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Bezeichnung der Erfindung: Mounting device for rotary-cutter tools
 Title of invention:
 Titre de l'invention :

Klassifikation / Classification / Classement : B 23 B 31/04

ENTSCHEIDUNG / DECISION
 vom / of / du 28. May 1986

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent / Titulaire du brevet : Sandvik (Respondent)
 Hahn & Kolb (Appellant)

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Unpaid opposition fee/SANDVIK

Articles 99(1), 122(1) EPC
 Rule 88 EPC
 "Arrangements for Deposit Accounts"

Opposition fee not paid and not referred to - correction of factual mistake - debit order - appraisal of circumstances

Leitsatz / Headnote / Sommaire

1. Failure to pay a fee within a required time limit, when payment was intended, is a mistake of fact which cannot be corrected under Rule 88 EPC, first sentence.
2. Before the EPO can appropriate funds from a particular deposit account in payment of a fee, it must be possible to derive a clear and unambiguous intention to pay that fee from a particular identified deposit account.
3. Where responsibilities for deciding whether to carry out an act such as payment of a fee within a time limit lies with a person, there is no obligation upon the EPO to remind the person prior to expiry of the time limit, even when the person holds a deposit account with the EPO.

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D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 28 May 1986

Appellant :
(Opponent)

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Decision under appeal :

Decision of the Formalities Section
of the Opposition Division of the
European Patent Office dated 22.03.85

Composition of the Board :

Chairman : M. Huttner
Member : G. D. Paterson
Member : C. Maus

Summary of Facts and Submissions

- I. The grant of a European patent was mentioned in Patent Bulletin 83/30 dated 27 July 1983. The nine month period for filing notice of opposition therefore expired on 27 April 1984.
- II. On 14 April 1984 a notice of opposition dated 9 April 1984 from the Appellant's representative was received by the Opposition Division. The notice of opposition contained no reference to payment of the opposition fee, and the opposition fee was not paid by 27 April 1984.
- III. By a communication pursuant to Rule 69(1) EPC dated 4 June 1984, the Appellant's representative was informed that the opposition fee had not been paid within the required nine month period, and that the notice of opposition was therefore deemed not to have been filed, in accordance with Article 99(1) EPC.
- IV. By a letter received on 2 August 1984 the Appellant's representative applied to amend the notice of opposition in accordance with Rule 88 EPC, by adding the following sentence "The opposition fee amounting to DM 520 is to be deducted from the European Patent Office Account No. 2800.0125 belonging to the Opponent's representative". By a letter dated 20 November 1984 the Appellant's representative argued that the EPO was properly authorized to debit the amount of the opposition fee from his deposit upon receipt of the notice of opposition.
- V. By a Decision dated 22 March 1985 the Opposition Division refused to allow the notice of opposition to be amended on the basis that a failure to pay a fee in due time was a mistake of fact, not a mistake "in a document" such as could be corrected under Rule 88 EPC, first sentence; and

held that the notice of opposition was deemed not to have been filed, because the EPO had not been authorized to debit the deposit account within the time limit.

VI. The Appellant's representative filed notice of appeal and paid the appeal fee on 16 May 1985. He filed a Statement of Grounds on 7 June 1985, in which it was contended that :

- (1) The application for amendment of the notice of opposition satisfied the requirements for Rule 88 EPC to be applicable. To distinguish between a mistake in a document and a mistake of fact by failure to pay a fee in due time was contrary to the meaning and objective of Rule 88 EPC. Refusal to apply Rule 88 EPC would be unfair to an Opponent because Article 122 EPC is not available to an Opponent.
- (2) The (latter) notice of opposition filed on 14 April 1984 should be considered as a clear indication that the opposition fee should be debited from the deposit account of the Appellant's representative.
- (3) The opening by the representative of a deposit account created a special legal relationship between the EPO and the representative as a result of which the EPO should have informed the representative between receipt of the notice of opposition and expiry of the nine month opposition period, that no clear instruction for payment of the opposition fee had been received.

VII. In a reply to a communication from the Board of Appeal dated 26 February 1986, further submissions in support of the above contentions were set out by the Appellant's representative in a letter dated 29 April 1986.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 EPC and Rule 64 EPC, and is therefore admissible.

2. The first sentence of Rule 88 EPC clearly gives the EPO power to correct a mistake in any document filed with the Office. Equally clearly, Rule 88 EPC does not give the EPO power to correct a mistake unless it is in a document (or is a linguistic error or an error of transcription). The last sentence of Article 99(1) EPC states that a notice of opposition shall not be deemed to have been filed until the opposition fee has been paid. Payment of an opposition fee is thus a factual requirement, which must be fulfilled within the nine month opposition period if an opposition is to be admitted. A failure to pay an opposition fee within the required time limit in the circumstance when the filing of an opposition is intended, is a factual mistake, which cannot be rectified once the time limit for filing an opposition has passed. Thus even if the notice of opposition was to be amended in the way set out in the representative's letter received on 2 August 1984, such an amendment could not alter the fact that the opposition fee was not paid before expiry of the nine month opposition period.

