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**Datasheet for the interlocutory decision
of 21 June 2013**

Case Number: T 0022/09 - 3.3.07
Application Number: 99906328.2
Publication Number: 1058580
IPC: B01J 33/00, B01J 23/75,
C07C 1/04, B01J 37/02
Language of the proceedings: EN

Title of invention:

Process for producing fischer-tropsch catalysts

Patent Proprietor:

Sasol Technology (Proprietary) Limited

Opponent:

Formalities Bureau Limited

Headword:

Party status/Fischer-Tropsch Catalysts/SASOL TECHNOLOGY

Relevant legal provisions:

EPC Art. 107, 108, 112(1)(a)
EPC R. 101(1)

Keyword:

"Opponent company dissolved before decision of Opposition Division was issued - dissolved company restored to register of companies under national law after filing of appeal - retroactive effect under national law"
"Point of law of fundamental importance - no case law on that point - legal uncertainty about party status (yes) - necessity to refer questions to Enlarged Board (yes)"

Decisions cited:

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Headnote:

Questions

1. Where an opposition is filed by a company which is dissolved before the Opposition Division issues a decision maintaining the opposed patent in amended form, but that company is subsequently restored to the register of companies under a provision of the national law governing the company, by virtue of which the company is deemed to have continued in existence as if it had not been dissolved, must the European Patent Office recognize the retroactive effect of that provision of national law and allow the opposition proceedings to be continued by the restored company?

2. Where an appeal is filed in the name of the dissolved company against the decision maintaining the patent in amended form, and the restoration of the company to the register of companies, with retroactive effect as described in question 1, takes place after the filing of the appeal and after the expiry of the time limit for filing the appeal under Article 108 EPC, must the Board of Appeal treat the appeal as admissible?

3. If either of questions 1 and 2 is answered in the negative, does that mean that the decision of the Opposition Division maintaining the opposed patent in amended form automatically ceases to have effect, with the result that the patent is to be maintained as granted?



Case Number: T 0022/09 - 3.3.07

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.3.07
of 21 June 2013

Appellant:
(Opponent)

Formalities Bureau Limited
4 The Gatehouse, 2 High Street
Harpenden Herts, AL5 2TH (GB)

Representative:

Bawden, Peter Charles
Bawden & Associates
4 The Gatehouse
2 High Street
Harpenden,
Hertfordshire AL5 2TH (GB)

Respondent:
(Patent Proprietor)

Sasol Technology (Proprietary) Limited
1 Sturdee Avenue,
Rosebank
2196 Johannesburg,
Transvaal (ZA)

Representative:

Kador & Partner
Corneliusstrasse 15
D-80469 München (DE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted
29 October 2008 concerning maintenance of
European patent No. 1058580 in amended form.**

Composition of the Board:

Chairman: J. Riolo
Members: D. T. Keeling
G. Santavicca

Summary of Facts and Submissions

- I. On 29 October 2008 the Opposition Division issued an interlocutory decision whereby European Patent No. 1058580 and the invention to which it related were found to meet the requirements of the European Patent Convention, account being taken of the amended claims of the Main Request filed by the proprietor on 27 August 2008.
- II. The opposition proceedings had been initiated in the name of Formalities Bureau Limited, a company governed by the law of the United Kingdom. The notice of opposition was filed on 2 November 2004. The opponent was represented by Mr Peter Charles Bawden, of Bawden & Associates.
- III. On 29 December 2008 Mr Bawden, acting on behalf of the opponent, filed a notice of appeal against the decision of the Opposition Division. The appeal fee was paid on the same date. A statement of grounds of appeal was filed on 2 March 2009. Oral proceedings before the Board of Appeal were scheduled for 6 September 2012.
- IV. On 27 August 2012 the patent proprietor (the respondent) filed written observations in response to submissions of the opponent dated 9 and 20 August 2012. As well as addressing issues of substance, the respondent raised an objection of inadmissibility against the appeal on the ground that there was a discrepancy in the manner in which the appellant had been identified in the notice of appeal and in the statement of grounds of appeal. The respondent pointed out that the notice of

appeal had been filed in the name of the original opponent, namely:

Formalities Bureau Ltd.
4 The Gate House
2 High Street Harpenden
Herts AL5 2TH
GB.

