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**Datasheet for the decision
of 5 May 2025**

Case Number: T 1029/23 - 3.3.02

Application Number: 16157757.2

Publication Number: 3211049

IPC: C09D161/20, C09D171/02

Language of the proceedings: EN

Title of invention:
COATING COMPOSITION

Patent Proprietor:
Holland Novochem Technical Coatings B.V.

Opponent:
PPG Industries, Inc.

Headword:

Relevant legal provisions:
EPC Art. 112(1)(a), 122(1), 122(2)
EPC R. 136(1), 152

Keyword:
Re-establishment of rights - (no)

Decisions cited:

G 0002/04, G 0001/14, J 0001/20, J 0003/13, J 0018/98,
J 0027/90, J 0027/88, J 0029/86, J 0005/80, T 2136/16,
T 0592/11, T 1095/06, T 0287/84, T 0191/82

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 1029/23 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 5 May 2025

Appellant: Holland Novochem Technical Coatings B.V.
(Patent Proprietor) Papiermolen 5
3994 DJ Houten (NL)

Representative: Arnold & Siedsma
Bezuidenhoutseweg 57
2594 AC The Hague (NL)

Respondent: PPG Industries, Inc.
(Opponent) One PPG Place
Pittsburgh, PA 15272 (US)

Representative: Appleyard Lees IP LLP
15 Clare Road
Halifax HX1 2HY (GB)

Decision under appeal: **Decision of the opposition Division of the
European Patent Office posted on 19 July 2022
revoking European patent No. 3211049 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: P. O'Sullivan
B. Burm-Herregodts

Summary of Facts and Submissions

- I. The appeal by the patent proprietor ("appellant") lies from the decision of the opposition division of 19 July 2022 to revoke European patent No. 3 211 049.
- II. Opposition was filed by the opponent (respondent) under Article 100(a) to (c) EPC.
- III. The opposition division sent out a communication dated 1 December 2021 in which the appellant was requested to file observations within a period of four months. The appellant did not respond.
- IV. In its written reasoned decision dated 19 July 2022, sent to the parties by registered letter with advice of delivery on the same day, the opposition division came to the conclusion that the opposition was admissible and decided to revoke the patent on the grounds for opposition under Article 100(c) EPC.
- V. The appellant contested that this decision had reached the appellant's former representative. A notice of appeal was not filed within the two-month time limit of Article 108 EPC.
- VI. The opposition division issued a communication dated 4 November 2022 concerning the termination of opposition proceedings and stating that these proceedings were ended since no appeal against the decision of the opposition division was filed within the time limit for appeal. This communication was sent to the former representative at the correct office address.

VII. The appellant changed their representative from F van Den Berg of Van den Berg IP GmbH ("former representative") to Arnold & Siedsma patents and trademarks (hereinafter: "present representative"). The authorisation was filed on 6 June 2023. On 15 May 2023 the present representative filed a request for re-establishment of rights under Article 122 EPC and paid the required fee. On the same day the present representative filed a notice of appeal and the appeal fee was paid accordingly. With the request for re-establishment of rights, the present representative submitted a declaration of the former representative of the appellant, denoted by the board as follows:

D11: Declaration of F. van den Berg of 11 May 2023

VIII. With reply to the appeal dated 21 November 2023 the respondent submitted a new item of evidence (labelled P6 by the respondent), renumbered by the board as follows:

D12: Communication from the EPO dated 4 November 2022

IX. The parties were summoned to oral proceedings. In preparation for the oral proceedings, the board issued a communication under Article 15(1) RPBA. In this communication the board expressed the preliminary opinion that the request for re-establishment of rights was to be rejected pursuant to Article 122(2) EPC.

X. Final requests relevant to the decision

The appellant (patent proprietor) requested that its request for re-establishment of rights be considered admissible and allowable.

The respondent (opponent) requested that the appellant's request for re-establishment of rights be rejected.

XI. As regards the parties's submissions relevant to the decision, reference is made to the reasons for the decision below.

Reasons for the Decision

1. Request for re-establishment of rights - Article 122(1) and Rule 136(1) EPC

1.1 Case history

The following timeline of the undisputed facts of the case are relevant to the issue of re-establishment of rights, requested by the appellant:

- On 17 November 2021, notice of opposition was filed by the respondent,
- A communication of a notice of opposition from the EPO dated 23 November 2021 was sent to the former representative F Van den Berg of Van den Berg IP GmbH at Roessligasse 30, 4132 Muttenz, Switzerland,
- A communication of the EPO of the notice of opposition (Rule 79(1) EPC) dated 1 December 2021 inviting the appellant to reply within four months was sent to the former representative at the same address in Switzerland,
- No reply was received,

