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**Datasheet for the decision
of 12 October 2006**

Case Number: T 0743/05 - 3.2.07

Application Number: 97907521.5

Publication Number: 0885099

IPC: B27N 3/18

Language of the proceedings: EN

Title of invention:

A method of pre-pressing fibre material in the manufacture of board products

Patentee:

Valmet Fibertech AB

Opponent:

Siempelkamp Maschinen- und Anlagenbau GmbH & Co.

Headword:

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Relevant legal provisions:

EPC Art. 108, 119, 122, 134(1)
EPC R. 65(1), 77(2), 78(1)(2)(3), 81(1)

Keyword:

"Admissibility of the appeal"
"Meaning of the expression 'delivered to the addressee'"
"All due care - Mistake of law"
"Principle of the protection of legitimate expectations"
"Principle of good faith"

Decisions cited:

G 0012/91, G 0002/97, J 0031/90, J 0033/90, J 0002/02,
J 0042/89, T 0491/89, T 0542/89, T 0853/90, T 0561/91,
T 0690/93, T 0864/94, T 0493/95, T 0172/04, D 0006/82

Catchword:

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Case Number: T 0743/05 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 12 October 2006

Appellant: Valmet Fibertech AB
(Patent Proprietor) SE-851 94 Sundsvall (SE)

Representative: Karlsson, Leif Karl Gunnar
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Box 6107
SE-102 32 Stockholm (SE)

Respondent: Siempelkamp Maschinen- und Anlagenbau GmbH &
(Opponent) Co. KG
Siempelkampstrasse 75
D-47803 Krefeld (DE)

Representative: von dem Borne, Andreas
Patentanwälte
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 12 May 2005
revoking European patent No. 0885099 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: H.-P. Felgenhauer
E. Lachacinski

Summary of Facts and Submissions

I. The patent proprietor lodged an appeal on 5 July 2005 against the decision of the Opposition Division dated and dispatched on 12 May 2005 to revoke European Patent 0 885 099. The advice of delivery was signed and dated for receipt with the date of 16 May 2005.

II. The opposition in question had been filed against the patent as a whole and was based on Article 100(a) EPC (i.e. lack of novelty and lack of inventive step) and Article 100(b) EPC (i.e. the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art).

The Opposition Division held that the patent disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. Furthermore, the subject-matter of claim 1 according to the main request complied with the provision of Article 54 EPC. However, the subject-matter of claim 1 according to the main request and the auxiliary request was considered to lack inventive step (Article 56 EPC).

III. The appellant (patent proprietor) pointed out in its notice of appeal that it would "provide a written statement setting out the grounds of appeal before the four-month limit from notification of the decision, i.e. 24.09.2005". Such a statement was filed on 26 September 2005.

IV. With a communication dated 13 October 2005 the appellant was informed that the written statement of grounds of appeal had been filed out of time and that it was to be expected that the appeal would be rejected as inadmissible pursuant to Article 108 EPC in conjunction with Rule 65(1) EPC.

V. With letter of 25 October 2005 the appellant filed observations in response to this communication. It argued that the decision to revoke the European Patent was received by the person acting as representative for the appellant only on 24 May 2005 and consequently, that the four month time limit for filing a written statement setting out the grounds of appeal ended on 24 September 2005. The latter being a Saturday the time limit extended to 26 September 2005, the date it had filed that statement.

VI. Should the Board of Appeal decide that the appeal was inadmissible the appellant requested by letter dated 12 December 2005 the re-establishment of rights according to Article 122 EPC. The corresponding fee was paid that same day.

VII. Oral proceedings before the Board were held on 12 October 2006.

(a) The appellant requested that the appeal be considered admissible, either on the basis that the statement of grounds of appeal had been timely filed or on the basis of re-establishment in the time limit for filing these grounds; that the decision under appeal be set aside; that the patent be maintained with claim 1

according to the main request filed with letter of 18 May 2006 with dependent claims to be adapted.

(b) The respondent (opponent) requested that the appeal be rejected as inadmissible or subsidiarily that it be dismissed.

