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I N T E R L O C U T O R Y D E C I S I O N
of 3 September 2002

Case Number: T 0283/01 - 3.3.5

Application Number: 96100118.7

Publication Number: 0720969

IPC: C03C 3/06

Language of the proceedings: EN

Title of invention:

Silica glass, optical member including the same, the method for producing the same

Patentee:

NIKON CORPORATION

Opponent:

Heraeus Quarzglas GmbH & Co. KG

Headword:

Re-establishment/HERAEUS

Relevant legal provisions:

EPC Art. 122

Keyword:

"Due care (no)"

Decisions cited:

T 0167/97, T 0493/95, T 0186/97, G001/86

Catchword:

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Case Number: T 0283/01 - 3.3.5

Interlocutory Decision
of the Technical Board of Appeal 3.3.5
of 3 September 2002

Appellant: Heraeus Quarzglas GmbH & Co. KG
(Opponent) Quarzstrasse 8
D-63450 Hanau (DE)

Representative: -

Respondent: NIKON CORPORATION
(Proprietor of the patent) 2-3, Marunouchi 3-chome
Chiyoda-ku
Tokyo 100 (JP)

Representative: Hansen, Bernd, Dr. Dipl.-Chem.
Hoffmann Eitle,
Patent- und Rechtsanwälte
Arabellastrasse 4
D-81925 München (DE)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted
8 January 2001 concerning maintenance of European
patent No. 0 720 969 in amended form.

Composition of the Board:

Chairman: R. K. Spangenberg
Members: J. H. Van Moer
M. M. Eberhard

Summary of Facts and Submissions

- I. The appellant (opponent), HERAEUS QUARZGLAS GmbH and Co, KG filed a notice of appeal against the decision of the opposition Division maintaining European patent No. 720 969 in amended form.

They were informed by the Board that they had failed to file a statement of grounds of appeal. In response the appellant filed an application for re-establishment of rights (Article 122 EPC) and at the same time a statement of grounds of appeal.

- II. Oral proceedings were held on 3 September 2002. The sole subject-matter of these proceedings was the application for re-establishment of rights with respect to the time limit for filing the statement of grounds of appeal. The written and oral submissions of the appellant, i.e. the applicant for re-establishment of rights (hereinafter: "the applicant"), can be summarised as follows:

The application for re-establishment of rights is admissible since the statement of grounds of the appeal meets the requirements of Article 108 EPC, last sentence, for it is sufficiently substantiated. Indeed it sets out, over eleven pages, technical and legal arguments considered to demonstrate that the final requests are well founded. As a consequence decision T 167/97 is irrelevant.

As to the allowability of the application for re-establishment of rights, the failure to file the statement of grounds of appeal in due time was caused by a chain of exceptional circumstances resulting in

not noting and not controlling the time limit in spite of all due care. For controlling time limits a satisfactory system, professionally staffed and organised, existed.

In said system the time limit for filing the statement of grounds of appeal was calculated and noted when the notice of appeal was filed.

In the present case, due to exceptional circumstances, the applicant entrusted Mr Staudt, an external representative who was formerly in charge of that case in his capacity as the applicant's employee, with the payment of the appeal fee and the filing of the notice of appeal. According to Mr. Staudt's declaration annexed to the application for re-establishment of rights he was charged with the filing of the notice of appeal, but not with the filing of the statement of grounds of appeal, and it was foreseen that the applicant should be informed in writing about the effective filing of the appeal when the confirmation letter of the EPO was received. Confirmation of the filing of the appeal was, however, only given to the applicant by phone, since Mr Staudt did not receive a confirmation letter of the EPO.

Further the communication of the EPO dated 23 March 2001 confirming the filing of the notice of appeal did not mention any time limit so that no deadline was noted when it was received.

Finally the services of the applicant were negatively affected by the fact that the said communication of the EPO dated 23 March 2001 was addressed to Mr Staudt at the premises of the applicant though since July 1999

Mr Staudt was no longer their employee.

- III. The patent proprietor (hereinafter: "the respondent") who had also lodged an appeal, requested that the application for re-establishment of rights be rejected. Their arguments, submitted in writing and orally, were as follows:

The application for re-establishment of rights is inadmissible. In the present case the omitted act to be performed under Article 122(2)EPC, second sentence, is the filing of the statement of grounds of appeal and this act is only performed if that statement of grounds is itself admissible under Article 108 EPC, last sentence, ie substantiated (see Decisions T 167/97 and T 493/95).

Said statement of grounds of appeal only contains a repetition of the arguments submitted in the first instance proceedings and gives no reason why the decision under appeal had to be set aside.

The application for re-establishment of rights is furthermore not allowable. The applicant never stated the essential reasons why the time limit was not observed.

The system for noting and controlling the time limits was not satisfactory.

The applicant admitted that they used to note the deadline for filing the statement of grounds of appeal after filing the notice of appeal and not with the notification of the decision and this implies the absence of due care (see Decision T 186/97).

The applicant also admitted that they were informed orally by Mr Staudt about the filing of the notice of appeal and that the deadline was not noted at that time. The applicant's argument that a written confirmation should have been the occasion to note the four months time period could not be followed.

The applicant also admitted that they received the notification of the EPO dated 23 March 2001 but did not react.

Finally, the EPO was only informed on 21 August 2001 - together with the filing of the application for re-establishment of rights - that Mr Staudt was no longer the representative of the applicant.