The statement of grounds of appeal had on the other hand, according to the respondent, been filed by a different entity, namely:

Formalities Bureau
Bawden & Associates
4 The Gate House
2 High Street Harpenden
Hertfordshire AL5 2TH
United Kingdom.

The respondent argued that in accordance with the case law of the Boards of Appeal (e.g. T 298/97 of 28 May 2001) both the notice of appeal and the statement of grounds of appeal had to be filed by the same party, namely the party adversely affected by the decision appealed against, in order for the appeal to be admissible.

- V. In written observations filed on 4 September 2012 the respondent raised a further objection of inadmissibility based on its discovery, made the day before, that the company in whose name the opposition had been filed (Formalities Bureau Limited) had ceased to exist in the year 2005, i.e. three years before the

Opposition Division issued the decision under appeal. As evidence, an internet printout from Companies House (the UK register of companies) was produced, showing that Formalities Bureau Limited had been dissolved on 4 October 2005. Also produced was an internet printout from www.duedil.com which contained similar information.

VI. At the oral proceedings on 6 September 2012 the Board dealt solely with the issue of admissibility, as announced in a communication addressed to the parties by fax the day before. Mr Bawden, on behalf of the appellant, requested the Board to suspend the proceedings for one month in order to give him time to present arguments on the objections of inadmissibility raised by the respondent. The Board acceded to that request.

VII. The respondent submitted further written observations on 17 September 2012, together with extensive documentation from Companies House. In that communication the respondent formulated the following requests:

- (1) that the appeal be dismissed as inadmissible;
- (2) that oral proceedings be held in the event that the Board is not willing to dismiss the appeal as inadmissible;
- (3) that no extension of the one-month period granted to the appellant at the oral proceedings on 6 September 2012 be granted;

- (4) that the enclosed documents from the UK companies register be admitted into the proceedings;
- (5) that the Board require the appellant's representative to state which party he is representing and to provide evidence that this party is an existing legal entity; furthermore, that the Board require the appellant to submit evidence that the party "Formalities Bureau Bawden & Associates" for which the grounds of appeal were filed is an independent legal entity and was an independent legal entity when the grounds of appeal were filed.

VIII. Mr Bawden submitted written observations on behalf of the appellant on 8 October 2012. He provided details of an application to the Chancery Division of the High Court of Justice to restore Formalities Bureau Limited to the register of companies under section 1029 of the UK Companies Act 2006. He also supplied copies of the relevant UK legislation and a legal opinion by a UK solicitor concerning the procedure for restoring a dissolved company to the register and the prospects of success for the application to restore Formalities Bureau Limited to the register.

IX. In the observations of 8 October 2012 Mr Bawden formulated the following requests on behalf of the appellant:

- (1) that the patent proprietor's request that the appeal be dismissed as inadmissible be denied;

(2) that, if necessary, a decision on admissibility not be issued until a decision on the application to restore Formalities Bureau Limited to the register of companies is received;

(3) that oral proceedings be held in the event that the Board is not willing to deny the patent proprietor's request that the appeal be dismissed as inadmissible.

X. On 7 December 2012 Mr Bawden informed the Board that the Court had approved the application to restore Formalities Bureau Limited to the register of companies. On 17 December 2012 he provided the Board with a copy of a "General Form of Judgment or Order", dated 5 December 2012, by which the Chancery Division of the High Court of Justice ordered the restoration of Formalities Bureau Limited to the register of companies. Point 3 of the order required a copy thereof to be delivered to the Registrar of Companies and stated that, pursuant to the Companies Act 2006, the company was "thereupon to be deemed to have continued in existence as if its name had not been struck off". The order of the High Court required Mr Bawden to inform the Registrar of Companies, at six-monthly intervals, as to what steps had been taken to progress the present appeal proceedings.