VIII. The arguments of the professional representative of the appellant supporting the request for deeming the statement of grounds of appeal to have been filed in time can be summarised as follows:

He personally received, as representative of the patent proprietor, the decision to revoke the patent only on 24 May 2005, i.e. more than ten days after the date of notification of the decision. During the period from 13 to 23 May 2005 he had been on travel to the U.S. and the actual earliest day for him to be notified of the decision was therefore 24 May 2005. The provisions of Rule 78(2) EPC apply since the notification of the contested decision by registered letter with advice of delivery was effected at a later date than the tenth day following the posting. Since the letter reached him personally only on 24 May 2005 he considered that the fictitious date based on the tenth day did not apply. He had no reason to believe that Rule 78(2) EPC should be interpreted in a way which deviates from its explicit wording, in particular with reference to the last half sentence of the above cited rule. In any case, the EPO did not react on the apparently inaccurate mention contained in his notice of appeal that the four month time limit ended on Saturday 24 September 2005, and thus, effectively on Monday 26 September 2005, as it should have done. The EPO did not make use of the

above mentioned possibility laid down in Rule 78(2) EPC to establish the date of actual delivery and consequently implicitly recognised 24 September 2005 as the end of the 4 month time limit for filing the statement of grounds of appeal. According to Rule 78(2) EPC the EPO has to provide evidence for what is to be considered the notification date in case the tenth day rule does not apply. He contested that the notification was delivered to the addressee as prescribed in Rule 78(2) EPC, as he, the addressee, was on travel when the notification reached his office. "Delivered to the addressee" has to be interpreted as "delivered to the person to whom the notification is addressed", and in the present case that person was he himself, and the delivery date was 24 May 2005.

IX. The professional representative's arguments in support of the request for re-establishment in the time limit for filing the grounds of appeal can be summarised as follows:

By applying the literal interpretation of Rule 78(2) EPC he took all due care and there was no reason to believe that the provisions of this rule should be interpreted otherwise. Neither the EPC nor the Guidelines for Examination in the EPO contain anything that implies a deviation from his interpretation and there is no decision of the boards of appeal which explicitly defines that this part of Rule 78(2) EPC should be interpreted other than according to its literal meaning. Since the due date was later than the normal due date according to the tenth day rule, he had found it important to draw in the notice of appeal the EPO's attention to the due date as he saw it. If the

date as mentioned by him was wrong the EPO could have readily identified the deficiency and it could have been expected, on the basis of the principle of the protection of legitimate expectations, that the EPO would have reacted by indicating the mistake to him. The mention in the notice of appeal of the due date for filing the statement of grounds of appeal is normally superfluous information but it was done in the present case to indicate a deviation from the date normally calculated by applying the tenth day rule, plus the 4 month time limit of Article 108 EPC. According to decision G 2/97 (OJ EPO 1999,123) the principle of the protection of legitimate expectations requires the EPO to warn the applicant of any loss of rights if such warning can be expected in good faith, particularly if the deficiency can be readily identified within the framework of normal handling at the relevant stage of the proceedings and the applicant is in a position to correct it within the time limit. In the present case, the representative could have legitimately expected that the EPO would have warned him of this mistake in calculating the due date. Consequently, the wrong calculation of the end of the time limit was a mistake that could be made by an experienced professional representative without implying that not all due care as required by the circumstances had been observed.

Reasons for the decision

1. Admissibility of the appeal.
 - 1.1 The provisions of Article 119 EPC state that the European Patent Office shall, as a matter of course,

notify those concerned of decisions and summonses, and of any notice or other communication from which a time limit is reckoned, or of which those concerned must be notified under other provisions of the Convention, or of which notification has been ordered by the President of the European Patent Office.

The form of the notification of decisions, summonses and any notice or other communication from which a time limit is reckoned is a crucial matter in the European patent system. This will have a particular influence on the behaviour of all who are acting through this system.

Pursuant to Rule 77(2)(a) EPC any notification in proceedings before the EPO shall be made by post in accordance with Rule 78 EPC and according to Rule 81(1) EPC be made to the representative if one has been appointed.

The provisions of Rule 78(1) EPC foresee that decisions, in particular those incurring a time limit for appeal, shall be notified by registered letter with advice of delivery.

According to Rule 78(2) EPC, first sentence, where notification is effected by registered letter, whether or not with advice of delivery, this shall be deemed to be delivered to the addressee on the tenth day following its posting.

- 1.2 This rule is the core of the EPO's notification system applying to decisions incurring a time limit, which are to be notified by registered letter with advice of delivery.

The tenth day fiction of Rule 78(2) EPC was introduced in the Implementing Regulations to the EPC in order to account for the different notification systems in use in the different Contracting States and to try to standardise the EPO's notification system in an independent manner.

When a registered letter with advice of delivery is effectively delivered to the addressee depends on the national postal regulations, which means consequently that the EPO would depend on them.

The aim of the tenth day fiction as provided for in Rule 78(2) EPC was to be independent from these national postal regulations and, in this way, to have an objective system to calculate the beginning of a time limit, which is to the benefit of the parties and all the users (see also G 12/91, OJ EPO 1994, 285, point 6.2).

