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D E C I S I O N
of 26 August 1999

Case Number: J 0024/97 - 3.1.1
Application Number: 92500139.8
Publication Number: 0543765
IPC: A611 25/00

Language of the proceedings: EN

Title of invention:

Process for the preparation of calcium phosphate cements and their application as bio-materials

Applicant:

Boltong, Maria Gertruda

Opponent:

-

Headword:

Restituto/BOLTONG

Relevant legal provisions:

EPC Art. 122
EPC R. 69

Keyword:

"Restitutio - removal of cause of non-compliance - time limit for filing application"

Decisions cited:

T 0192/82, J 0027/88, T0315/90, J 0027/90

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: J 0024/97 - 3.1.1

D E C I S I O N
of the Technical Board of Appeal 3.1.1
of 26 August 1999

Appellant: Boltong, Maria Gertruda
Mezenlaan 12
6581 CM Malden (NL)

Representative: Suarez Diaz, Jesus
Ikur, S.L.
Hermosilla, 30
28001 Madrid (ES)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 20 February 1997
refusing the application for re-establishment of
rights concerning European patent application
No. 92 500 139.8.

Composition of the Board:

Chairman: J.-C. Saisset
Members: B. J. Schachenmann
S. C. Perryman

Summary of Facts and Submissions

- I. The appellant is the applicant of European patent application No. 92 500 139.8 for which the renewal fee for the fourth year was due on 31 October 1995. On 6 December 1995 the EPO informed the appellant's professional representative that the fee was not paid by the due date but could still be validly paid, pursuant to Article 86(2) EPC, within 6 months of that date provided that the additional fee was paid. The additional period expired on 30 April 1996. The fee and the additional fee were paid on 8 May 1996 by means of a debit order transmitted with letter dated 6 May 1996.
- II. On 14 June 1996 the EPO issued a communication under Rule 69 EPC according to which the application was deemed to be withdrawn under Article 86(3) EPC since the fees referred to above were not paid in due time.
- III. An application for re-establishment of rights pursuant to Article 122 EPC was filed on 8 August 1996. At the same time the fee for re-establishment of rights was paid. In support of this request it was submitted that the appellant had been travelling a lot during the critical period so that it had been difficult for the representative to contact her then. The appellant confirmed in a sworn statement dated 5 November 1996 that, due to her periodic absences, the letters from the representative were normally returned during these periods since she could not collect them at the Post Office.
- IV. With decision dated 20 February 1997 the Examining Division of the European Patent Office rejected the application for re-establishment of rights on the grounds that the appellant had not exercised all due care required by the circumstances. The Examining

Division found that the appellant could not prove satisfactorily how she had monitored her application and, in particular, the time limits for the payment of the renewal fees.

V. The present appeal is directed against the decision referred to above. Together with the statement of grounds a medical certificate was submitted attesting that, due to serious health problems, the appellant was under medical care in June and July 1995. After having left the medical Center she had to spend a long recovery period which lasted practically until the end of 1995. During this period she had to travel abroad due to the death of her sister. In January 1996 another close relative of hers fell seriously ill for which reason she again had to travel abroad various times. As a consequence, there was a period in 1995 during which mail sent to her by the former representative was not received. However, she could not be blamed for that since multiple *force majeure* circumstances had severely altered her daily life during the critical period.

VI. In a communication the Board expressed doubts on whether the application for re-establishment was admissible under Article 122(2) EPC. It appeared that the cause of non-compliance with the time limit was removed when the professional representative paid the outstanding renewal fee plus surcharge, i.e. on 6 May 1996. However, the application was not filed until 8 August 1996, i.e. more than two months after that date.

It was also pointed out that no proof had been submitted showing how the professional representative had monitored the time limits and that reminders were indeed sent to the appellant.

Concerning the appellant's behaviour, it was mentioned that, in the event of a long absence, a careful applicant should either inform the representative or take appropriate steps for safeguarding postal delivery. The fact that she could not be contacted from June 1995 to April 1996 did not therefore allow to conclude that she had complied with the requirement of all due care according to Article 122(1) EPC.

VII. In two responses, the appellant maintained that the application for restitutio was admissible since it had been filed within two months from the receipt of the communication pursuant to Rule 69 EPC. In that communication it was stated that the applicant shall have his rights re-established "providing he meets the time limits and formal requirements under Article 122 EPC". From this statement in the communication it could be concluded that the application for re-establishment could still be filed within two months from its receipt. Thus, the former representative was misled by this information on which he could rely according to the principle of good faith.

Furthermore, it was submitted that a recent routine review of the file had revealed, that the applicant indeed had instructed her Spanish patent agent to pay the renewal fee in question in December 1995 as followed from a copy of a corresponding invoice of the Spanish patent agent dated 15 December 1995. It was further submitted that the Spanish patent agent, since he was not qualified to act before the EPO under Article 134 EPC, had entrusted this task to a professional representative qualified accordingly. However, the applicant had only communicated with her Spanish patent agent. From these facts it was apparent, that the loss of right was caused by a series of unforeseeable events while the applicant had in fact paid the fee in time.