XI. In his letter of 17 December 2012 Mr Bawden maintained the requests set out in the letter of 8 October 2012 and formulated an additional request that the Board provide a preliminary view on admissibility. He also stated that the appellant reserved the right to request that the issue of admissibility be referred to the

Enlarged Board of Appeal, should the Board be inclined to find the appeal inadmissible.

XII. On 13 December 2012 the respondent submitted further written observations to the Board of Appeal. The respondent contended that both the opposition and the appeal were inadmissible on the ground that the opponent had ceased to exist several years before the Opposition Division issued the decision under appeal. Furthermore, the appeal was inadmissible on the ground that the notice of appeal and the statement of grounds of appeal had been filed by different entities. The respondent also argued that Mr Bawden, being the sole director of Formalities Bureau Limited at the time of its dissolution, must have been aware that the company had ceased to exist and, by failing to inform the European Patent Office of that fact, was in breach of his obligation to inform the Office of all matters relevant to the opposition and appeal proceedings.

XIII. In the communication of 13 December 2012 the respondent formulated the following requests:

- (1) that the decision under appeal be revoked and the patent maintained as granted, because the opposition proceedings lapsed as a result of the dissolution of Formalities Bureau Limited;
- (2) in the alternative, that the appeal be dismissed as inadmissible;
- (3) in the further alternative, that the following questions be referred to the Enlarged Board of Appeal:

- "1. Is there an obligation for the parties to proceedings at the EPO to inform the EPO about important facts concerning the proceedings, e.g. concerning the status of the party?
2. Is a company which has been dissolved according to national company law still party to proceedings before the EPO, e.g. party to opposition proceedings?
3. Does a company which has been dissolved according to national company law remain party to proceedings at the EPO by the fact that the EPO is not informed about its dissolution?
4. If question 3 is answered in the negative, is the dissolved company, if restored, automatically regaining its status as a party to the proceedings?"

In addition the respondent maintained all the requests formulated in its communication of 17 September 2012.

XIV. The appellant's arguments may be summarized as follows:

As regards the alleged doubt about the identity of the Appellant

It is clear that the party filing the notice of appeal and the party filing the grounds of appeal were intended to be the same party, i.e. Formalities Bureau Limited. In the grounds of appeal the word "Limited" or "Ltd" has accidentally been omitted. The reference to

Bawden & Associates is written as part of the appellant's address. Despite these "small typographical errors" there is sufficient information on file to identify the appellant and its address, as required by the case law of the Boards of Appeal (see T 344/04 of 25 July 2005, T 613/91 of 5 October 1993, T 334/95 of 25 June 1997 and T 786/00 of 19 December 2001). In so far as a mistake was made in indicating the name and address of the appellant, that deficiency can be corrected under Rule 101(2) EPC.

As regards the dissolution of the opponent company and its restoration to the register of companies

An opponent is a party adversely affected by a decision to maintain a patent in amended form. Even if the opponent no longer exists there is a period from the date of grant of the patent until the company ceases to exist during which the company was adversely affected by the decision of the Opposition Division, which is retroactive back to the date of grant. The company might, for example, have had legal or financial obligations imposed on it, dependent on the outcome of the opposition.

The opponent company has now been restored to the register of companies maintained by Companies House by virtue of a court order dated 5 December 2012. The effect of that order, under section 1032(1) of the UK Companies Act 2006, is that "the company is deemed to have continued in existence as if it had not been dissolved or struck off the register".

