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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 9 September 2002

Case Number: T 0874/01 - 3.3.3

Application Number: 93306276.2

Publication Number: 0586109

IPC: C08L 23/10

Language of the proceedings: EN

Title of invention:
Polypropylene compositions and films thereof

Patentee:
SUMITOMO CHEMICAL COMPANY LIMITED

Opponents:
Fina Research S.A.
Basell Polyolefine GmbH
BOREALIS A/S
ExxonMobil Chemical Patents Inc. Law Technology

Headword:
-

Relevant legal provisions:
EPC Art. 108, 122

Keyword:
"Restitutio - all due care (no)"

Decisions cited:
G 0001/86, J 0002/86, J 0003/86, J 0026/92, T 0828/94

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0874/01 - 3.3.3

Interlocutory decision
of the Technical Board of Appeal 3.3.3
of 9 September 2002

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Decision under appeal:

Interlocutory decision of the Opposition Division of the European Patent Office dated 16 May 2001 and issued in writing on 11 June 2001 concerning maintenance of European patent No. 0 586 109 in amended form.

Composition of the Board:

Chairman: R. Young
Members: A. Däweritz
J. Van Moer

Summary of Facts and Submissions

I. In an interlocutory decision announced orally on 16 May 2001 and issued in writing on 11 June 2001, European patent No. 0 586 109 which had been granted in respect of European patent application No. 93 306 276.2, filed on 9 August 1993 and claiming priority of 11 August 1992 of an earlier application in Japan (214040/92), held to meet the requirements of the EPC in amended form.

II. Against this interlocutory decision, Notices of Appeal were filed by the Opponents on 31 July 2001 (Appellant I, former Opponent 01), on 8 August 2001 (Appellants III and IV, former Opponents 03 and 04), and 20 August 2001 (Appellant II, former Opponent 02). The respective prescribed fees were paid on the same dates. The Statement of Grounds of Appeal of Appellant III was received on 10 October 2001, that of Appellant IV on 12 October 2001 and that of Appellant II on 22 October 2001.

III. By letter dated 8 January 2002, received by fax on 9 January 2002, Appellant I referred to its Notice of Appeal mentioned above and, in view of its failure to submit the grounds of appeal in due time, requested re-establishment of rights under Article 122 EPC. The prescribed fee for this request was paid at the same time. The statement of grounds for this request and the Statement of Grounds of Appeal against the above Interlocutory Decision, ie the omitted act, were annexed to this letter.

IV. According to the statement of grounds for the request under Article 122 EPC, the Applicant for re-

establishment of rights (Appellant I) had become aware of its mistake upon reception of the transmittal of the Statements of Grounds of Appeal of the other appellants (Communication dated 7 November 2001, received by the Applicant on 12 November 2001).

The Applicant further explained that its patent department used a software called "MIS-Brevet" from Memotech as records and reminder system, which required that "the dates be computed by the person entering the data". All incoming mail would be viewed by a "formalities officer" ("assistant"), who "encodes in the software all the events that included a time limit for the patent counsels in the department"; at the same time, the cover page of the incoming mail would be marked by him (i) with an "M" (for MIS-Brevets) to indicate that the time limit had been entered in the monitoring system and (ii) with the time limit he had actually calculated and entered into the system. Thereafter, the mail would be sent to the patent counsel who verified that the "M" was present on the cover page of the mail and that the date calculated by the formalities officer was correct. All the patent counsels in the department would have access to MIS-Brevet in reading mode at all times.

Once a month, each patent counsel would get from the formalities officer a printed list containing all the events including the due dates in chronological order which were to be accomplished by him or her within the next two months. At the end of each week, the assistant would verify that each patent counsel was aware of all the coming events in his or her agenda, ie the assistant had instructions always to inform the person in charge of the file about any action which had not

yet been taken, but for which the due date was nearing.

In addition, the Applicant provided some information about the educational background, the training and the tasks of the assistant and submitted - with reference to case law - that the assistant was properly selected, instructed and supervised. Thus, it was emphasised that he was supervised by two European Patent Attorneys. Furthermore, it was asserted that the procedures followed in the company of the Applicant corresponded essentially to the procedure described in J 26/92 of 23 August 1994 as satisfactory (confirmed in T 828/94 of 18 October 1996, both decisions not published in OJ EPO), and that these procedures had been working efficiently for many years.

In the present case, the instructions to inform the person in charge about the upcoming due date failed because the date relied upon had, however, been incorrectly entered in the reminder system: "The time-limit was inadvertently written as 11.10.2010 instead of 11.10.2001 and thus did not appear in the calendar that we receive every month for a period covering the two coming months".

Reference was additionally made to a phase of reorganisation consecutive to a merger of three companies which had led to a temporary and exceptional increase of the workload of all the employees in the patent department (ie two European Patent Attorneys, two trainees, one assistant and one secretary).

The Applicant concluded that all due care had been taken and that the isolated mistake, which had passed through an independent cross-check, was not to be

imputed to the Applicant.