The fact that the wording of Article 122 EPC does not enable an Opponent to apply for re-establishment of rights cannot affect the proper construction of Article 99(1) EPC and Rule 88 EPC, which is as set out above.

it appears from the wording of Rule 88 EPC to be the clear policy of the EPO to distinguish between a mistake in a document and other kinds of mistakes, such as a failure to pay a fee in time, and only to allow correction of a

mistake in a document. In this circumstance, Rule 88 EPC cannot enable the Appellant's representative to correct the failure to pay the opposition fee in time.

3. The "Arrangements for Deposit Accounts" (Official Journal of the EPO 1982, pages 15 to 18) sets out in section 6 thereof what is required for the debiting of a deposit account at the EPO. Thus section 6.2 provides that a "deposit account can only be debited on the basis of a debit order made out in writing and signed by the account holder (or where appropriate on the basis of a telex)" and section 6.3 provides that "the debit order must contain the particulars necessary to identify the purpose of the payment and must indicate the number of the account which is to be debited". In the present case, as already noted, the notice of opposition contains no reference to payment of the opposition fee at all. Thus the Appellant's representative did not file any document within the nine month opposition period which could be construed as a debit order at all, and clearly the requirements of section 6.2 and 6.3 of the above arrangements were not satisfied. In this situation, the mere fact that a deposit account exists in the name of the Appellant's representative, which contains sufficient funds to meet payment of the opposition fee, cannot be of any assistance to the Appellant.

As a matter of general principle, before the EPO can properly appropriate an amount of money from a deposit account which it holds, in settlement of a fee or of the cost of some service, it must receive a clear and unambiguous instruction in writing to do so, signed by the account holder. In the present case, no such instruction was received by the EPO.

The Appellant's representative has contended that if (a) an account with sufficient funds exists, and (b) the intention to pay can be derived from the general circumstances, that is sufficient for the EPO to debit the account in question. In the present case, where the notice of opposition contains no reference to payment at all, it is impossible even to derive an intention to pay from the general circumstances. The mere fact that a comprehensive notice of opposition has been filed within the required time limit does not mean that the Opponent or his representative in fact intended to pay the opposition fee within the required time limit as well. It would be quite possible for a notice of opposition to be filed as a precaution, prior to the making of the decision whether or not actually to file the opposition by paying the opposition fee.

Even if it was possible to derive a clear and unambiguous intention to pay the opposition fee within the time limit, it must also be clear and unambiguous that a particular identified deposit account is the intended source for such payment. In a case such as the present where no reference to payment has been made at all, there is necessarily a double ambiguity, namely, first as to whether or not payment was intended, and secondly, if it was, as to the method of such payment.

For the above reasons, in the Board's view the notice of opposition which was filed within the time limit for opposition in the present case cannot be construed as a debit order to allocate payment of the opposition fee from the deposit account of the Appellant's representative within the time limit as well.

The above view is fully consistent with each of the previous Debit Order cases I, II and III of the Board of Appeal (T152/82, T17/83 and T170/83), in each of which

there was a written statement which referred expressly to the debiting of a deposit account as the intended method of payment of a particular fee.

4. The legal obligations between the EPO and a deposit account holder are set out in the "Arrangements for Deposit Accounts". As discussed above, the decision whether or not to pay a particular opposition fee within the required time limit lies with the potential opponent and his representative, and for this reason there can be no legal obligation upon the EPO to notify a potential opponent of non-payment of a fee. Article 99(1) EPC provides a nine month period during which notice of opposition may be filed and the opposition fee paid, payment of the fee being essential for filing of the opposition. Until the requirements of Article 99(1) EPC have been met, a potential opponent is not a party to any proceedings before the EPO, and the burden of satisfying such requirements in order to become an opponent remains with the potential opponent.

While in certain circumstances it may be possible for the EPO to provide an informal reminder to a professional representative of a party in respect of an act which it requires to be carried out within a specified period, there can be no proper criticism of the EPO if no such reminder is provided, in a situation where the burden and responsibility for carrying out the act lies with such party, and especially in a situation such as in the present case, where the decision whether or not to carry out the act (i.e. to pay the opposition fee) determines whether or not the potential opponent becomes a party to proceedings before the EPO.

5. For the above reasons the Decision of the Formalities Section of the Opposition Division is affirmed.

Order

For these reasons,

it is decided that :

The appeal against the Decision of the Formalities Section of the Opposition Division dated 22 March 1985 is dismissed.

The Registrar

The Chairman

B A Norman

M Huttner