- A letter of the EPO dated 19 July 2022 notifying the decision of the opposition division to revoke the patent and information concerning the possibility of appeal was sent to the former representative at the same address in Switzerland,
- The acknowledgement of receipt form in relation to the notified decision was returned to the EPO and date stamped on 4 August 2022; no receipt of delivery was recorded on the form,
- On 31 October 2022 the revocation of the Patent appeared in the European Patent Register,
- No notice of appeal was filed and no appeal fee was paid by the appellant within the two-month time limit under Article 108 EPC,
- A communication of the EPO to the parties concerning termination of opposition proceedings dated 4 November 2022 was sent to the former representative at the same address in Switzerland,
- On 7 December 2022, the revocation of the patent was published in the European Patent Bulletin,
- A request for re-establishment of rights and accompanying grounds dated 15 May 2023 was submitted by the present representative, i.e. not by the former representative F Van den Berg,
- Notice of appeal was submitted on the same day,
- An invitation of the EPO to file an authorisation (Rule 152(2) EPC) dated 1 June 2023 was sent to the

present representative, Arnold & Siedsma patents and trademarks,

- Authorisation dated 19 June 2023 to represent the appellant was submitted to the EPO by the present representative on 5 July 2023,
- A statement of grounds of appeal was submitted by the present representative and received by the EPO on 15 July 2023, 2 months after filing of the request for re-establishment of rights.

1.2 As is apparent from the above case history, the request for re-establishment of rights was filed by the present representative, not by the former representative who was authorised to act on behalf of the appellant at the time the request was submitted. Hence the question arises as to whether the request was filed by the duly appointed authorised representative responsible for the patent. To the appellant's advantage, this issue is not considered any further in this decision.

1.3 The request for re-establishment of rights - the appellant's written arguments

1.3.1 In its grounds for re-establishment of rights the appellant argued as follows. The failure of the appellant to observe the time limit for filing the notice of appeal and paying the appeal fee within the two-month time limit of Article 108 EPC occurred in spite of all due care. The failure to observe the time limit was due to an isolated fault within a normally satisfactory system (J 2/86) in which the former representative adequately monitored time limits using an Excel sheet docketing system. Specifically, the letter of the EPO dated 19 July 2022 notifying the

decision of the opposition division was not received by the former representative, as evidenced by the advice of delivery, which was returned to the EPO on 4 August 2022 without receipt of delivery from the former representative. It was argued by the present representative, and confirmed by the former representative in affidavit D11 that the former representative held office in Switzerland where he was at least once a month to collect the mail. Whenever he was not present, mail was collected on his behalf by his landlady, who informed the former representative when registered mail was received. The letter of the EPO dated 19 July 2022 notifying the decision of the opposition division was not received, nor was a collection note, normally left by Swiss post in the event that a registered letter cannot be delivered, found in his letter box. During this time, the former representative was on holiday. Hence, despite all due care, the former representative was not able to meet the time limit for filing an appeal against the decision of the opposition division to revoke the patent.

1.3.2 The present representative argued that it had only become aware of the decision under appeal on 15 March 2023 when it discovered that upcoming renewal fees could not be paid, as the patent had been revoked. This came as a complete surprise to the appellant and the former representative (who was presumably informed of these facts by the present representative). After being informed of the loss of rights, the appellant requested the present representative to submit a request for re-establishment along with a notice of appeal.

1.4 With its reply to the request for re-establishment and the statement of grounds of appeal, the respondent

submitted that the request for re-establishment should be rejected on the basis that:

- (a) the requirement of 'due care' stipulated in Article 122(1) EPC had not been met, and
- (b) the request for re-establishment had not been filed within 2 months of the latest date on which it could be considered that the cause for non-compliance was removed, as required by Rule 136(1) EPC.

1.5 (a) The requirement of due care (Article 122(1) EPC)

1.5.1 Article 122(1) EPC reads as follows:

*"An applicant for or proprietor of a European patent who, **in spite of all due care required by the circumstances having been taken**, was unable to observe a time limit vis-à-vis the European Patent Office shall have his rights re-established upon request if the non-observance of this time limit has the direct consequence of causing the refusal of the European patent application or of a request, or the deeming of the application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress."* (emphasis on text relevant to this decision added by the board)

1.5.2 In written appeal proceedings the appellant provided reasons (detailed above) why, despite all due care, the decision notifying the revocation of the patent dated 19 July 2022 did not reach the former representative, and that this therefore represented an isolated fault within a normally satisfactory system.