XV. The respondent's arguments may be summarized as follows:

A. *Inadmissibility of the opposition*

The opposition had ceased to be admissible at the time when the Opposition Division issued the decision under appeal on 29 October 2008, since the opponent had ceased to exist on 4 October 2005. As a consequence the decision of the Opposition Division must be revoked and the patent maintained as granted because the EPC provides no legal remedy to retroactively render admissible an opposition.

An appeal filed by a dissolved company is inadmissible, as is clear from the decisions of the Board of Appeal in Cases T 525/94 (*supra*) and T 353/95 (*supra*). Those cases dealt with the dissolution of a German GmbH (Gesellschaft mit beschränkter Haftung), which is the equivalent to a limited company incorporated in the United Kingdom. The legal consequences of being struck off the register are the same for a German GmbH and a UK limited company because both entities cease to exist on the day of their dissolution. A dissolved company cannot sue or be sued.

The question that arises is whether the restoration of the opponent company to the register of companies can make the opposition retroactively admissible due to the legal fiction created by section 1032(1) of the UK Companies Act 2006. If such a retroactive effect were accepted it would make it possible to remedy the factual inadmissibility of an opposition more than four years after the Opposition Division issued its decision and it would allow the opponent company to regain its status as a party to the proceedings approximately

seven years after it lost that status due to its dissolution.

The EPC provides for legal remedies in cases in which a party to proceedings has inadvertently suffered a loss of rights, e.g. a request for further processing under Article 121 EPC or for re-establishment of rights under Article 122 EPC. A request for re-establishment of rights must be filed within one year of the expiry of the time limit, the non-observance of which led to the loss of rights, and the party concerned must show that all due care required by the circumstances was taken. If the present opposition were allowed to become retroactively admissible by virtue of the legal fiction created by section 1032(1) of the Companies Act 2006, that would mean introducing a new legal remedy that extends by far the remedies available under the EPC. In effect the EPC would be overruled by UK company law.

Proceedings at the EPO are designed to achieve the highest possible amount of legal certainty. That is why they are generally coupled to time limits. The case law of the Enlarged Board of Appeal shows that the existing remedies of the EPC should not be extended see G 1/97 (OJ 2000, 322), at point 4, second paragraph.

Since the opponent had ceased to exist more than three years before the Opposition Division issued its decision maintaining the patent in amended form, that decision must be revoked and the patent must be maintained as granted.

B. *Inadmissibility of the Appeal*

The appeal is inadmissible because the appellant was not a party to proceedings adversely affected by the decision under appeal, within the meaning of Article 107 EPC. The decisive point in time, for this purpose, is the date of the decision. The appellant had lost its status as a party to the proceedings as a result of its dissolution several years before that date. The only possible remedy for such a deficiency might have been a request for re-establishment of rights under Article 122 EPC. However, that is out of the question because the one-year time limit laid down in Rule 136 EPC had long since expired.

If the retroactive restoration of the opponent company to the register of companies were accepted as a remedy to its loss of party status it would be within the discretion of the opponent to switch party status on and off depending on whether it decided to apply for restoration.

C. *Lack of clarity as to the identity of the appellant*

Both the notice of appeal and the statement of grounds of appeal have to be filed by the same person, namely the party adversely affected by the decision under appeal (T 298/97, *supra*). The notice of appeal in the present case was filed by "Formalities Bureau Ltd" but the statement of grounds of appeal was filed by "Formalities Bureau, Bawden & Associates". Considering that Formalities Bureau Ltd had been dissolved when the appeal was filed and that the representative had knowledge of that fact, it cannot be ruled out that the

statement of grounds of appeal was deliberately filed in the name of Formalities Bureau, Bawden & Associates.

D. *The parties' obligation to tell the truth and to keep the EPO informed*

The parties to proceedings before the EPO have a general obligation to tell the truth. Such an obligation is prescribed in German law by § 124 of the Patentgesetz and by the principle of good faith (Treu und Glauben). It applies to proceedings before the EPO by virtue of Article 125 EPC. The appellant's representative was the sole director of Formalities Bureau Limited at the time of its dissolution and must therefore have been aware of that fact. As a European Patent Attorney he has an obligation to tell the truth, which includes the duty to report any relevant fact that might hinder successful proceedings before the EPO.

