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Aktenzeichen / Case Number / N° du recours : T 191/82

Anmeldenummer / Filing No / N° de la demande : 80 900 996.2

Veröffentlichungs-Nr. / Publication No / N° de la publication : WO 80/02411

Bezeichnung der Erfindung: Baled wastepaper product containing a deinking
Title of invention: chemical
Titre de l'invention :

Klassifikation / Classification / Classement : B 65D 71/00

ENTSCHEIDUNG / DECISION

vom / of / du 16 April 1985

Anmelder / Applicant / Demandeur : FIBRE-CHEM CORPORATION

~~Patentinhaber / Proprietor of the patent /
Titulaire du brevet /~~

~~Einsprechender / Opponent / Opposant /~~

Stichwort / Headword / Référence : Re-establishment of rights/FIBRE-CHEM

EPO / EPC / CBE Art.122

Leitsatz / Headnote / Sommaire

In a case in which non-compliance with a time limit leading to a loss of rights under the EPC is discovered by an employee of a representative, the cause of non-compliance, i.e. failure to appreciate that the time limit has not been complied with, cannot be considered to have been removed until the representative concerned has himself been made aware of the facts, since it must be his responsibility to decide whether an application for re-establishment of rights should be made and, if it is to be made, to determine the grounds and supporting facts to be presented to the European Patent Office.

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number: T 191 / 82

DECISION

of the Technical Board of Appeal 3.2.1

of 16. April 1985

concerning re-establishment of rights

Appellant:

FIBRE-CHEM CORPORATION
474 Central Avenue
Highland Park, IL 60035
(US)

Representative:

Geering, Keith Edwin
REDDIE & GROSE
16 Theobalds Road
London WC1X 8PL
(GB)

Decision under appeal:

Decision of Examining Division 082
Office dated 3 August 1982
application No 80 900 996.2
EPC

of the European Patent
refusing European patent
pursuant to Article 97(1)

Composition of the Board:

Chairman: G. Andersson

Member: P. Ford

Member: P. Lançon

SUMMARY OF FACTS AND SUBMISSIONS

- I. The appellants' European patent application N°.80 900 996.2 was refused by a Decision of Examining Division 082 of the European Patent Office dated 3 August 1982.

- II. By letter dated 1 October 1982, filed on 4 October 1982, the appellants gave notice of appeal against the Decision. The appeal fee was duly paid and a Statement of Grounds of the appeal, dated 6 December 1982, was filed on 8 December 1982.

- III. A Communication of the Technical Board of Appeal was issued on 28 July 1983 and the appellants filed observations in reply on 31 October 1983.

- IV. The renewal fee for the fifth year calculated from the date of filing the application, payable in accordance with the provisions of Article 86(1) EPC, was not paid in full by the due date (30 April 1984). As the result of an error by a telex operator in the appellants' professional representatives' office, an amount of DM 570, identified as the fourth year renewal fee, was paid on 26 April 1984. An additional amount of DM 150, being the difference between the amount already paid and the correct amount of the fifth year renewal fee, was paid on 14 May 1984.

- V. By notice dated 1 June 1984, the Registrar of the Boards of Appeal drew attention to the fact that the renewal fee could be considered to have been validly paid, provided that the additional fee of 10 per cent of the belated renewal fee was paid within 6 months of the due date. Attention was drawn to the provisions of Article 86(3) EPC, in accordance with which, if the additional fee was not paid within that period, the European patent application would be deemed to have been withdrawn.