- 1.5.3 However, the communication of the EPO dated 4 November 2023 (D12) concerning termination of opposition proceedings had also been sent by the EPO to the former representative long in advance of the alleged date of removal of non-compliance, i.e. 15 March 2023. Based on this communication, the respondent argued that it *inter alia* provided evidence against the appellant's assertion that all due care had been taken.
- 1.5.4 The appellant did not reply to the respondent's submission in writing, but submitted for the first time at oral proceedings before the board that **none** of the communications of the EPO sent to the appellant during opposition proceedings had reached the former representative. This not only included the notification of the decision of the opposition division dated 19 July 2022, but also the aforementioned letter of the EPO dated 4 November 2022 (D12), the communication of a notice of opposition dated 23 November 2021 and the communication of the EPO of the notice of opposition (Rule 79(1) EPC) dated 1 December 2021 inviting the appellant to reply. Hence, according to the present representative, all four consecutive communications from the EPO were not received by the former representative at its place of business.
- 1.5.5 This admission however represents a shifting of the position of the appellant in the sense that it contradicts its arguments submitted in writing according to which the failure to observe the time limit was due to an isolated fault within a normally satisfactory system.
- 1.5.6 If the statement that none of said communications were received is accepted, it cannot at the same time be

accepted that the non-reception by the former representative of the decision notifying the revocation of the patent was an isolated fault within a normally satisfactory system. Without any explanation, let alone proof concerning reasons explaining why four consecutive communications from the EPO were not received, it must be assumed that not one isolated fault, as argued by the appellant, but a consecutive series of faults in the former representative's system must have occurred. Therefore the requirement of all due care set out in Article 122(1) EPC is not met.

1.6 For this reason alone, the request for re-establishment must be rejected.

1.7 b) Date of removal of the cause for non-compliance

1.7.1 Even if the requirement of all due care under Article 122(1) EPC were to be ignored, the requirements of Rule 136(1) EPC are not met.

1.7.2 Rule 136(1) EPC reads as follows:

*"Any request for re-establishment of rights under Article 122, paragraph 1, shall be filed in writing **within two months of the removal of the cause of non-compliance with the period**, but at the latest within one year of expiry of the unobserved time limit. However, a request for re-establishment of rights in respect of any of the periods specified in Article 87, paragraph 1, and in Article 112a, paragraph 4, shall be filed within two months of expiry of that period. The request for re-establishment of rights shall not be deemed to have been filed until the prescribed fee has been paid."* (emphasis of text relevant to this decision added by the board)

- 1.7.3 During oral proceedings, the focus of the discussion was on the question of which date should count as the date of non-compliance from which the 2-month limit of Rule 136(1) EPC was to be calculated.
- 1.7.4 The appellant submitted, for the first time at oral proceedings, that according to J 1/20, the removal of the cause of non-compliance was a question of fact; it related not to the point in time at which the responsible person **should** have become aware of the non-compliance, but rather when it actually became aware. Since the appellant had only become aware of the non-compliance on 15 March 2023 as addressed above, this was the relevant date from which the two-month time limit of Rule 136(1) EPC was to be calculated. Since the request and the grounds for re-establishment of rights along with the submission of the notice of appeal had been filed within 2 months of this date (15 May 2023), the requirements of Rule 136(1) EPC were fulfilled.
- 1.7.5 Even accepting the appellant's position for the sake of argument, i.e. that the removal of the cause of non-compliance is a question of fact and relates to the point in time at which the responsible person actually became aware of the non-compliance, this does not necessarily mean that said date must correspond to that alleged by the appellant, in the present case 15 March 2023.
- 1.7.6 Rather, as with any other fact, the evidential burden of proof lies with the person alleging said fact, in the present case the appellant. Whether the alleged date can be accepted as the date on which the responsible person became aware depends on the evidence

on file and the circumstances of the case. As discussed during oral proceedings, this understanding also emerges from J 1/20:

*"In the Board's view, removal of the cause of non-compliance with the period **is a purely factual criterion. Removal occurs on the date on which the person responsible for the application/patent (normally the authorised representative) becomes aware of an error.** If a loss-of-rights communication is served there is (i) a presumption that removal occurs on the date of receipt of such communication and (ii) an obligation for the recipient not to ignore it, and to take action"* (reasons for the decision, point 3.7.1; emphasis added by the board)

and

*"The Board nevertheless does not see the risk that, by abandoning the application of due care for the determination of the date of removal, a party would be in a position to arbitrarily determine this date. **Indeed, it remains the burden of a party to demonstrate with appropriate facts and evidence that, due to special circumstances, notification of a loss-of-rights communication was not sufficient to remove the cause of non-compliance.** On the other hand, if the responsible person, despite having knowledge of the missed time limit, did not take action (contrary to condition (ii) cited above in point 3.7.1), the two-month period under Rule 136 EPC would start running."* (reasons for the decision, point 3.7.4; emphasis added by the board)

- 1.7.7 As stated by the respondent in the reply to the grounds of appeal and the request for re-establishment of rights, the letter of the EPO dated 4 November 2022

concerning termination of opposition proceedings (D12) was sent to the appellant at the correct address. Hence, as set out by the respondent, the appellant must be assumed to have been aware of the non-compliance at least on this date. Furthermore, if not at that point in time, the appellant must have become aware of the non-compliance at the latest when the revocation of the patent appeared in the European Patent Register on 31 October 2022 or when the revocation of the patent was published in the European Patent Bulletin on 7 December 2022. Since the request for re-establishment of rights dated 15 May 2023 was submitted more than 2 months after any of these dates, the requirements of Rule 136(1) EPC are not fulfilled.