The principle of procedural fairness was not observed by the appellant or its representative.

Reasons for the Decision

The alleged doubt about the identity of the appellant

1. The Board does not agree with the respondent's contention that there is a lack of clarity concerning the identity of the appellant. It is clear from the documents on file that the notice of appeal and the statement of grounds of appeal were filed on behalf of the company in whose name the opposition had been filed,

namely Formalities Bureau Limited. The omission of the word "Limited" in the name of the company appears to have been accidental. The words "Bawden & Associates" were added as part of the address, not as part of the name of the appellant. That is clear from the fact that those words were placed on the next line.

The legal consequences of the dissolution of Formalities Bureau Limited and its retroactive restoration to the UK register of companies

2. *Locus standi* to oppose a European patent is defined in extremely broad terms. Under Article 99(1) EPC "any person" may file a notice of opposition within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin. The opponent does not have to have any special interest in challenging the patent: G 1/84 (OJ 1985, 299) and T 798/93 (OJ 1997, 363). An opposition may be filed by a "straw man", that is to say a party acting on behalf of another person: G 3/97 and G 4/97 (OJ 1999, 245, 270).

3. The term "person" in Article 99(1) EPC may refer either to a natural person or to an artificial legal person such as a limited company. When an opposition is filed by a company, that company must not only exist at the moment when the opposition is filed but must continue to exist throughout the opposition proceedings and, in the event of an appeal, throughout the appeal proceedings. In Case T 525/94 of 17 June 1998 it was held that an appeal filed in the name of a company that had been dissolved was inadmissible. In Case T 353/95 of 25 July 2000 the appeal proceedings were terminated

without a decision on the substance because the appellant company, although in existence at the time when the appeal was filed, had been dissolved while the proceedings were still pending.

4. In the present case the opposition was filed in the name of Formalities Bureau Limited. That company existed at the time when the opposition was filed but it had ceased to exist by the time the Opposition Division issued its decision maintaining the patent in amended form. The company had in fact been dissolved over three years earlier. In Case T 353/95 the Board of Appeal stated that "Only an existing natural or legal person can be a party to opposition parties". Hence, following the dissolution of the sole opponent the opposition proceedings could have been terminated. It would, however, also have been open to the Opposition Division to continue the proceedings of its own motion under Rule 60(2) EPC 1973 (now Rule 84(2) EPC). Moreover, since the appellant did not legally exist at the time when the appeal was filed in its name, or at any point during the two-month period referred to in Article 108 EPC for filing the notice of appeal, the appeal could have been rejected as inadmissible under Rule 101(1) EPC on the ground that it did not comply with Article 107 EPC. That article provides that an appeal may be filed by any party to proceedings adversely affected by a decision. Having ceased to exist, the company could not have been a party to the proceedings, still less a party adversely affected by the decision of the Opposition Division.
5. The question that arises in the special circumstances of the present case is whether the resurrection of the

opponent company as a result of its restoration - with retroactive effect - to the UK register of companies is capable of curing the defects alluded to in paragraphs 3 and 4 above.

6. In principle the question whether a company exists is to be determined by the law under which it was created. Formalities Bureau Limited was created under the law of the United Kingdom. According to section 1032(1) of the UK Companies Act 2006, the "general effect of an order by the court for restoration [of a dissolved company] to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register". Point 3 of the order made by the Chancery Division of the High Court of Justice on 5 December 2012 expressly recognizes the retroactive effect of the restoration of Formalities Bureau Limited to the register of companies (see paragraph X of the summary of facts and submissions above). Moreover, it is clear from the terms of the order that the purpose of restoring the company to the UK register of companies was to allow it to continue to participate in the present appeal proceedings.