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- VI. The additional fee was not paid and on 29 November 1984 the European Patent Office sent a Communication under Rule 69(1)EPC stating that the European patent application was deemed to be withdrawn.
- VII. By telex dated 10 December 1984, the appellants' representative's firm ordered its Deposit Account with the Bank of the European Patent Office to be debited both in respect of the additional fee and in respect of the fee payable for re-establishment of rights in accordance with Article 122 EPC.
- VIII. No application in writing for re-establishment of rights was received by the European Patent Office, however, until 13 February 1985, which appeared prima facie to be after expiry of the period of two months for the filing of such an application provided for by Article 122(2)EPC, first sentence. The Board of Appeal, therefore, requested the representative to explain the circumstances in which more than two months had elapsed between payment of the fee for re-establishment of rights and the filing of the application for re-establishment.
- IX. By telex dated 19 March 1985, duly confirmed by letter of the same date, the appellants' representative explained that the instruction to pay the additional fee and the fee for re-establishment of rights had been given by his unqualified trainee assistant on his own initiative, when the representative concerned was absent from his office for some days. The assistant had been asked to check the file of the European patent application following the receipt of a query concerning assignment and, on doing so, he had discovered the fee payment error.
- A copy of the telex instruction sheet, signed by the assistant and marked with the representative's initials and the words "check on return", in the assistant's handwriting, has been produced to the Board of Appeal.

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The representative himself had not been made aware of the situation until 13 or 14 December 1984, after his return to his office. Therefore, it was implied, the period of two months for filing the application for re-establishment of rights should be calculated from 13 or 14 December 1984, so that the application was actually filed in due time.

- X. In support of the application for re-establishment of rights, it was alleged that responsibility for the payment of the fifth renewal fee was delegated, as was standard practice, to the Registers Department of the representative's office, which was manned by experienced clerks. Instructions for telexing fees were entered by such a clerk on a form which was given to the telex operator.
- In the present case the form for the payment of the fifth year renewal fee was completed correctly by the clerk, but the telex operator, who was attending at the same time to several fourth year renewal payments, inadvertently sent instead a telex for a fourth year payment.
- This error was subsequently discovered by the clerk and instructions to pay the balance for the fifth year fee were then telexed. The notice referred to in para. V above was misinterpreted by the clerk concerned, who confused the requested additional fee with the balance already paid so that no action was taken.
- XI. The appellants request re-establishment of rights so that the prosecution of the European patent application can continue.

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REASONS FOR THE DECISION

1. Having regard to the explanation furnished by the appellant's representative, summarised in para. IX above, the Board is satisfied that it is proper to consider the date on which the representative responsible first became aware of the non-payment of the additional fee, namely 13 or 14 December 1984, as the date on which the removal of the cause of non-compliance with the time limit occurred, for the purposes of Article 122(2) EPC. In a case in which non-compliance with a time limit leading to a loss of rights under the EPC is discovered by an employee of a representative, the cause of non-compliance, i.e. failure to appreciate that the time limit has not been complied with, cannot be considered to have been removed until the representative concerned has himself been made aware of the facts, since it must be his responsibility to decide whether an application for re-establishment of rights should be made and, if it is to be made, to determine the grounds and supporting facts to be presented to the European Patent Office. The application for re-establishment of rights can therefore be considered to have been made in due time. Furthermore, the relevant fee has been duly paid and the omitted act has been duly completed by payment of the additional fee on 10 December 1984.

2. Every application for re-establishment of rights has to be examined on its own particular facts and the European Patent Office has to be satisfied that all due care required by the circumstances has been taken. In the present case, it seems clear that the telex operator was used to sending telexed instructions for payments to the Bank of the European Patent Office, was properly instructed, both in general and in the particular case, and made a wholly inadvertent mistake.

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The clerk was also experienced and properly instructed but was confused by the communications received from the European Patent Office in the particular, and unusual, circumstances of the case. The failure to pay the additional fee in due time, so that the European patent application was deemed to be withdrawn, was clearly the cumulative result of the mistakes of properly chosen and experienced employees.

3. In these circumstances, the Board does not have to impute the mistakes of the employees to the representative concerned (cf. Decision of the Legal Board of Appeal in Case J 05/80, OJ EPO 1981, 343). Accordingly, the Board is able to conclude that all due care required by the circumstances was taken. It follows that the request for re-establishment of rights can be granted.

O R D E R

For these reasons,

it is decided that:

The appellants are restored in their rights and European patent application N°. 80 900 996.2 is to be regarded as not having been withdrawn for failure to pay the fifth year renewal fee.

The Registrar

The Chairman

B A Norman

G. Andersson