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# Datasheet for the decision of 28 March 2019

**Case Number:** T 0076/17 - 3.3.08

**Application Number:** 07789931.8

**Publication Number:** 2046970

**IPC:** C12P21/02, C12N15/113, C12N5/10

**Language of the proceedings:** EN

**Title of invention:**
A method of producing recombinant biological products

**Patent Proprietor:**
Dublin City University

**Opponent:**
Gleiss Große Schrell und Partner mbB

**Headword:**
Recombinant biological products/DUBLIN CITY UNIVERSITY

**Relevant legal provisions:**
EPC Art. 108, 122
EPC R. 115(2), 126(2), 131(4)
RPBA Art. 15(3)

**Keyword:**
Re-establishment of rights - isolated mistake within a satisfactory system for monitoring time limits (no) - exceptional circumstances (no)
Appeal not deemed to have been filed

**Decisions cited:**
J 0009/16, R 0018/13, T 0592/11

**Catchword:**

Europäisches Patentamt
European Patent Office
Office européen des brevets

**Beschwerdekammern**

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**Case Number: T 0076/17 - 3.3.08**

# D E C I S I O N
# of Technical Board of Appeal 3.3.08
# of 28 March 2019

| | |
|---|---|
| **Appellant:** (Patent Proprietor) | Dublin City University<br>Glasnevin<br>Dublin 9 (IE) |
| **Representative:** | Purdy, Barry<br>PurdyLucey Intellectual Property<br>6-7 Harcourt Terrace<br>D02 FH73 Dublin 2 (IE) |
| **Respondent:** (Opponent) | Gleiss Große Schrell und Partner mbB<br>Leitzstrasse 45<br>70469 Stuttgart (DE) |
| **Representative:** | Schrell, Andreas<br>Gleiss Große Schrell und Partner mbB<br>Patentanwälte Rechtsanwälte<br>Leitzstrasse 45<br>70469 Stuttgart (DE) |
| **Decision under appeal:** | **Interlocutory decision of the Opposition Division of the European Patent Office posted on 12 August 2016 concerning maintenance of the European Patent No. 2046970 in amended form.** |

**Composition of the Board:**

| | |
|---|---|
| **Chairman** | B. Stolz |
| **Members:** | L. Bühler |
| | M. Montrone |

## Summary of Facts and Submissions

I. The interlocutory decision of an opposition division to maintain European patent No. 2 046 970 in amended form was posted on 12 August 2016 and received at the office of the patent proprietor's representative on 18 August 2016.

II. On 24 November 2016, the patent proprietor filed a request for re-establishment of the time limit pursuant to Article 108 EPC for filing an appeal. At the same time, the patent proprietor filed a notice of appeal and a statement setting out the grounds for appeal, and paid the appeal fee.

III. The opponent filed a reply on 17 May 2017.

IV. The parties were summoned to oral proceedings. In a separate communication pursuant to Article 17(1) RPBA, the board conveyed its preliminary opinion on the request for re-establishment of rights. In a reply to this opinion, the opponent announced that it would not be attending the oral proceedings.

V. Oral proceedings were held on 28 March 2019 in the absence of the parties.

VI. The patent proprietor's submissions in support of its request for re-establishment can be summarised as follows:

(a) The interlocutory decision was received at the office of the patent proprietor's representative on 18 August 2016. At that time, the representative was on leave, and the patent administrator did not

enter a deadline in the file management software. On his return on 26 August 2016, the representative was informed that the decision had been notified and that no deadline had been entered. The representative decided to take care of the entry himself since the deadline was not regularly encountered by his firm. On 3 September 2016, the representative entered the deadline for the notice of appeal. However, due to a miscalculation, "the deadline was inadvertently entered as 12 December 2016 instead of 12 October 2016".

(b) The error was discovered on 10 November 2016, when the representative was preparing for a meeting with the patent proprietor's contact person. At that time, the time limit for filing the notice of appeal had been missed.

(c) A normally satisfactory system for monitoring time limits was in place which employed a double-check system for ensuring that deadlines are correctly entered in the system. The entry of an incorrect deadline was due to an isolated error by the responsible representative entering the two-month deadline into the case management system.

VII. The arguments submitted by the opponent correspond to the reasons on which the present decision is based.

VIII. The patent proprietor requested re-establishment of the time limit pursuant to Article 108 EPC for filing an appeal against the interlocutory decision, posted on 12 August 2016.

IX. The opponent requested that the patent proprietor's request for re-establishment of rights be rejected and the appeal be held inadmissible.

## Reasons for the Decision

1. The request for re-establishment of rights was filed, the prescribed fee paid, and the omitted act completed within the time limits set in Rule 136 EPC.

