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D E C I S I O N
of 9 July 2002

Case Number: J 0002/02 - 3.1.1

Application Number: 98113672.4

Publication Number: 0905062

IPC: B65G 49/06

Language of the proceedings: EN

Title of invention:

Storage unit for sheets of glass

Applicant:

FOR.EL. BASE di VIANELLO FORTUNATO & C. S.n.c.

Opponent:

-

Headword:

Re-establishment of rights/FOR.EL. BASE di VIANELLO FORTUNATO

Relevant legal provisions:

EPC Art. 122

Keyword:

"Re-establishment of rights - Article 122 EPC is an exceptional means of judicial remedy and not an usual way to extend an initial time limit"

Decisions cited:

J 0031/89, J 0005/94, T 0413/91

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: J 0002/02 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 9 July 2002

Appellant: FOR.EL. BASE di VIANELLO FORTUNATO & C. S.n.c.
Via per Monastier 4
I-31056 Vallio di Roncade (Treviso) (IT)

Representative: -

Decision under appeal: Decision of Examining Division of the European Patent Office dated 25 September 2001 refusing re-establishment of rights under Article 122 EPC into the time limit for payment of the third renewal fee and additional fee concerning application No. 98 113 672.4

Composition of the Board:

Chairman: J.-C. Saisset
Members: M.-B. Tardo-Dino
H. Preglau

Summary of Facts and Submissions

- I. European Patent application No. 98 113 672.4 was filed on 22 July 1998. The time limit for the payment of renewal fee for the third year expired on 31 July 2000, and the applicant did not pay this fee in due time.
- II. The EPO issued a communication dated 5 September 2000 notifying the applicant that under Article 86(2) EPC the renewal fee could still be validly paid within six months of the due date with additional fee.
- III. The renewal fee remained unpaid and the applicant was notified by a communication under Rule 69(1) EPC dated 27 February 2001 that the application was deemed withdrawn pursuant to Article 86(3) EPC.
- IV. The applicant by a letter dated 13 April 2001 requested re-establishment of rights under Article 122 EPC into the time limit for payment of the third renewal fee and the additional fee under Article 86 EPC.
- IV. Before the Examining Division the applicant argued in support of his request that:
- in order to save the costs of a professional representative he tried to prepare a large quantity of procedures by himself, and even though everything was carried out with care and accuracy sometimes difficulties arose when interpreting the rules.
 - he never received the reminder of 5 September 2000: he intended not to take advantage of this failure as an excuse but relied on it as a fact to be considered when applying Article 122(1) (and not 122(5) as erroneously alleged) EPC.

- in the current case and because of high costs resulting from court procedures he decided to hold back the renewal fee until the expiry of the term for re-establishment of rights and to await developments in infringement litigation against competitors.

- V. The applicant paid the renewal fee and the additional fee on 11 April 2001.

- VI. A communication under Article 113 EPC was issued on 22 May 2001 informing the applicant that as opposed to further processing under Article 121 EPC, Article 122 EPC was not available to extend time limits for completing actions.

- VII. The applicant by a letter dated 21 July 2001 repeated his request in the same terms as in his previous letter dated 18 April 2001. He added that retention of the payment was provoked by competitors claiming "a precedence in possession" and no proof was furnished of this allegation.

- VIII. The Examining Division rejected the request in its decision dated 25 September 2001 on the main ground that Article 122 EPC was an exceptional means of redress and could not be used to gain a further extension of time limit.

- IX. The present appeal was lodged against this decision on 28 November 2001. The appeal fee was paid on the same date and the grounds of appeal filed on 23 January 2002.

- X. The appellant requested that the decision under appeal be set aside and that he be re-established into the time limit for payment of the third year renewal fee and additional fee under Article 122 EPC.

XI. He submitted in support of his appeal his personal interpretation of Article 122 EPC, and in this respect:

- he asked the Board to include in the term "circumstances" referred to by this article the bad behaviour of his competitors, and to adapt the concept of "due care required by the circumstances" which he alleged was not defined in the EPC to his particular case where the applicant alone prosecutes the application and where the isolated human error consisted of his wrong interpretation of the EPC rules.
- he alleged that for his interpretation of rules he was misled by the Guide for Applicants (points 217 to 219, 9th edition 1992 updated 1997).
- he protested that he used "due care" as required especially regarding the frequent confusing errors committed by the EPO in many of its letters concerning the codes (RRM1 instead of RMM1), or the dates (31 February 2000 in letter of 23 April 2001)

Reasons for the Decision

1. The appeal is admissible under Articles 106 to 108 EPC.
2. The appellant did not request oral proceedings. Because the present decision is based on grounds and evidence on which the appellant has already had an opportunity to comment in his statements of grounds the Board is satisfied that his right to be heard is met and a sending of communication under Article 113(1) EPC is not needed.

3. The main argument of the appellant can be summarized as follows:

an erroneous interpretation of Article 122 EPC combined with exercise of "due care" under special circumstances (the fact that the applicant alone prosecutes the application and the behaviour of competitors) must justify restitution of rights.

4. The appellant no longer insists on the original reason why he did not pay the fee in due time. He maintains however that he held back the renewal fee "because he was waiting for developments in pending infringement litigation ..." but he no longer specifies "*until the expiry of the time limit for re-establishment of right*" as he did before the first instance. He now simply rectifies his argument declaring "*in the proximity of the expiry of the term of the payment of the renewal fee for the third year with additional fee*" and he emphasises that he could not take the risk of paying a fee which would not later have been refunded.

5. From the above, the Board concludes that the renewal fee was deliberately not paid in time.

6. It is worth re-stating here as did the Examining Division that Article 122 EPC is an extraordinary means to re-instate a right lost by missing a time limit due to specific excusable circumstances (see T 413/91 not published in OJ EPO).

This provision cannot be considered as providing a usual way to extend a missed time limit.

7. The reason for the non-payment mentioned in point (4) above is a circumstance that *per se* is inconsistent with the condition required by Article 122 EPC namely that due care required is to be exercised, this concept

having to be understood not in an abstract meaning but in connection with what was done to abide by the initial time limit.

Article 122 EPC does not imply for an applicant any right to have the final effect of an intentional action cancelled.

Holding back the payment of the fee for a reason other than the impossibility to comply with the legal provisions - particularly as a matter of strategy in the circumstances and for tactical considerations - is outside the scope of Article 122 EPC, and deprives the applicant from the possibility to invoke this article.

8. The fact that this failure results from a wrong interpretation of a provision of the Convention by an applicant who chose to prosecute the application on his own is irrelevant. It is clear from the case law of the Boards of Appeal that a mistake of law is not a ground for re-establishment of rights(see J 31/89), even not in case of an individual applicant. In its decision J 5/94 (not published in OJ EPO) the Legal Board held that in case of an individual applicant a less degree of due care than in case of a professional representative or the patent department of a large firm is allowed but stated expressly that even in such a case ignorance of the law is not accepted as an excuse (point 3.1 last sentence of the decision).

Especially the misinterpretation allegedly provoked by the "Guide for Applicants", is without foundation. The allegation simply ignores the clear terms of Article 122 EPC itself and also those of the "Guide" which are clear on the question of which time limit must be met.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

J.-C. Saisset