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Aktenzeichen / Case Number / N° du recours : J 17/89 - 3.1.1

Anmeldenummer / Filing No / N° de la demande : 85 303 368.6

Veröffentlichungs-Nr. / Publication No / N° de la publication : 0 164 911

Bezeichnung der Erfindung: Improvements in or relating to beer production

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : C12 C9/08

ENTSCHEIDUNG / DECISION

vom / of / du 09. 01. 1990

Anmelder / Applicant / Demandeur : LION BREWERIES LIMITED

Patentinhaber / Proprietor of the patent /

Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Article 122

Schlagwort / Keyword / Mot clé : "Re-establishment of rights - date of removal of cause of non-compliance"

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number : J 17/89

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 9 January 1990

Appellant : Lion Breweries Limited
15-17 Murphy Street
Wellington
New Zealand

Representative : Wilkinson, Stephen John et al,
c/o Stevens, Hewlett & Perkins
5 Quality Court
Chancery Lane
GB-London WC2A 1HZ

Decision under appeal : Decision of the Receiving Section
of the European Patent Office dated
16 February 1989 rejecting a request
under Article 122 for re-
establishment of rights.

Composition of the Board :

Chairman : P. Ford

Members : C. Holtz

F. Benussi

Summary of Facts and Submissions

- I. European patent application 85 303 368.6 was filed on 13.05.85 on behalf of the Appellant, a New Zealand company, by European professional representatives. In a letter dated 16.07.85, another firm of European professional representatives informed the EPO that they had taken over the case. The Appellant instructed both firms of European representatives through their domestic representatives in New Zealand.

- II. On 01.06.87 the renewal fee for the third year fell due, but the fee was not paid. The Appellant's European professional representatives were subsequently informed about the possibility under Article 86(2) EPC to pay the fee validly within six months, provided an additional fee was paid at the same time. No payment was made.

- III. On 05.01.88 the Receiving Section issued a notification to the Appellant that the patent application was considered withdrawn pursuant to Article 86(3) EPC.

On 11.02.88 the Receiving Section issued a second notification to the effect that the finding of 05.01.88 regarding the loss of rights appeared to have been correct. A time limit of one month for comments was set, but no such comments were submitted.

- IV. In a letter dated 18.05.88 the Appellant requested re-establishment under Article 122 EPC. The renewal fee and additional fee were paid on 19.05.88.

On 21.07.88 the Receiving Section issued a notification that it intended to reject the request as inadmissible.

The applicant submitted comments to this notification in a letter dated 23.08.88.

- V. By the decision under appeal, of 16.02.89, the Receiving Section rejected the request as inadmissible, on the ground that it had not been submitted within the two months from the date of removal of the cause of non-compliance prescribed in Article 122 EPC. The date of removal of the cause of non-compliance was established by the Receiving Section at 21.02.88 (ten days after the notification dated 11.2.88).

- VI. Notice of appeal was filed on 17.04.89 by telecopy, subsequently confirmed. The appeal fee was paid on 20.04.89. On 15.06.89 a statement of grounds was filed. The Appellant requests that the decision be set aside and that the request for re-establishment of rights be allowed.

- VII. Oral proceedings were held on 09.01.90, during which the Appellant agreed to the Board's examining the request under Article 122 EPC also on its merits, should this request be considered admissible.

- VIII. The facts of the case as submitted by the Appellant were the following:

The file which was handed over by the first European professional representatives to their successors contained a standing instruction to pay fees, unless countermanded by the client. Their successors, applying their own policy of not paying any fees unless instructed specifically to do so, overlooked this and consequently proceeded to send three reminders (on 09.02, 16.03, and 01.07.87 respectively) to the New Zealand representatives. These reminders contained a notice that the European

professional representatives undertook no responsibility as regards payment of fees, unless specifically instructed.

However, the reminders went unnoticed at the New Zealand representatives' office, due to a number of coinciding factors. The result was that the European professional representatives were unaware of their instructions to pay, while the New Zealand representatives relied on their standing instructions.

When the European professional representatives received the notification of 05.01.88 from the EPO that the application was deemed to be withdrawn, they telefaxed the New Zealand representatives on 12.01.88, at the same time sending them a copy of Article 122 EPC.

The telefax alerted the New Zealand representatives to start an investigation. On 13.05.88 they instructed the European professional representatives to file a request for re-establishment. The responsible New Zealand agent has testified that he realised that something was amiss when he received the telefax.

- IX. The Appellant has - as regards the issue of what constitutes the proper date for the removal of the cause of non-compliance - in essence argued that this was only when the European representative had established that the Appellant really had wanted the renewal fee to be paid. This meant that the cause of non-compliance was not removed until May 1988, when the European representative learnt about the result of the enquiries into this matter made by the New Zealand representative.

Reasons for the Decision

1. The appeal is admissible.
2. According to the established case-law of the EPO, the date of the removal of the cause of non-compliance can only be assessed after consideration of the specific facts of each separate case (cf. J 07/82, OJ EPO 1982, 391, "Cause of non-compliance/Cataldo").
3. The Board cannot agree with the interpretation of the law put forward on behalf of the Appellant (cf. paragraph IX above). According to this interpretation, the two month period for the submission of a request for re-establishment did not start until May 1988.

However, the two month period laid down in Article 122 EPC was clearly designed to enable parties to carry out the necessary investigations and consultations, as well as to prepare the documentation for submission of a request under Article 122 EPC. The date of removal of the cause of non-compliance, therefore, cannot be set at the date when these preparations have been completed to the point where the representative is about to submit a request for re-establishment, but must be a date before that.

4. The Receiving Section has found the relevant date to be that on which the notification of 11.02.88 is to be considered to have been received by application of Rule 78(3) EPC, i.e. 21.02.88. However, the Appellant's New Zealand representatives have admitted that they realised that something was amiss already in January of that year. The European representatives have also admitted by letter that they knew of the standing instructions on 13 January 1988.

5. Accordingly, the Board finds that the date of removal of the cause of non-compliance must be set at 13 January 1988. Thus, the request for re-establishment was submitted too late and is, therefore, inadmissible.

6. As a result of the above finding, the question of examination of the request as to its merits does not arise.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

J. R. Be

The Chairman:

Peer Lind

26.01.90: Catarina Hoff