- 1.7.8 As set out above, during discussions addressing this issue at oral proceedings, the appellant stated that none of the communications of the EPO sent to the appellant during opposition proceedings had reached the former representative at its place of business.
- 1.7.9 As noted above, the appellant argued that the failure to observe the time limit for filing an appeal was due to an isolated fault within a normally satisfactory system, which led to the non-reception by the former representative of the letter of the EPO dated 19 July 2022 notifying the decision of the opposition division. However, if this is to be accepted, it cannot at the same time be considered as credible that, in such a functioning satisfactory system, the communication of the EPO dated 4 November, as well as the further communications of the EPO sent during opposition proceedings, did not reach the former representative. Furthermore, as stated by the respondent, aside from the mere statement by the appellant at oral proceedings that none of the EPO

communications had been received by the former representatives, no explanation was provided as to why this might have occurred despite the undisputed correctness of the former representative's address in the EPO systems, and no evidence, e.g. in the form of a statement from the former representative, was provided.

1.7.10 Therefore, the appellant's allegation that the removal of the cause of non-compliance with the period for filing the notice of appeal occurred only on 15 March 2023 when the present representative realised that the renewal fee could not be paid, rather than at any earlier point in time, such as when the communication of the EPO dated 4 November 2022 was issued, is not credible.

1.7.11 Although not required to reach this conclusion, further support therefore is provided by the letter of the former representative dated 18 November 2020 submitted during examination proceedings. In this letter the former representative stated:

*"I would like to inform you that I am aware of the Notice of Intention to Grant issued on 13 November 2020 and have **received this Notification in electronic form.** Sending this Notice to my office address in Switzerland is not necessary and can be refrained of."* (emphasis added by the board)

1.7.12 The board addressed this letter during oral proceedings and expressed the view that it appeared to indicate that the former representative had access to the electronic mailbox of the EPO. Hence, even if aforementioned communications of the EPO had not reached the former representative at his business address via the postal service, they would have been

received electronically. In response, the present representative stated that it was not aware of whether the former representative had access to the electronic mailbox. However, in view of the former representative's letter and the absence of any information or evidence to the contrary, it appears on the balance of probabilities most likely that the former representative indeed received the letter of 4 November 2022 (and any other communication), at least electronically.

- 1.7.13 The appellant's arguments to the contrary failed to convince the board. In particular, the appellant submitted that the loss of rights communication referred to in J 1/20 (see reasons for the decision point 3.7.1 quoted above) was a communication notified by registered letter with acknowledgement of receipt. The presumption that it was received, and therefore that the removal of the cause for non-compliance occurred on the same date, was a direct consequence of the acknowledgement of reception, which had been received by the EPO. In contrast in the present case, the communication of the EPO dated 4 November 2022 was not notified, i.e. no acknowledgement of receipt was required, and therefore there was and could not be any presumption that it had been received by the former representative.
- 1.7.14 The board acknowledges this difference in the nature of the respective communications as set out by the appellant. However, while the situation in the present case is not identical to that underlying J 1/20, the principle is the same, namely that the burden of proof remains with the party alleging a particular fact due to special circumstances, in the present case that the communication of 4 November 2022 was not received. As

set out above, this is not credible. As equally set out above, if not by means of this communication, the former representative, without any argument, let alone proof to the contrary, must be assumed to have become aware of the missed time period also by other means long before 15 March 2023.

- 1.7.15 Consequently, the request for re-establishment of rights dated 15 May 2023 was not submitted within two months of the removal of the cause of non-compliance with the period of filing an appeal. The requirements of Rule 136(1) EPC are therefore not fulfilled, and the request for re-establishment is to be rejected.

2. Conclusions

3. It follows from the above that the situation underlying the present case is one in which either the requirements of Article 122(1) EPC are not met **and/or** the requirements of Rule 136(1) EPC are not met. Since both situations lead to rejection of the appellant's request for re-establishment of rights, there is no need for the board to determine which of the two provisions apply.

4. The request for re-establishment of rights is therefore rejected and the appeal is deemed not to have been filed.

Reimbursement of the appeal fee

5. Since the appeal is deemed not to have been filed the appeal fee is to be reimbursed (G 1/18, headnote).

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is rejected.
2. The appeal is deemed not to have been filed and the appeal fee is reimbursed.

The Registrar:

The Chairman:



U. Bultmann

M. O. Müller

Decision electronically authenticated