Accordingly, under Rule 101(6) EPC, the EPO correctly continued to regard Mr Staudt as the representative.

The EPO was also never informed of a change of address of Mr Staudt.

Reasons for the Decision

1. According to decision G 1/86 (OJ EPO 1987, 447) Article 122 EPC is applicable in the present case where an appealing opponent had not filed the statement of grounds of appeal within the prescribed time limit.
2. Concerning the admissibility of the application for re-establishment of rights, the respondent no longer disputed at the end of the oral proceedings that the application was filed within two months after the removal of the cause of non-compliance with the time

limit. The respondent also did not dispute that the said application was accompanied by a document with the title "statement of grounds of appeal". The admissibility of the application depends on the question whether this document sufficiently substantiates the appeal. The Board considers, however, that, on the one hand, the statement of grounds is not prima facie unsubstantiated. Since, on the other hand, the Board is not satisfied, for the reasons set out hereinafter, that the application itself is allowable, it does not consider it appropriate to entertain a detailed investigation of the content of the statement of grounds of appeal and assumes, instead, in the applicant's favour that it is sufficiently reasoned and that the application is, therefore, admissible.

3. As to the merits of the application for re-establishment of rights, the question to be decided by the board is whether or not the applicant or their representative have taken all due care required by the circumstances, as stipulated in Article 122(1) EPC.

As to the facts on which the application relies, the board considers in favour of the applicant that the facts submitted by them are sufficiently supported by evidence.

From these facts (see point II above) it appears that the cause of non-compliance referred to in Article 122(2) EPC was a mistake consisting in not noting and not calculating at any time in these appeal proceedings the time limit of four months set out in Article 108 EPC, last sentence, for filing the statement of grounds of appeal.

3.1 The applicant's system for noting and controlling time limits implied noting the time limit for filing the statement of grounds of appeal when the notice of appeal was filed. In the present case, however, the applicant did not calculate and note the time limit at the point in time they charged the external representative with the payment of the appeal fee and the filing of the notice of appeal, but intended to do so only after receipt of a **written** confirmation from Mr. Staudt of the effective filing of the notice of appeal. Therefore, although an **oral** confirmation was indeed given by phone by Mr Staudt, no time limit was noted. When the confirmation letter of the EPO dated 23 March 2001 was received by the applicant, they did not note any time limit because this communication did not mention a time limit.

It follows therefrom that it was the external representative's obligation to obtain the necessary confirmation from the EPO and to transmit this information to his client. Therefore, this representative should have set up a reliable system for controlling whether the notice of appeal had been filed and whether the client had been informed accordingly in writing well in advance of the expiration of the time limit for filing the statement of grounds of appeal. It appears, however, that the representative relied solely on the receipt of a confirmation letter produced by the EPO. The board is therefore not convinced that the requirement of due care set out in Article 122(1) EPC was met.

3.2 The board further considers that the particular circumstances why in the present case the confirmation letter of 23 march 2001 was not received by the

external representative do not indicate that all due care was taken by the applicant and their representative. In this respect, taking "all due care required by the circumstances" would have implied that either the applicant or Mr. Staudt should have informed the EPO about the change of address of Mr. Staudt and of the fact that he was no longer an employee of the applicant. In the absence of any such information the EPO was entitled to send the communication of 23 March 2001 in the way they did it.

- 3.3 Moreover, when the applicant received the communication of 23 March 2001 addressed to Mr. Staudt, they also did not exercise all due care required by the circumstances since they neither calculated nor noted the time limit for filing a statement of grounds of appeal, although it was clear at the date of receipt of that letter that the appeal had effectively been filed and although the applicant was aware that the external representative was not in charge of filing the statement of grounds of appeal. The applicant submitted that they did not do so, since no time limit was indicated in the communication. There was no reason, however, let alone any legal obligation, for the EPO to mention a time limit in the communication, since according to Article 108 EPC this time limit had to be calculated on the basis of the date of notification of the decision open to appeal.

The board also observes that no care was obviously taken to inform Mr. Staudt that the said communication addressed to him was received by the applicant.

- 3.4 It clearly follows from the applicant's own submission that their system for monitoring the time limits did

not provide for an external representative being involved in the filing and prosecution of appeals. Even less did it take into account the possibility that different representatives were responsible for filing the notice of appeal and the statement of grounds. It follows therefrom that the system was not properly designed for handling the present appeal, involving partial responsibility of an external representative. The deviation from the normal way of filing and prosecuting an appeal was the applicant's deliberate decision in the particular circumstances of the present case. The failure to take note of the time limit for filing the statement of grounds of appeal was a consequence of this deviation. The board cannot, therefore, agree with the applicant's submission that the failure to meet the time limit for filing the statement of grounds of appeal was caused by circumstances for which neither the applicant nor their representative were responsible. On the contrary, the board holds that taking all due care required by the circumstances of the present case should have implied installing an individual control mechanism, offering a realistic possibility to detect and to correct the failure to note and calculate the time limit for filing the statement of grounds of appeal. However, it follows from the facts submitted by the appellant that no such measures were taken.

- 3.5 It follows from the above that the requirement of "due care" stipulated by Article 122(1) EPC was not met. Therefore, the application for re-establishment of rights cannot succeed.

Order

For these reasons it is decided:

The request for re-establishment is rejected.

The Registrar:



U. Bultmann

The Chairman:



R. Spangenberg

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