7. The respondent argues in essence that, since the opposition had lapsed by the time the decision under appeal was issued and the appeal was inadmissible when it was filed, those fundamental defects cannot be overcome by recourse to a legal fiction provided for in national law whereby a dissolved company is deemed to have continued to exist throughout the relevant period as though the dissolution had never occurred. According to the respondent, the recognition of such a retroactive effect by the European Patent Office would

subvert the system of legal remedies and time limits provided for in the EPC.

8. The Board is not persuaded by the respondent's argument based on Articles 121 and 122 EPC. Both those provisions are concerned with the situation that occurs when a party to proceedings fails to observe a time limit vis-à-vis the European Patent Office. That is not what has happened in the present case, so it is difficult to see what relevance those articles have.

9. However, the respondent's general argument along the lines that it would be wrong to allow a peculiar feature of UK company law to trump the EPC is not so easily dismissed. The fact is that, although the opposition was admissible when it was filed, the opposition proceedings could have been terminated at any point between 4 October 2005 (on which date the opponent company was dissolved) and 29 October 2008 (the date of the decision under appeal) on the ground that the sole opponent had ceased to exist. Moreover, the appeal was inadmissible at the time when it was filed because the appellant did not at that moment exist. Can those defects be cured retroactively by virtue of a provision of national law which restores a company to the register seven years after its dissolution and deems the company never to have been dissolved? There is no clear answer to that question in the EPC or in the case law of the EPO Boards of Appeal. It involves a point of law of fundamental importance, within the meaning of Article 112(1) EPC, inasmuch as it concerns the system of remedies provided for in the EPC, the acquisition and retention of the status of party to proceedings before the EPO and the

relationship between the EPC and national law. A decision on that question is obviously necessary since the Board of Appeal cannot determine whether there is a proper basis for the continuation of the opposition proceedings by the restored company and whether the appeal is admissible without an answer to the question. It is therefore appropriate to refer the question to the Enlarged Board of Appeal under Article 112(1)(a) EPC.

10. If the defects alluded to in paragraphs 3 and 4 above cannot be cured retroactively as a result of the restoration of the opponent company to the UK register of companies under section 1032(1) of the Companies Act 2006, it will be necessary to decide whether that has the consequence that the decision of the Opposition Division automatically ceases to have effect and that the opposed patent is maintained as granted. It is appropriate to refer that question also to the Enlarged Board of Appeal.

The question of the parties' obligation to keep the EPO informed about certain matters

11. The respondent has not explained the relevance of the question which it asks the Board to refer to the Enlarged Board of Appeal concerning the parties' obligation to keep the EPO informed about certain matters. In particular, the respondent has not indicated what specific consequences would, in its view, follow in the present case from a failure to comply with such an obligation (were the existence thereof established). The Board does not therefore consider it

necessary to refer that question to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

The following questions are referred to the Enlarged Board of Appeal:

1. Where an opposition is filed by a company which is dissolved before the Opposition Division issues a decision maintaining the opposed patent in amended form, but that company is subsequently restored to the register of companies under a provision of the national law governing the company, by virtue of which the company is deemed to have continued in existence as if it had not been dissolved, must the European Patent Office recognize the retroactive effect of that provision of national law and allow the opposition proceedings to be continued by the restored company?
2. Where an appeal is filed in the name of the dissolved company against the decision maintaining the patent in amended form, and the restoration of the company to the register of companies, with retroactive effect as described in question 1, takes place after the filing of the appeal and after the expiry of the time limit for filing the appeal under Article 108 EPC, must the Board of Appeal treat the appeal as admissible?
3. If either of questions 1 and 2 is answered in the negative, does that mean that the decision of the Opposition Division maintaining the opposed patent in

amended form automatically ceases to have effect, with the result that the patent is to be maintained as granted?

The Registrar

The Chairman

I. Aperribay

J. Riolo