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D E C I S I O N
of 21 June 1995

Case Number: J 0002/94 - 3.1.1

Application Number: 90402319.9

Publication Number: 0419304

IPC: A23L 3/00

Language of the proceedings: EN

Title of invention:

Method for preparing food products for long-term preservation

Applicant:

UNION POUR LE COMMERCE LE FINANCEMENT ET LES ETUDES

Opponent:

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Headword:

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Relevant legal provisions:

EPC Art. 122

Keyword:

"Removal of the cause of non-compliance"
"Missing fees for re-establishment - no warning"
"Principle of good faith"

Decisions cited:

G 0005/88; J 0027/90; J 0041/92; T 0128/87; T 0682/92

Catchword:

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Case Number: J 0002/94 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 21 June 1995

Appellant: UNION POUR LE COMMERCE
LE FINANCEMENT ET LES ETUDES
57, rue Charlot
F-75003 Paris (F)

Representative: Hammond, William
Cabinet Hammond
96 rue de Montreuil
F-75011 Paris (F)

Decision under appeal: Decision of the Examining Division (Formalities Officer) of the European Patent Office dated 1 October 1993 refusing a request for re-establishment of rights with respect to European patent application No. 90 402 319.9.

Composition of the Board:

Chairman: R. Schulte
Members: R. E. Teschemacher
B. J. Schachenmann

Summary of Facts and Submissions

- I. European patent application No. 90 402 319.9 concerning a method for preparing food products for long-term preservation was filed on 21 August 1990.

- II. In a notice of 6 October 1992 (form 2522), the applicant's attention was drawn to the fact that he had not paid the renewal fee for the third year, due on 31 August 1992, but that it could still be validly paid within 6 months of the due date, provided that the prescribed additional fee was paid at the same time, failing which the application would be deemed to be withdrawn.

- III. In a communication of 1 April 1993 pursuant to Rule 69(1) EPC (form 2524), the applicant was informed that, since the payment of the renewal fee and the additional fee for the third year had not been made in due time, the application was deemed to be withdrawn pursuant to Article 86(3) EPC. On 6 April 1993, the applicant's representative phoned the formalities officer, asking for clarification, who in reply sent a copy of the fee reminder (form 2522).

- IV. In a letter of 25 May 1993, received on 2 June 1993, the applicant applied for re-establishment of rights, explaining why the time limit had not been observed. The instruction from the applicant to pay the renewal fee with surcharge, received on 21 October 1992, had been misplaced in the representative's office, without having been dealt with, and the separate "renewal fee file" for this application had been placed by error among abandoned applications.

- V. In a fax of 18 June 1993, the applicant was informed that neither the fee for re-establishment of rights nor the third renewal fee including the additional fee had been paid; he was invited "to verify the matter and to pay possibly". The fees were paid with effect of 23 June 1993.
- VI. The Formalities Officer stated in her decision, dated 1 October 1993, that the request for re-establishment was deemed not to have been filed, due to non-compliance with Article 122(2), (3) EPC, and that the application was deemed to be withdrawn, due to non-payment of the renewal fee in accordance with Article 86(3) EPC.
- VII. In a faxed letter of 29 November 1993, the applicant filed an appeal. The appeal fee was paid on the same date and a statement of grounds was filed on 9 February 1994.
- VIII. The representative submitted that the omission to pay the necessary fees with his request for re-establishment was due to an administrative error which he could not have discovered, though he applied all due care in handling the case. When he signed the request he also signed a debit order for the fees due which the secretary, due to an oversight, did not put into the envelope addressed to the EPO. Furthermore, according to the principle of good faith, the EPO should have drawn his attention to the fact that the fees were missing within the time limit of two months for requesting re-establishment.
- IX. In respect of the substance of the request for re-establishment, he submitted that the failure to pay the renewal fee within the grace period under Article 86(2) EPC was due to two isolated errors in a satisfactory system. The order to pay had been entered into the

renewal fee file but this file was placed erroneously among the abandoned applications. The letter containing the order had been filed erroneously in another file concerning an application by the same applicant.

- X. In reply to a communication from the Board, the appellant made additional submissions. In particular, it was stated that the renewal fee file for the present application could not be found when the communication pursuant to Rule 69(1) EPC was received and that the prosecution file did not reveal any instructions to the representative to pay the renewal fee. Nevertheless the representative asked the secretary to check the renewal fee file before he left his office on 8 April 1993. When he returned on 19 April 1993 the secretary had found the missing file which did not contain an instruction to pay. There was, however, a "cross sign" on the front page which led to an investigation in the office which revealed "some days later" that the instruction to pay, received on 21 October 1992, was wrongly classified and misplaced in the file of another application of the same applicant. The representative could not remember whether this was detected on 22, 23 or 26 April 1993 (Monday).
- XI. The appellant requested that the decision under appeal be set aside and that he be re-established in his rights.

