BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS | BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE | CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Publication in the Official Journal ~~Yes~~ / No

File Number: T 248/91 - 3.3.2

Application No.: 86 200 238.3

Publication No.: 0 196 121

Title of invention: Process for obtaining the preparation for the treatment of the disease psoriasis; drug for the treatment of psoriasis and its application

Classification: A61K 31/57

D E C I S I O N
of 20 June 1991

Applicant: Dr. Pero Visnjic

Headword: Restitutio/VISNJIC

EPC Article 108, 122(2)

Keyword: "Restitutio in integrum - date of removal of the cause of non-compliance - valid cause of non-compliance"
"Late notice of appeal and payment of appeal fee - no appeal in existence" - "Reimbursement of appeal fee"

Headnote

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number : T 248/91 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 20 June 1991

Appellant : Visnjic, Pero Dr.
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Representative : Noz, Franciscus Xaverius, Ir.
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Decision under appeal : **Decision of Examining Division 001 of the European Patent Office dated 6 August 1990 refusing European patent application No. 86 200 238.3 pursuant to Article 97(1) EPC.**

Composition of the Board :

Chairman : P.A.M. Lançon
Members : C. Holtz
A. Nuss

Summary of Facts and Submissions

I. This decision concerns a request for **restitutio in integrum** with regard to the missed time limit for notice of appeal under Article 108 EPC.

II. The Examining Division decided on 6 August 1990 to refuse European patent application No. 86 200 238.3. On 10 December 1990 a notice of appeal together with a request for **restitutio in integrum** was filed by the Appellants. The appeal and restitutio fees were paid on the same date.

III. In their application for restitutio, the Appellants invoked the fact that there were difficulties to obtain the necessary trial data in order that the appeal be successful. Only on 6 December 1990 were they in a position to instruct their representative to file an appeal.

The representative has explained that he had, as soon as the decision reached him, advised the Appellants that an appeal would have to be filed before 6 October 1990.

IV. On 23 January 1991, four reports on comparative clinical trials were submitted by the Appellants.

Reasons for the Decision

1. According to Article 108 EPC, a notice of appeal must be filed within two months of the notification of the decision under appeal. The appeal fee must be paid within the same time period. For the present case, this means that the latest date for these acts was 16 October 1990 (Article 108, in combination with Rule 78(3) EPC, the

latter setting the date of notification at ten days after the posting date).

2. In the present case, the Appellants, through their representative, were aware from the outset, i.e. from 8 August 1990, when the representative received the decision under appeal, about these conditions, see the representative's letter received on 10 December 1990.

3. Under Article 122(2), it would have been possible for the Appellants to validly file an application for re-establishment into the time limit for the notice of appeal, if the application had been filed within two months of the removal of the cause of non-compliance. Taking account of the fact that the representative was aware from the start that the notice had to be filed in accordance with the form accompanying the decision, there was no apparent cause for the non-compliance. This effectively puts the latest date for the application for restitutio at the same date as the latest one for the notice of appeal, i.e. at 16 October 1990. The request having been filed only on 10 December 1990 therefore seems to have been too late.

4. The question arises, however, whether the reason for the delay, i.e. that the reports from the comparative studies were long in coming can represent the kind of cause for non-compliance recognised under Article 122(3) EPC.

It seems that the Appellants believed that they were not allowed to file a notice of appeal until they were in possession of evidence to support their case in such a way that their appeal would succeed.

5. At the outset, it should be noted that nowhere in the Convention is it laid down that appeals cannot be lodged

unless they have a chance of being successful when considered on their merits. On the contrary, it is the constant practice of the EPO to recognise the difference between issues of admissibility and of merit (cf. T 222/85, OJ EPO 1988, 128, T 234/86, OJ EPO 1989, 79 and T 560/90 of 19 March 1991, to be published in OJ EPO). Thus, the Appellants could very well have lodged a notice of appeal in due time, stating their appeal request, and then within the time limit of four months after the notification of the decision under appeal, file a statement of grounds giving the further details of their appeal, including a reference to evidence to support their claim - in the present case - to inventive step. It was not necessary at that stage for them to be able to present the content of the evidence on which they relied. These conclusions are in line with those expressed in T 250/89 of 6 November 1990, point 10, to be published in OJ EPO.

6. That they refrained from filing a notice of appeal in time, seems to be a result of an error in jure, rather than a mistake in facts. As errors regarding the law are not excusable, the request for restitutio must be considered out of time.

7. Even if the request for restitutio had been admissible, the Appellants have not given any explanations to show that all due care was taken, on the part of themselves as well as on the part of their representative, to avoid missing the time limit.

8. Decisions T 287/84, OJ EPO 1985, 333 and T 14/89, OJ EPO 1990, 432, indicate that the Office has a general obligation to remind a party, when it finds deficiencies in an application for restitutio in integrum, to complete his application if there is a possibility that the deficiencies can be remedied within the two month time

limit of Article 122(2). In the present case, however, the application for restitutio was filed after expiry of that time limit. There is thus no room for such a completion of the application.

9. The application for restitutio in integrum must therefore be refused.

10. Therefore, neither the notice of appeal nor the appeal fee was submitted in time. Consequently, there is no appeal in existence and the appeal fee has to be reimbursed.

Order

For these reasons, it is decided that:

1. The application for restitutio in integrum is refused.

2. There is no appeal in existence.

3. Reimbursement of the appeal fee is ordered.

The Registrar: The Chairman:

P. Martorana P.A.M. Lançon