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**D E C I S I O N**  
**of 16 June 2003**

**Case Number:** T 1155/02 - 3.3.6

**Application Number:** 97950361.2

**Publication Number:** 0958348

**IPC:** C11D 11/00

**Language of the proceedings:** EN

**Title of invention:**

Dishwashing method and detergent therefor

**Applicant:**

DEEAY TECHNOLOGIES LTD.

**Opponent:**

-

**Headword:**

Dishwashing/DEEAY

**Relevant legal provisions:**

EPC Art. 108, 122(1)(2)(3), 133(2)  
EPC R. 57

**Keyword:**

"Re-establishment of rights (no) - all due care not taken"  
"Appeal deemed not filed - reimbursement or appeal fee (yes)"

**Decisions cited:**

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**Catchword:**

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Case Number: T 1155/02 - 3.3.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.6**  
**of 16 June 2003**

**Appellant:** DEEAY TECHNOLOGIES LTD.  
22 Mivtza Kadesh Street  
51203 Bnei Braq (IL)

**Representative:** VOSSIUS & PARTNER  
Siebertstrasse 4  
D-81675 München (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 2 July 2002  
refusing European patent application  
No. 97 950 361.2 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** P. Krasa  
**Members:** L. Li Voti  
C. Rennie-Smith

## Summary of Facts and Submissions

- I. European patent application No. 97 950 361.2, entitled "Dishwashing method and detergent composition therefor", based on International Application PCT/IL97/00443 and claiming a priority date of 6 January 1997, was filed on 31 December 1997. The applicant (appellant) is Deeday Technologies Ltd, an Israeli company.
  
- II. The application was refused on the grounds of lack of inventive step and unallowable amendment (Articles 52(1), 56 and 123(2) EPC) by a decision posted on 2 July 2002, following oral proceedings before the Examining Division on 7 June 2002 which were not attended by the appellant. The time limit for filing an appeal against this decision expired on 12 September 2002 (Article 108 and Rule 78(2) EPC).
  
- III. In the form of a single letter dated and received on 12 November 2002, the appellant filed a request under Article 122 EPC for re-establishment of the right to file an appeal, a Notice of Appeal and a Statement of Grounds of Appeal. The fees for the re-establishment request and the appeal were paid on the same date. The appellant also enclosed with its letter a declaration from a member of the board of directors of the company in support of the re-establishment request and a main and three auxiliary requests relating to the appeal. All those requests were amended versions of the main and auxiliary requests refused by the Examining Division.
  
- IV. In support of its re-establishment request, the

appellant presented the following evidence in the declaration:

Following receipt of the summons to oral proceedings dated 7 December 2001, the appellant's managing director decided not to continue with the application and gave instructions to the appellant's representatives not to take any further action but not to abandon the application. The oral proceedings took place on 7 June 2002 in the absence of the appellant. Following the decision of 2 July 2002 to refuse the application, a meeting of the board of the appellant company took place on 29 September 2002 at which the managing director was informed "policy decisions regarding registration of patents" were a matter for the board, that the action he had taken was beyond his competence and that all necessary steps should be taken to reinstate the application.

On the basis of this evidence the appellant argued that the removal of the cause of non-compliance with the time limit for filing an appeal occurred on 29 September 2002 and therefore the re-establishment request was filed and the omitted act (the filing of an appeal) was completed within the two month time limit in Article 122(2) EPC.

- V. The appellant requests re-establishment of its right to file an appeal against the decision of 2 July 2002 or, if that request is not granted, reimbursement of the appeal fee. If the re-establishment request is granted, it requests that the decision of 2 July 2002 be set aside and a patent be granted on the basis of the main request or alternatively one of the three auxiliary requests filed with the Grounds of Appeal. There is no

request for oral proceedings.

## **Reasons for the Decision**

1. This appeal has, as the appellant's letter of 12 November 2002 acknowledges, been filed out of time and, but for the request for re-establishment, it would be deemed not to have been filed. This is because late payment of the appeal fee leads to the Notice of Appeal being treated as not filed (Article 108 EPC). Accordingly, neither the admissibility nor the allowability of the appeal can be considered unless the re-establishment request succeeds. The Board must therefore consider first the admissibility and then the allowability of that request.

### *Admissibility of the re-establishment request*

- 2.1 That request itself is admissible since it was filed within a year after the unobserved time limit expired on 12 September 2002, and since within two months after the removal of the cause of non-compliance both the omitted act (the filing of an appeal) was performed and the request was filed and additionally the appropriate fee was paid (see Article 122(2)(3) EPC). However, this two month time limit was observed only by virtue of the fact that the re-establishment request and appeal were filed on 12 November 2002 (i.e. exactly two months after the time limit for filing an appeal expired) and not, as the appellant argues, because the cause for non-compliance was only removed on 29 September 2002, the date the board of the appellant company became aware of the steps taken by the managing director.