- 1.3 Registered mail would normally arrive at the addressee in any of the Contracting States within ten days of its posting and on the basis of this assumption it was determined in the Implementing Regulations to the EPC that the date of notification is deemed to be the tenth day after dispatch.

As a consequence, the exact date of delivery of the registered letter containing the decision is normally of no importance provided the letter has been posted and has been delivered to the addressee. Only in the event of a dispute does the EPO have to establish the

date on which the letter has actually reached its destination.

- 1.4 In the present case the decision of the Opposition Division was posted on 12 May 2005 as registered letter with advice of delivery.

Pursuant to Rule 78(2) EPC the notification of this decision is deemed to have been **delivered** to the addressee on the tenth day following its posting, i.e. on 22 May 2005.

That this day was a Sunday has no influence on the calculation of the ensuing time limit for filing the statement of grounds of appeal.

Although the advice of delivery of the registered letter in question shows 16 May 2005 as the date of actual delivery to the office of the addressee (i.e. before the expiration of the ten days of Rule 78(2) EPC) and the signature of the employee "A.P." who seems to have been involved in receiving this registered letter, the provision of Rule 78(2) EPC prevails. The decision is deemed to have been delivered on 22 May 2005.

Therefore the four months time limit for filing the statements of grounds of appeal ended on 22 September 2005.

- 1.5 In his last submission the appellant pointed out that the Board had to decide whether the expression "delivered to the addressee" was to be interpreted as "delivered to the representative's office" or,

according to his opinion, "delivered to the professional representative in person".

He argued that the correct date of notification was 24 May 2005 when he personally signed the acknowledgement of receipt of the letter in question, not 22 May 2005 as calculated by the Board.

- 1.6 According to the definition given by the Merriam-Webster OnLine an "addressee" is "one to whom something is addressed".

The signature of the employee of the representative's office on the advice of delivery fulfils this definition since the addressee on the registered letter sent on 12 May 2005 by the EPO bears the correct name of the professional representative on file and it has never been argued by the appellant that the person who signed the advice of delivery had not been authorised to act for the professional representative in accepting this mail.

Contrary to the appellant's arguments "delivered to the addressee" does not mean that the notification in question has to be actually brought the attention of the professional representative **in person** (see in particular T 172/04, point 4, paragraph 6, decision not published in OJ EPO).

As pointed out in the above quoted decision, to which the present Board subscribes, the circumstance that the professional representative himself had knowledge of the notification only several days later than the tenth day after posting is irrelevant since the only

condition to be fulfilled is the delivery to the addressee, i.e. to the firm of the appellant's representative.

- 1.7 The appellant's interpretation would lead to an inextricable situation which would have as a consequence uncertainty for all the users of the European Patent system.

The answer to the question whether notification has effectively taken place could in that case depend entirely on the honesty, goodwill or organisational skills of the professional representative.

When receiving a notification of a decision at his office he could unilaterally decide when to accept delivery of the decision and thus determine at will when the time limit for lodging an appeal or filing a statement of grounds of appeal would start to run.

Thus, decisions adversely affecting the party in question might never have been delivered to the addressee. This cannot be the case.

- 1.8 The Board's interpretation is also in line with the provisions of Rule 78(3) EPC, which have the effect that refusing delivery of a registered letter sent by the EPO has no impact on the fiction that the letter is deemed to have been delivered to the addressee ten days after its posting, as stipulated by Rule 78(2) EPC.

From the wording of this rule it transpires that it does not make a difference whether it is the addressee himself or an other person acting for him who accepts

delivery of the letter. By analogy, that must count for the application of Rule 78(2) EPC as well.

- 1.9 Since the appellant disputed the delivery of the letter in question, it is incumbent on the EPO to provide evidence proving the exact date on which the registered letter with advice of delivery reached the addressee. The advice of delivery shows in this respect the date of actual receipt as 16 May 2005, which is well within the ten days time period ending 22 May 2005.

The requirements of Rule 78(2) EPC, last sentence, are therefore fulfilled.

As already stated above, (point 1.4), the notification by registered letter with advice of delivery of the decision dated 12 May 2005 is consequently deemed to have been delivered to the appellant on the tenth day following its posting, i.e. on 22 May 2005.

Since the statement of grounds of appeal has not been filed within the four month time limit set by Article 108 EPC the appeal must be rejected as inadmissible in application of Rule 65(1) EPC, unless the application for re-establishment of rights filed by the appellant is granted.

However, as consequence of the present initial inadmissibility of the appeal the request for reimbursement of the fee for re-establishment of rights has to be rejected.