V. On 21 June 2002, the parties were summoned to attend oral proceedings to deal with the request for re-establishment of rights of the Applicant (Appellant I).

In an annex to the summons, a number of questions were raised as regards the sequence of steps actually taken by the Applicant and the causes for the non-compliance with Article 108 EPC:

Having regard to the statement that the time limit was "inadvertently written as 11.10.2010 ...", it was not clear in the context of the description of "The records and reminder system" where the erroneous date was "written". In particular, it was not clear whether the erroneous date was typed in by the assistant (formalities officer) or computer-generated after the event (ie incoming mail), which included a time limit, ie had been "encoded" in the software, and whether it was written on the incoming mail together with the "M".

This lack of clarity was compounded by the absence of any comments as to the extent to which the patent counsel was obliged to check the correctness of the calculated due dates when receiving the incoming mail from the assistant and which checks were in fact carried out.

Consequently, the Board was not in a position to determine the extent of the contribution of human error to the failure to meet the time limit.

There was no evidence on file about the alleged workload and its characteristics. *Prima facie* a merger

was not an unexpected event a professional could not cope with.

VI. By letters dated 9 July 2002 (Appellant III), 19 July 2002 (Appellant IV), 8 August 2002 (Applicant; Appellant I), 19 August 2002 (Appellant II), 5 September 2002 (Respondent), the parties informed the Board that they would not attend the oral proceedings.

Furthermore, the Applicant provided additional details as to the sequence of steps normally carried out with incoming mail by the assistant and the patent counsel in charge of the specific case. Further information about the steps taken in the present case on the incoming mail was also given including a copy of the front sheet of the Interlocutory decision dated 11 June 2001, received by the Applicant on 14 June 2001:

The assistant (formalities officer) received the incoming mail from a secretary who had sorted the mail and assigned each document to the patent attorney/counsel in charge of the individual case.

The assistant calculated any time limit(s) to be observed with respect to the individual document without including the 10 days of Rule 78(2) EPC, wrote the time limit(s) on the document, manually entered the time limit(s) in the reminder system (MIS-Brevet software) and indicated that this had happened by means of an "M" in a circle on the front page of the document. Then the document was despatched by him to the patent counsel in charge who verified that the dates calculated by the formalities officer were correct and that the "M" was there.

Once a month, a list was printed by the formalities officer for each patent counsel containing, in chronological order, all events to be accomplished by the counsel within the following two months, including the due dates and brief descriptions of the tasks to be fulfilled. Additionally, the formalities officer verified at the end of each week that each patent counsel had accomplished the tasks of the elapsed week and was aware of the coming events in his agenda.

Each patent counsel verified the correctness of the data manually written on the incoming document of which he or she was in charge.

VII. The oral proceedings were held on 9 September 2002 in the absence of all the parties in accordance with Rule 71(2) EPC.

Reasons for the Decision

1. The Interlocutory Decision forming the basis for the present appeal proceedings was notified by the Opposition Division to the parties on 11 June 2001. Consequently, the time limits for filing the Statement of Grounds of Appeal ran out on Monday, 22 October 2001 (Article 108, and Rules 78(2), 83(4) and 85(1) EPC). This has not been disputed by the Applicant.

1.1 The Statements of Grounds of Appeal which had been submitted by Appellants II, III and IV were forwarded to the other parties with a Communication dated 7 November 2001, admittedly received by the Applicant (Appellant I) on 12 November 2001.

1.2 On 9 January 2002, ie within the relevant time limits of Article 122(2) EPC, the request for re-establishment of rights, the prescribed fee, the statement of grounds for this request and the Statement of Grounds of Appeal against the above Interlocutory Decision, ie the omitted act, were received by the EPO. The failure to submit a Statement of Grounds of Appeal in due time was not contested by the Applicant.

1.3 In Decision G 1/86 (OJ EPO 1987, 447), it was decided by the Enlarged Board of Appeal that Article 122 EPC is not to be interpreted as being applicable only to the Applicant or patent Proprietor, but that an Opponent as Appellant (as in the present case Appellant I) may have its rights re-established under Article 122 EPC if it failed to observe the time limit for filing the Statement of Grounds of Appeal (Headnote).

Consequently, the formal requirements as laid down in Article 122, paragraphs 2 and 3 EPC are met.

It follows that the request for re-establishment of rights in accordance with Article 122(1) EPC is admissible.

2. It is the established jurisprudence of the Boards of Appeal that Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2/86 and J 3/86, OJ EPO 1987, 362).

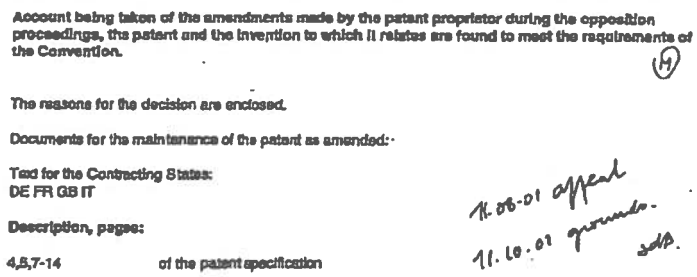
Whether or not a request for re-establishment of rights may be allowed, however, requires consideration of the circumstances of each individual case and depends on

whether or not the Appellant can establish that it was unable to observe the time limit in spite of all due care required by the circumstances having been taken.