2. The duly summoned parties did not attend the oral proceedings, which, in accordance with Rule 115(2) EPC and Article 15(3) RPBA, took place in their absence.

3. Under Article 122(1) EPC, for re-establishment of rights to be allowed, the requester must show that it was unable to observe a time limit despite all due care required by the circumstances having been taken. In cases where the cause of non-compliance with a time limit involved some error in the carrying out of the party's intention to comply with the time limit, the case law has established that all due care is considered to have been taken if non-compliance with the time limit resulted either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law of the Boards of Appeal, 8th edition, 2016, III E 5.3 and 5.4).

*Isolated mistake within a normally satisfactory monitoring system*

4. The patent proprietor argues that the mistake in the present case, i.e. the entry of an admittedly erroneous deadline for filing a notice of appeal into a case management system, was an isolated one in a normally

satisfactory system for monitoring deadlines and that this mistake was thus excusable.

5. According to the case law, a normally satisfactory system for monitoring time limits requires an independent cross-check. There is a substantial body of case law addressing what an independent cross-check must entail. In general, it is required that two distinct persons need to convince themselves that the action(s) required for observing a time limit or the very recording of the time limit did take place, either by performing the required act themselves or by checking that someone else performed it (see J 9/16 of 21 November 2016, point 18).

6. According to point 1 of the patent proprietor's letter dated 24 November 2016, the recording of the time limits to be observed vis-à-vis the EPO employed a double-check system for ensuring that deadlines are correctly entered in the system. It can therefore be accepted that a normally satisfactory system for monitoring time limits was established at the relevant time in the representative's office.

7. However, the normal procedure for recording a time limit was not followed in the present case. The patent proprietor's representative himself took care of the entry in the file management system. As a consequence, there was no cross-check. Two distinct persons did not ascertain the correct recording of the time limit to be monitored. Therefore, the mistake did not happen within the system for monitoring time limits established at the representative's office but when deviating from the internal workflow.

8. Moreover, although it can be accepted that the error that occurred was isolated in that no loss of rights had occurred at the representative's office over a long period of time and that only a single mistake by a single person apparently caused the missing of the time limit for filing an appeal, it was the representative's mistake, not an assistant's. While an "isolated mistake" of an assistant or administrator may be excusable, this is not the case if the mistake was made by a representative unless there are exceptional circumstances (see R 18/13 of 17 March 2014, points 19 to 21; T 592/11 of 25 October 2012, point 5.2.2).

*Exceptional circumstances*

9. The patent proprietor argues that its representative had been on leave when the decision was notified and that the patent administrator did not enter the deadline into the system. Upon return from leave, the representative decided to take care of the deadline entry himself. However, the circumstances cannot be considered exceptional.

10. Moreover, the entry of the erroneous time limit for filing an appeal did not result from these circumstances. The mistake occurred 10 days after the representative's return from his leave. There was thus ample time for the representative to consider the action(s) required and to record the respective time limit(s) in the file management system. There is no evidence on file that the representative experienced technical difficulties with this system or other particular circumstances at the time of recording the time limit. Moreover, a professional representative should be able to correctly calculate the time limit for filing an appeal upon consultation of the relevant

legal provisions. For the sake of completeness, it is also noted that there is no evidence on file suggesting that the erroneous entry was due to circumstances beyond the representative's control, e.g. a malfunctioning of the monitoring system.

11. For the above reasons, the entry of the erroneous deadline in the representative's monitoring system is not excusable for the purposes of Article 122(1) EPC. The request for re-establishment of rights is thus to be rejected.

12. Pursuant to Rule 126(2) EPC, the opposition division's decision posted on 12 August 2016 was deemed to be delivered to the patent proprietor on 22 August 2016. Hence, the time limit for filing a notice of appeal expired on 22 October 2016 (Article 108, third sentence EPC, Rule 131(4) EPC). No notice of appeal and no payment of the appeal fee were received within this time limit. As a consequence of the rejection of the request for re-establishment of rights under Article 122 EPC, the patent proprietor's failure to comply with the time limit for filing an appeal entails as a legal consequence that no appeal against the opposition division's decision posted on 12 August 2016 came into existence. The appeal filed on 24 November 2016 as part of the request under Article 122 EPC is, therefore, not deemed to have been filed. Consequently, the appeal fee is to be reimbursed.

**Order**

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

1. The request for re-establishment of rights is rejected.

2. The appeal is not deemed to have been filed.

3. The reimbursement of the appeal fee is ordered.

The Registrar: The Chairman:


B. ter Heijden B. Stolz

Decision electronically authenticated