2. *Request for re-establishment of rights*

- 2.1 The Application for re-establishment of rights complies with the formal requirements of Article 122 EPC.

The cause of non-compliance with the time limit was removed on 17 October 2005, the date of receipt of the communication of the Board's Registry dated 13 October 2005, informing the appellant that the statement of grounds of appeal was filed out of time. The request was filed on 12 December 2005, that is within the two months time limit prescribed.

The omitted act, i.e. to file the statement of grounds of appeal was already completed by 26 September 2005 and is therefore deemed to have been completed within this period.

The request for re-establishment of rights also complies with the requirement of the one year time limit for filing such a request.

- 2.2 Under Article 122(1) EPC, for re-establishment of rights to be allowed, the party in question must set out the facts that it missed the time limit despite taking all due care required by the circumstances.

The obligation to exercise due care must be considered in the light of the situation as it was before the time limit expired.

- 2.3 In the present case the professional representative of the appellant stated that since the letter reached him personally only on 24 May 2005, this date was the

notification date and not the fictitious date based on the tenth day rule. He was completely sure of this interpretation and had no doubt in this respect since he found the wording of Rule 78(2) EPC to be totally clear.

He added that he had also drawn the attention of the EPO to the fact that he had regarded the date of notification to be two days later than the EPO would have calculated on the basis of the tenth day rule by stating in the notice of appeal that the statement of grounds of appeal would be filed before the end of the four month limit from notification of the decision and would thus be filed before 24 September 2005.

- 2.4 However, taking account of the provisions of Article 108 EPC and Rule 78(2) EPC and as indicated above, the professional representative wrongly calculated the time limit for filing the statement of grounds of appeal.

The question to be answered is then whether this erroneous interpretation of the EPC and its Implementing Regulations on the part of the professional representative could be excused and whether in the present case all due care required by the circumstances was observed.

It must firstly be taken into account that under Article 134(1) EPC the Contracting States have in principle limited representation of parties before the EPO to professional representatives who, by virtue of their qualification, should guarantee the best possible representation.

Secondly, the interpretation of the European Patent Convention and its Implementing Regulations as well as of the jurisprudence of the Boards of Appeal of the EPO are among the principal tasks of representatives (see J 33/90, point 3 second paragraph, decision not published in OJ EPO).

In J 31/90 (point 3), J 42/89 (point 3.1 fifteenth paragraph), J 2/02 (point 8), and T 493/95 (points 3.2 and 3.3) - all not published in OJ EPO - the boards in question decided that a mistake of law did not, as a general rule, constitute a ground for re-establishment of rights.

- 2.5 It is true, as the professional representative stated, that the determination of the moment in time under the provisions of Rule 78(2) EPC at which a notification of the EPO has been delivered to the addressee seems not to have given rise to numerous decisions of the Boards of Appeal, and in particular not to one regarding the provisions on the date of notification and the calculation of time limits following that date.

This can, however also mean that the legal fiction of the Rule 78(2) EPC apparently was never a point of discussion in these cases, because of its clear meaning which does not need interpretation.

- 2.6 The obligation to take "all due care required by the circumstances" as stipulated in Article 122(1) EPC means that the persons engaged in proceedings before or involving the EPO must acquaint themselves with the relevant procedural rules. (see D 6/82, OJ EPO 1983,

337, point 8), T 491/89 (point 6), T 853/90 (point 6), and T 516/91 (point 5) the last three decisions not published in OJ EPO).

In that respect, the Guidelines for Examination in the European Patent Office (E-I, 2.3 - 2.5) and the main commentaries on the doctrine (see especially Schachenmann, Münchener Gemeinschaftskommentar, Articles 119 and 120 EPC, pages 22 to 25; Singer/Stauder, Europäisches Patentübereinkommen, 2nd Edition, pages 676 and 677; Singer/Stauder, The European Patent Convention 3rd Edition, Vol.II, pages 378 to 380; Schulte, Patentgesetz mit EPÜ, 7th Edition, pages 1312 and 1313; Gall, Die europäische Patentanmeldung und der PCT in Frage und Antwort, pages 109 and 113; Rippe, Europäische und internationale Patentanmeldung Praxis Leitfaden, 3rd Edition, pages 431 to 433 and Krasser, Patentrecht, 5th Edition, page 655) give an unambiguous answer as to how to apply the provisions of Rule 78(2) EPC: the notification by registered letter with advice of delivery is deemed to have been delivered to the addressee, when it is duly received at the office of the latter on the tenth day following its posting.

