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Aktenzeichen / Case Number / N^o du recours : J 30/89
Anmeldenummer / Filing No / N^o de la demande : 83 901 679.7
Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 107 705
Bezeichnung der Erfindung: Process for producing a slurry containing
Title of invention: concentrated liquid and ice crystals and sub-
Titre de l'invention : assembly therefor
Klassifikation / Classification / Classement : F28F 19/00

ENTSCHEIDUNG / DECISION
vom / of / du 14 December 1989

Anmelder / Applicant / Demandeur : Concentration Specialists
Patentinhaber / Proprietor of the patent /
Titulaire du brevet :
Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPO / EPC / CBE Article 122, Rule 85(1)

Schlagwort / Keyword / Mot clé : "Restitutio in integrum"

Leitsatz / Headnote / Sommaire

Under Rule 85(1) EPC, in the text ruling prior to its amendment with effect from 1 August 1989, if the branch Office at The Hague was not open for receipt of documents on the day on which a time limit expired, the time limit was extended until the first day thereafter on which both the branch Office and the Munich Office were open for receipt of documents.

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours

Case Number : J 30/89



D E C I S I O N
of the Legal Board of Appeal
of 14 December 1989

Appellant : Concentration Specialists, Inc.
26 Dundee Park
Andover, Massachusetts 01810
USA

Representative : Lynd, Michael Arthur
Marks & Clerk
57-60 Lincoln's Inn Fields
London WC2A 3LS

Decision under appeal : Decision of the Formalities Section
of the European Patent Office dated
29 March 1989 refusing re-
establishment into the period for
payment of the fourth renewal fee

Composition of the Board :

Chairman : P. Ford
Members : J. Stephens-Ofner
J.-C. Saisset

Summary of Facts and Submissions

- I. In a Notice (Form 2522) issued by the Formalities Officer of Directorate General 2 on 28 May 1986, it was alleged that the renewal fee for the fourth year payable in respect of the Appellant's Euro-PCT Application No. 83 901 679.7 had fallen due on 30 April 1986 and it was stated that under Article 86(2) EPC the fee might be validly paid within 6 months of that date provided that within that period the additional fee was also paid. In fact, 30 April 1986 was a public holiday in the Netherlands and a day on which the branch of the Office at The Hague was officially closed for the receipt of documents (OJ EPO 1986, 22).

- II. The renewal fee and the additional fee were paid by telexed instructions to the EPO Munich on 31 October 1986. Other actions were subsequently taken both by the Office and by the Appellant on the basis that the application was subsisting and it was not until 9 March 1988 that the Office issued a Communication under Rule 69(1) EPC (Form 2901) alleging that the application was deemed to be withdrawn as the fourth year renewal fee and additional fee had not been paid within the six month period of grace calculated from 30 April 1986.

- III. On 1 April 1988 the Appellant requested a decision in the matter under Rule 69(2) EPC and also filed an application under Article 122 EPC for re-establishment into the allegedly unobserved time limit.

- IV. In the Decision under appeal, issued on 29 March 1989, the application for re-establishment was rejected as inadmissible (Article 122(2), fourth sentence, EPC) and the Euro-PCT patent application was held to be withdrawn in

accordance with Article 86(3) EPC on account of non-payment of the renewal fee in respect of the fourth year. It was held, *inter alia*, that the fact that the branch of the Office at The Hague was closed on 30 April 1986 was not relevant. Rule 85(1) EPC, in the text prior to its amendment, with effect from 1 August 1987, did not justify the Appellant's interpretation that it had the same meaning as the Rule in its amended form, i.e. that if a time limit expires on a day on which one of the filing offices of the EPO is not open for the receipt of documents, the time limit shall extend to the first day thereafter on which all the filing offices are open.

- V. The Appellant duly filed a Notice of Appeal, paid the appeal fee on 29 May 1989 and duly filed a Statement of Grounds of Appeal on 25 July 1989. The arguments presented previously were essentially repeated and cancellation of the Decision and refund of the appeal fee were requested.