Reasons for the Decision

1. The admissible appeal lies from the decision of the Examining Division refusing re-establishment of rights in respect of the payment of the renewal fee for the third year. The allowability of a request for re-establishment can only be examined if an admissible

request is filed. The request has to be filed within two months from the removal of the cause of non-compliance with the time limit. The omitted act has to be completed within this period. The request shall not be deemed to be filed until after the fee for re-establishment has been paid (Article 122(2) first and second sentence, (3), second sentence, EPC).

2. In the present case, the applicant was informed of the non-observance of the time limit by the communication of 1 April 1993 which the representative received before his telephone enquiry of 6 April 1993. In the absence of circumstances to the contrary, such information removes the cause of non-compliance. There are, however, special circumstances in this case since the cause of non-compliance was not the representative's unawareness of the fact that the renewal fee had not been paid. Rather the cause of the omission to pay was his misconception that there was no instruction from the client to pay the fee. In the case of such an error of fact, the removal occurs on the date on which the person responsible discovered or should have discovered the error (J 27/90, OJ EPO 1993, 422, pt. 2.4 of the reasons).
3. According to the appellant's submissions, the representative became aware of the letter instructing him to pay on 22, 23, or 26 April 1993. This does not exclude the possibility that the payment necessary for the admissibility of the request was made outside the time limit pursuant to Article 122(2), first sentence, EPC: if the cause of non-compliance was removed on 22 April 1993, the time limit lapsed on 22 June 1993 (Tuesday), whereas the payment was not effected until 23 June 1993.

4. A request for restitutio in integrum has to set out the facts on which it is relies (Article 122(3), first sentence, EPC). The party has not only to prove that it was unable to observe the relevant time limit in spite of all due care having been taken but must also set out the facts from which the admissibility of the request can be derived. As already stated, a communication from the EPO informing of an omitted payment normally removes the cause of non-compliance. An error of fact justifying a deviation from this rule has to be established by the party requesting re-establishment. The facts submitted by the appellant include the possibility that the cause of non-compliance was already removed on 22 April 1993. It may be that it was removed on 23 or 26 April, but since the first possibility is neither remote nor theoretical, the Board cannot take it for granted that the cause of non-compliance was removed after 22 April 1993. If the facts submitted are not sufficient to ascertain that a request for re-establishment meets the requirements, the impossibility of furnishing appropriate proof goes against the applicant (T 682/92, dated 4 October 1993, not published in OJ EPO, concerning due care). The facts submitted cannot satisfy the Board that the time limit was kept. In such a situation, the request for re-establishment of rights cannot be considered admissible.

5. The appellant could not expect to be informed of the missing fees, immediately after receipt of his request for re-establishment by the EPO. Whereas the EPO may be obliged, on the basis of the principle of good faith governing the procedure before the EPO (G 5/88 OJ EPO 1991, 137), to give prompt information on a specific query, a party may not expect a warning in respect of any deficiency occurring in the course of the proceedings (J 41/92, OJ EPO 1995, 93, pt. 2.4 of the reasons). There was no evident indication in the

appellant's letter which made a clarification or reminder necessary. The mere fact that the request was not accompanied by a cheque or a debit order did not require an immediate reaction by the EPO. Many payments are made in a way which is not apparent from the letter containing the request (cf. Article 5(1) RRFees). Therefore, the EPO can often only establish whether a specific fee has been paid after the expiry of a time limit when it disposes of the complete data on all payments made during the relevant period. The present case is not comparable to the situation where a party asks for clarification in respect of a certain requirement (J 41/92, op. cit.) or where the documents filed show that a part which was intended to be filed is actually missing (T 128/87, OJ EPO 1989, 406).

6. Under the circumstances of the case, it was an appropriate course of action that the Formalities Officer sent a fax, 16 days after the receipt of the request for re-establishment, informing the appellant that there was no indication that the fees had been paid. Although the Formalities Officer could not know at this time all the facts relevant for the removal of the cause of non-compliance with the time limit, the appellant was in any case given a chance to react. Considering that the appellant has not established that the cause of non-compliance was removed after 22 April 1993, the appellant was still in a position to make a valid payment when he received the fax in the morning of 18 June 1993.

7. It has to be concluded that the request for re-establishment was filed late and is, therefore, inadmissible. Since the Board comes to this conclusion on the basis that the appellant has failed to establish that the cause of non-compliance was removed after 22 April 1993, it is not necessary to consider whether

the cause of non-compliance was already removed before that date. Neither is there a need to deal with other aspects regarding the admissibility of the request or with the question whether all due care was observed in respect of the time limit under Article 86(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar



M. Beer

The Chairman:



R. Schulte