Therefore, the Board cannot share the representative's interpretation of the cited rule.

- 2.7 The Board holds as a consequence that all due care required by the circumstances to observe the time limit of filing the statement of grounds of appeal has not been taken by the professional representative.

2.8 For the above reasons, the request for re-establishment in the time limit for filing the statement of grounds of appeal has to be dismissed.

3. *The principle of the protection of legitimate expectations*

3.1 The professional representative argued that he intentionally indicated in the notice of appeal that the statement of grounds of appeal would be filed before the end of the four month time limit from notification of the decision expired, i.e. 24 September 2005, to draw the EPO's attention to the fact that he did not regard the tenth day rule to apply in the present case.

He criticized the EPO's behaviour in this case as the EPO was able to react after receiving this information which in the view of the EPO was apparently erroneous, but did not do so.

In case the EPO had correctly reacted and had pointed out that the date which he had calculated as being the final date for filing the statement of grounds of appeal was not correct, he would have had sufficient time to adapt himself to the EPO's position and file the statement of grounds of appeal in time, i.e. before 22 September 2005.

Requesting the application of the principle of good faith he concluded that:

- by defining what he considered as the due date, he had a legitimate expectation to be informed if this was considered deficient,
- if the due date as indicated by him was deficient it could readily be identified by the EPO,
- filing the statement of grounds of appeal at the deficient due date would have led to a loss of rights,
- there would have been sufficient time to correct the deficiency if the EPO had reacted upon receiving his notice of appeal.

3.2 According to Rule 78(2) EPC if the registered letter notifying the decision has failed to reach the addressee or has reached him a later date than the tenth day following its posting, it shall be incumbent to the EPO to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee.

First of all, as indicated above (point 1.9) and contrary to the appellant's assertion the EPO has demonstrated according to Rule 78(2) EPC, last sentence, that the notification of the decision by registered letter with advice of delivery was effectively received at the representative's office on 16 May 2005.

Consequently, there is no question about the delivery in time of the notification of the decision under appeal and the provisions of Rule 78(2) EPC, last part of the first sentence, do not apply.

3.3 The professional representative also argued that the EPO should have informed him about the mistake he made.

It is true that an applicant must not suffer a disadvantage as a result of having relied on a misleading communication or information from the EPO.

However, in the present case the misleading information does not originate from the EPO but from the appellant's professional representative himself.

Further, according to G 2/97 (OJ EPO 1999, 123) if the protection of legitimate expectations requires the EPO to warn the applicant of any loss of rights, provided such warning can be expected in all good faith, this presupposes that the deficiency can be readily identified within the framework of the normal handling of the case at the relevant stage of the proceedings and the party in question is in a position to correct it within the time limit.

3.4 For the principle of the protection of legitimate expectations to apply, the deficiency or discrepancy must be evident so that the EPO, in this case the Board of Appeal or its Registry, can be expected to notice it.

However, when receiving the notice of appeal mentioning the date 24 September 2005, even viewed in combination with the mention of the date of the impugned decision of 12 May 2005, there is objectively no way of knowing **at what exact point in time** the professional representative would actually file the written statement setting out the grounds of appeal, as he

indicated that the latter would be filed "**before**" the four month time limit from notification of the decision, i.e. 24 September 2005 (emphasis added by the Board).

- 3.5 Furthermore, it is not reasonable to consider, as the professional representative has done, that the mentioning of the date in question had to be considered as a question or "implicitly similar to a query" in the light of its evident incorrectness.

Firstly, the mention of the date was not expressed in the form of a question or a query. Secondly, from the date mentioned, it was prima facie not derivable that it was necessarily wrong, as a time limit ending on a Saturday or Sunday is extended to the next working day, thus it easily can be that two further days have to be added. As the difference between 24 September (the wrongly conceived date) and 22 September (the correct date) amounts also to two days, the date mentioned need not necessarily be the result of an incorrectness calculation.

It was further not obvious to deduce from such a statement in the notice of appeal that the appellant would wait until the last day of the time limit for filing the statement of grounds of appeal.

- 3.6 These particular considerations lead the Board to conclude that the expectation of the professional representative to be warned of such a deficiency is not legitimate. The principle of the protection of legitimate expectations cannot therefore apply to the present case. The wrong calculation of the due date lies entirely within the sphere of the professional

representative's own responsibility (T 690/93, point 3.2 to 3.5 and T 864/94, point 4, both not published in OJ EPO).

- 3.7 For the above reasons, the principle of protection of legitimate expectations does not apply and thus cannot lead to the statement of grounds of appeal having to be considered as being filed in time.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders