPC and, additionally, restitutio in integrum; the fee

required under Article 122(3) EPC was not paid.

- VI. By decision issued on 9 August 1999 the Receiving Section held that the communication pursuant to Rule 69(1) dated 3 March 1999 was upheld and that the application was deemed to be withdrawn due to the late payment of the fees mentioned in the decision.
- VII. On 5 October 1999 the applicant filed a notice of appeal against said decision and paid the appeal fee.
- VIII. In the grounds for appeal received on 29 October 1999 the appellant asked "to admit the registration in the European register of the patent" for the reason that she, whilst having had the necessary funds at her disposal, was hindered from actually making the necessary payments in time by a serious illness which kept her in bed from December 1998 to (15) March 1999, when she paid the outstanding fees immediately after her recovery. An additional difficulty in observing time limits was caused to her by the fact that she had to count on third persons for making the translations of all documents and communications into a foreign language, namely English.
- IX. In response to a communication of the Board the appellant in her letter received on 11 May 2001 stressed her personal difficulties caused by health and language problems and asked that reimbursement of the fees be made at the same time as the notification of the final decision of the Board.

Reasons for the Decision

1. Despite the somewhat unusual wording of the appellant's request in the given context there could never be any doubt as to what is sought by the present appeal, namely the setting aside of the impugned decision which held that the application is deemed to be withdrawn due to the late or omitted payment of the fees mentioned in the decision under appeal; thus the request qualifies under Rule 64(b) EPC. All other relevant requirements having been met as well, the appeal is admissible.

2. The impugned decision correctly states that the fees mentioned therein have not been paid in time and that the legal consequence thereof is the deemed withdrawal of the application. The appellant has not contested this.

3. As there is no further legal remedy provided for in the EPC where relevant fees have not been paid even within the period of grace pursuant to Rule 85a EPC, the resulting loss of rights is final and there is no longer any legal basis for considering circumstances of any kind which were or may have been the cause of the non-observance of the time limit. In particular, this is also true for re-establishment of rights which is excluded in such a situation (Article 122(5) EPC; Decision G 3/91, OJ EPO 1993, 8); in addition, such request is deemed not to have been filed in the present case because the prescribed fee has not been paid (Article 122(3) EPC).

4. 25 January 1998 being a Sunday, the decision under appeal is also correct as far as it held that the deemed withdrawal took effect on 27 January 1999, which is the day after the expiration of the 21 month time limit provided for in Rule 104b(1) EPC as then in

force, said time limit having to be calculated from the priority date claimed, i.e. 25 April 1996. As a consequence all fees paid on or after that date, except the appeal fee, are to be reimbursed.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. All fees paid by the appellant for European application No. 97 919 410.7 on or after 27 January 1999, with the exception of the appeal fee, are to be reimbursed.

The Registrar:

The Chairman:

M. Beer

J.-C. Saisset



Case Number: J 0021/00 - 3.1.1

D E C I S I O N
of 27 September 2001 correcting errors in the
decision of the Legal Board of Appeal 3.1.1
of 5 July 2001

Appellant: Hernandez Maestre, Ana Maria
Avda. Paises Escandinavos no 18
Residencial Parque Christina
Bloque 20 - 80 F
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Representative: -

Decision under appeal: Decision of the Receiving Section of the European
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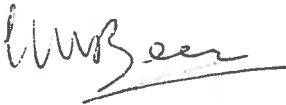
Composition of the Board:

Chairman: J.-C. Saisset
Members: R. T. Menapace
G. E. Weiss

In application of Rule 89 EPC the decision given on 5 July 2001 is hereby corrected as follows:

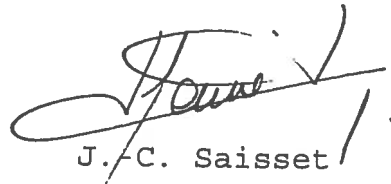
On page 3, point 4, line 3 and on page 4, Order, point 2 the date "27 January 1999" should read "27 January 1998".

The Registrar:



M. Beer

The Chairman:



J.-C. Saisset