3. In its letter dated 8 August 2002, the Applicant explained the normal procedure followed in its patent department in detail (see section VI, above) including a check by the patent counsel in charge, who verified the correctness of any data manually written on the incoming mail, and the steps actually taken in the present case.

Thus, the Applicant confirmed that the above check had been performed in the present case by the counsel and filed a copy of the front page of the Interlocutory decision forming the basis of these proceedings.

The page is stamped "REÇU LE 14 JUIN 2001 DEPT. DEB", and shows in handwriting the said "M" in a small circle, two dates of 11 August and 11 October 2001 with the annotations "appeal" and "grounds", respectively, and the initial "SdB." (see the partial copy in the figure below):



Account being taken of the amendments made by the patent proprietor during the opposition proceedings, the patent and the invention to which it relates are found to meet the requirements of the Convention.

The reasons for the decision are enclosed.

Documents for the maintenance of the patent as amended:

Text for the Contracting States:
DE FR GB IT

Description, pages:

4,5,7-14 of the patent specification

11.08.01 appeal
11.10.01 grounds
SdB.

The Applicant further stated that the second of these dates was entered in the system incorrectly as "11.10.2010" instead of "11.10.2001".

3.1 From the above facts and statements of the Applicant, it is evident to the Board that

- due dates for the Notice of Appeals and for the Statement of Grounds of Appeal were calculated by the assistant in accordance with the internal regulations in the patent department of the Applicant on the basis of the date stamped on the interlocutory decision ("11.06.01") by adding thereto the time limits of two and four months, respectively, as defined in Article 108 EPC, without taking the period according to Rule 78(2) EPC into account, and written on the incoming document;

- due dates for the Notice of Appeal and the Statement of Grounds of Appeal were entered manually by the assistant into the reminder system on the basis of these calculations;

- after having received the incoming document, the patent counsel in charge of the case checked that the calculated due dates on the front page of the incoming document, ie the interlocutory decision, complied with the above internal regulations;

- the monthly task list for each patent counsel was established on the basis of those data as entered into the computer.

3.2 The Applicant uses a specific reminder system, which according to its name "MIS-Brevets" seems to be specifically designed for monitoring the due dates to be met by a patent counsel in charge in proceedings before a patent authority. The details reported by the

Applicant show that it is possible to enter into this reminder and monitoring system a time limit of 9 years and 4 months without a warning or error message being created by the computer program (the Board is not aware of such a long time limit in any patent law, let alone in the EPC). This means that the computer program relied upon by the Applicant does not include a plausibility check for manual data inputs.

3.3 Wrong data inputs in computers based on typical typing errors, namely by inadvertent transposition of letters or cyphers (as asserted in the present case: "2010" instead of "2001"), are well known and, therefore, require specific attention, in particular in a case like this, where the data base of the MIS-Brevet program used by the Applicant forms the exclusive basis for the due date or task lists on which the patent counsels rely.

3.4 Consequently, it would have been indispensable for both the assistant and the patent counsel in charge of the file to cross-check the identity of the calculated dates on the front page of the document triggering the time limits and in the data base of "MIS-Brevet" triggering the due dates in the task list of each patent counsel.

3.5 However, although access to the data base was possible for the patent counsel in reading mode, such a cross-check for the plausibility of the dates was evidently not carried out, nor was it provided for as a routine task.

4. It follows from the facts and arguments provided by the Applicant that (i) its reminder system used for

monitoring time limits in this case evidently suffered from a systemic defect in that it allowed the entering of wrong dates without warning or error messages and that (ii), despite this deficiency, a proper cross-check between the computer database and the file itself had neither been provided for, nor carried out. Instead, the Applicant relied only on the presumption that the input of data would be free of errors. Even if a comparable failure to observe a time limit has not occurred previously, this cannot invalidate this finding, but can rather be attributed to favourable circumstances.

5. Therefore, the Board has come to the conclusion that a proper monitoring system should have contained some form of cross-check to be adequate enough to be considered as meeting the requirements of all due care under Article 122(1) EPC, and that due to the lack of such a cross-check the monitoring system cannot be considered as being satisfactory (T 828/94, above, points 2 and 5 of the reasons).

The failure to observe the time limit for filing the Statement of Grounds of Appeal was not based on circumstances which had occurred in spite of all due care within a normally satisfactory system, but was caused by the combination of an input error, which is not unusual, with a systemic defect in the system, ie the failure properly and independently to check the plausibility of the data entered in the computer system.

6. Consequently, the requirements for the allowability of the request for re-establishment of rights under Article 122 EPC are not fulfilled in this case.

Order

For these reasons it is decided that:

The request for re-establishment of rights is rejected.

The Registrar: The Chairman:

E. Görgmaier

R. Young