2.2 In a case such as the present where a party has neither a residence nor a principal place of business in a Contracting State, the EPO can only deal with a professional representative (Article 133(2) EPC). The decision to refuse the patent (accompanied by a notice of possible appeal under Rule 68(2) EPC) was communicated to the appellant's professional representative by the notification posted on 2 July 2002 which was deemed to be received on 12 July 2002 under Rule 78(2) EPC. As is clear from the re-establishment request it has filed on behalf of the appellant, the representative knew that the time limit for filing an appeal expired on 12 September 2002 and that knowledge was attributable to the appellant. It is equally clear, from paragraphs 4 and 5 of the declaration filed in support of the re-establishment request, that the appellant's managing director knew, before that time limit expired, both the date on which it would expire and the fact that, in view of the instructions he had already given, the time limit would not be complied with. Thus the cause of non-compliance actually pre-dated the expiry of the time limit and, this being known to the appellant in advance, the cause of non-compliance was removed as soon as the non-compliance occurred, namely on 12 September 2002.

*Allowability of the re-establishment request*

3.1 The re-establishment request being admissible, the appellant must demonstrate that the time limit for filing an appeal was not observed "in spite of all due care required by the circumstances having been taken" (Article 122(1) EPC). In the present case, the Board cannot find any evidence on which it could be said this condition is satisfied. Indeed, no evidence or argument

has actually been advanced on this issue; and such evidence as has been relied on in support of the re-establishment request generally points to an absence of due care having been taken.

3.2 Far from taking all due care to avoid non-observance of the time limit the appellant had, in the words of the declaration on which it now relies, given an instruction to its representative "not to take any further actions" and had done so even before the decision under appeal was taken or notified. Such a decision cannot be consistent with taking all due care to observe time limits; indeed, a decision to take no further action must necessarily mean that the time limits for future actions will be consciously ignored.

3.3 As mentioned above, the appellant considers the date of the appellant company's board meeting (29 September 2002) as the date of removal of the cause of non-compliance (incorrectly in the Board's view - see paragraph 2.2 above). If it is thereby implicitly argued that the managing director's failure to comply with the appellant company's internal rules justifies re-establishment, the Board cannot accept this argument. As already observed, the EPO must deal with the appellant's representative who, on the appellant's own evidence (paragraphs 4 and 5 of the declaration), accepted the instruction to take no further action by not attending the oral proceedings on 7 June 2002 and who was only instructed to revive the case after the board meeting on 29 September 2002 so decided. If the professional representative did not (or, which is more likely, could not) at the time question the propriety of the managing director's instruction, how can the Board now do so retrospectively? Non-compliance by

managing directors or other employees with their companies' internal rules is a matter to be resolved between those employees and companies under their national employment or company law. The Board must ensure legal certainty which would not be achieved if appellant companies were able, on discovering an internal irregularity, to reverse decisions on which they, by their professional representatives, and the EPO and the public (which may by inspection ascertain the status of any case at any time) have previously relied.

- 3.4 Even if the Board was able or prepared to take account now of the propriety of the acts or omissions of the managing director, it would make no difference to the issue of all due care. If, as the appellant now appears to argue, the managing director wrongly believed he and not the board was, in the words of the declaration (paragraph 6), responsible for "policy decisions regarding registration of patents", that indicates a general failure within the appellant company and not the "exceptional circumstances" or "an isolated mistake within a normally satisfactory system" which the case-law of the Boards of Appeal has consistently used as criteria for "taking all due care" (see "Case Law of the Boards of Appeal of the European Patent Office", 4th edition, 2001, pages 306 et seq).

*Reimbursement of appeal fee*

- 4.1 The re-establishment request cannot therefore be allowed. It follows that the appeal has been filed out of time and is accordingly deemed not to have been filed for the reasons in paragraph 1 above.



- 4.2 As regards the request for reimbursement of the appeal fee if the re-establishment request is not granted, reimbursement is not possible under the terms of Rule 67 EPC for two reasons. First, the appeal has not been allowed and, second, it would not be equitable to do so, the refusal of the request being the direct consequence of the appellant's own actions.
- 4.3 However, the only other occasion when reimbursement of an appeal fee may arise is when, as in this case, an appeal fee is not paid in time and accordingly, in the language of Article 108 EPC, the Notice of Appeal is deemed not to have been filed (see "Case Law", op cit, pages 552 to 553). Accordingly, the reimbursement request must be allowed.

## **Order**

### **For these reasons it is decided that:**

1. The request for re-establishment of rights is refused.
2. The request for reimbursement of the appeal fee is allowed.

The Registrar:

The Chairman:

G Rauh

P Krasa