Reasons for the Decision

1. The appeal is admissible.
2. The essential question in this appeal concerns the correct interpretation of Rule 85(1) EPC in the text ruling prior to 1 August 1987, which, so far as is material, stated that: "If a time limit expires on a day on which the European Patent Office is not open for receipt of documents ... the time limit shall extend until the first day thereafter on which the European Patent Office is open for receipt of documents ...".
3. In case J 01/81, "Public holiday/Losfeld", (OJ EPO 1983, 53), the Legal Board of Appeal held that if the time limit for payment of a fee expired on a day declared to be a

public holiday in Munich, the time limit was extended under Rule 85(1) EPC (in the text ruling prior to 1 August 1987), irrespective of whether it would have been possible to effect payment in some way on that day, but the question whether that also applied to the branch at The Hague was expressly left open because it did not arise in that case (cf. Reasons, paragraph 7).

4. Although that question was expressly left open in Case J 01/81, the Legal Board of Appeal as at present constituted considers that it would not be correct to interpret Rule 85(1) EPC, in the text ruling prior to 1 August 1987, differently when the branch at The Hague is concerned. The European Patent Office is one organ of the European Patent Organisation (cf. Article 4 EPC) and the public has always had the right to pay fees directly to the Office either in Munich or in The Hague and no reason can be seen to disadvantage users of the Office according to the place in which they chose to make payment. On the reasoning adopted in the decision under appeal, it would seem that the Appellant could have avoided the alleged loss of the patent application in suit by making payment on 31 October 1986 to The Hague instead of to Munich, which would be absurd. It is, of course, a well established and generally recognised principle of interpretation of law that if two interpretations of a text are possible, the one which leads to a sensible result is to be preferred to that which leads to an absurd result. Indeed, there does not seem to be any reason why the expression "the European Patent Office" in Rule 85(1) EPC, in the text ruling prior to 1 August 1987, should not be interpreted as meaning the whole Office, which would be its normal interpretation in the absence of express or implied qualification.
5. Accordingly, the Board holds that the due date for payment of the renewal fee for the fourth year in respect of the

patent application in suit was 2 May 1986, since the branch Office was officially closed on 30 April 1986 and both that Office and the Munich Office were officially closed on 1 May 1986 (OJ EPO 1986, 21-2). Since the renewal fee and the additional fee were paid within six months of that date, they were duly paid and the patent application in suit is not deemed to have been withdrawn as alleged.

6. It follows also that the application for re-establishment of rights under Article 122 EPC was made without cause and that, accordingly, the fee for re-establishment was not due and must be reimbursed (cf. Case T 243/86 - 3.2.1, 9.12.1986).

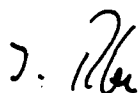
7. In Case J 01/81, the Legal Board of Appeal thought it right to order reimbursement of the appeal fee on the ground that there was a failure to take account of Rule 85(1) EPC in the circumstances of that case. In the present case, it was taken into account but not correctly interpreted. In the established case law of the Boards of Appeal, it is not a ground for reimbursement that the decision under appeal was based on an incorrect interpretation of the EPC which was previously current in the practice of the Office or was a possible alternative interpretation: cf. J 8/83, OJ EPO 1985, 102; J 8/84, OJ EPO 1985, 261; J 20/84 and J 23/85, OJ EPO 1987, 95. Accordingly, although the Office should certainly have raised the question of the payment of the fourth renewal fee at a much earlier date than 9 March 1988, the Board does not consider that there is a substantial procedural violation within the meaning of Rule 67 EPC which would justify ordering reimbursement of the appeal fee in the present case.

Order

For these reasons, it is decided that:

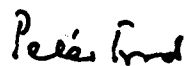
1. The decision under appeal is set aside in its entirety.
2. It is declared that Euro-PCT application No. 83 901 679.7 is not deemed to have been withdrawn for non-payment of the fourth renewal fee.
3. The fee for re-establishment of rights is to be refunded.

The Registrar:



J. Rückerl

The Chairman:



P. Ford