Reasons for the Decision

1. The present appeal complies with the provisions mentioned in Rule 65(1) EPC. It is therefore admissible.

2. *Admissibility of the request for reestablishment of rights*
 - 2.1 In accordance with Article 122(2) EPC an application for re-establishment of rights must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. An application for restitutio that does not comply with this provision has to be rejected as inadmissible and cannot therefore be considered as to its merits.

 - 2.2 According to the established case law of the Boards of Appeal, the removal of the cause of non-compliance occurs on the date on which the responsible person is made aware of the fact that a time limit has not been observed (T 192/82, OJ EPO 1985, 189). However, the effective date of the removal is not necessarily the date at which the omission has been discovered but the date at which the responsible person **should have** discovered it if he had taken all due care (J 27/88 of 5 July 1989, point 2.7; T 315/90 of 18 March 1991, point 6; J 27/90, OJ EPO 1993, 422, point 2.4).

 - 2.3 The first question to be answered in this context is therefore that of the "responsible person". In the present case, the appellant's Spanish patent agent who could not act before the EPO had entrusted a professional representative qualified under Article 134 EPC with conducting the proceedings before the EPO (see point VII, supra). His duties obviously involved

monitoring (and observing) all time limits to be complied with in the proceedings before the EPO including those for paying the renewal fees. Thus, the professional representative before the EPO was clearly the person responsible for any measure to be taken to avoid a loss of rights due to the late payment of a renewal fee.

- 2.4 The second question concerns the moment at which the cause of non-compliance with the time limit was removed, i.e. when the responsible person should have discovered that the time limit for the payment of the renewal fee for the fourth year was not complied with.

It follows from the facts set out (see points III, IV, and VII, supra) that the communication between the professional representative and the appellant was difficult for a number of reasons and that, consequently, the professional representative did not receive timely instructions to pay the renewal fees even if it appears that the appellant had instructed her Spanish patent agent in time. Thus, it has to be concluded that the cause of non-compliance with the time limit for the payment of the renewal fee was the professional representative's lack of instructions. In any case, no other explanation was presented in the course the present proceedings.

Thus, the cause of non-compliance with the time limit was removed at the time when the professional representative, as the responsible person, eventually received the instructions to pay the renewal fee. This must have been before or on 6 May 1996, i.e. the date when he signed and despatched the debit order for the EPO. At that time the professional representative had to be aware of the fact that the payment of the renewal fee was late as no careful representative would pay a renewal fee plus surcharge without informing himself -

by means of his system for monitoring time limits - on the due date for the payment. Incidentally, it was never submitted that the monitoring system of the professional representative had failed or that an error in using the same had been made.

Thus, it has to be concluded from the facts submitted in the course of the present proceedings that the cause for non-compliance with the time limit was removed on or before 6 May 1996.

- 2.5 In this context it was argued by the appellant that - according to the principle of good faith - the professional representative could rely on the content of the communication under Rule 69 EPC dated 14 June 1996 implying that the application for restitutio could still be filed within two months from the receipt of that communication.

However, the Board cannot find any statement to this effect in the communication under Rule 69 EPC. The communication makes a clear distinction between the possibility of applying for a decision under Rule 69(2) EPC within two months after notification, on the one hand, and the possibility of filing an application for re-establishment of rights in accordance with "the time limits and formal requirements under Article 122 EPC", on the other hand. Thus, it left no doubt as to the time limits to be observed in connection with an application for re-establishment of rights. The communication under Rule 69 EPC cannot therefore be considered as misleading, in particular not for a professional representative qualified under Article 134 EPC.

- 2.6 Since, for these reasons, the cause of non-compliance with the time limit for the payment of the fourth renewal fee plus surcharge was removed on or before 6 May 1996, the two months time limit for filing an application for re-establishment of rights ended at the latest on Monday, 8 July 1996. However, the application for re-establishment of rights was not filed until 8 August 1996, i.e. more than two months after the removal of the cause of non-compliance. It is therefore not admissible pursuant to Article 122(2) EPC.
3. As the application for re-establishment of rights is inadmissible, the question of whether "all due care" within the meaning of Article 122(1) EPC was taken need not to be dealt with.

Order

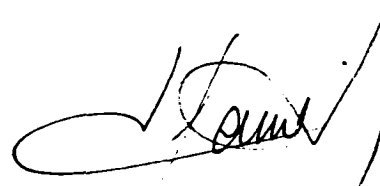
For these reasons it is decided that:

The appeal is dismissed.

The Registrar:


J. Rückerl

The Chairman:


J.-C. Saisset