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PATENTAMTS

BOARDS OF APPEAL
OF THE EUROPEAN
PATENT OFFICE

CHAMBRES DE RECOURS
DE L'OFFICE EUROPEEN
DES BREVETS

Publication in the Official Journal / No

Case Number :

File Number: T 413/91 - 3.3.2
Application No.: 83 107 626.0
Publication No.: 0 100 553
Title of invention: Process for fluidizing

Appellant :
(Opponent)

Classification: B01J 8/40

Respondent :
(Proprietor of

DECISION
of 25 June 1992

Representative

Proprietor of the patent: UNION CARBIDE CORPORATION

Opponent: BÜHLER GmbH

Decision under a

Headword: Restitutio/BÜHLER
EPC Article 122
Keyword: "Admissibility of appeal (no)"
"Re-establishment of rights (no) - unable to observe a
time limit (no)"

Composition of the

Chairman : P.A.
Members : E.M.
A.J.

Catchwords

The requirement "unable to observe a time limit" implies an objective fact preventing the required action. Restitutio in integrum is an extraordinary means of individual remedy, which offers no choice to a party as a substitute for the proper action to be taken. A party who has deliberately chosen not to file a Statement of Grounds for the appeal cannot achieve an appellate review through the back door of a request for restitutio in integrum.



Case Number : T 413/91 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 25 June 1992

Appellant :
(Opponent)

BÜHLER GmbH
Ernst-Amme-Strasse 19
Postfach 33 69
W - 3300 Braunschweig (DE)

Respondent :
(Proprietor of the patent)

UNION CARBIDE CORPORATION
39 Old Ridgebury Road
Danbury
Connecticut 06817 (US)

Representative :

Schwan, Gerhard, Dipl.-Ing.
Elfenstrasse 32
W - 8000 München 83 (DE)

Decision under appeal :

Interlocutory decision of the Opposition Division
of the European Patent Office dated 18 October
1990, posted on 27 March 1991 concerning
maintenance of European patent No. 0 100 553 in
amended form.

Composition of the Board :

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

Summary of Facts and Submissions

- I. By a decision of 27 March 1991, the Opposition Division maintained European patent No. 100 553 in amended form. The patent was based on European patent application No. 83 107 626.0 filed on 2 August 1983. The mention of grant was published on 10 February 1988.
- II. The Appellants/Opponents on 27 May 1991 filed a Notice of Appeal against the above decision. The appeal fee was paid on the same date.
- III. On 9 April 1992, the Registrar of the Boards of Appeal issued a communication to the Appellants pursuant to Article 108 and Rule 65(1) EPC, drawing attention to the fact that a written statement setting out the grounds of appeal appeared not to have been filed within the time limit laid down in Article 108 EPC.

In response to this communication, the Appellants on 20 May 1992 submitted a request for restitutio in integrum, a Statement of Grounds and paid the required fee.

As grounds for the request for restitutio in integrum the following was submitted by the Appellants:

Shortly before the decision of 27 March 1991 by the Opposition Division, the patentees declared themselves prepared to give the opponents a right of co-use of the invention, under certain conditions. For reasons not understood by the Appellants, such an agreement was however never reached. The Appellants had neither seen any concrete steps by the patentees to have the patent lapse as they had been led to believe. This caused the

Appellants to use the communication of 9 April 1992 to request restitutio in integrum.

Reasons for the Decision

1. The request for restitutio in integrum is admissible.
2. The Notice of Appeal and the appeal fee were submitted within the stipulated time limit under Article 108 EPC. As however the Statement of Grounds was submitted out of time, the question whether or not the appeal is admissible depends on the outcome of the request for restitutio in integrum.
3. Article 122 EPC on restitutio in integrum contains two fundamental requirements: The applicant or proprietor (or as in the present case the opponent, cf. G 1/86, OJ EPO 1987, 447) must establish that he was 1) unable to observe a time limit, 2) in spite of all due care required by the circumstances having been taken.
4. The Appellants' reasons for not filing any Statement of Grounds are that they had expected an agreement with the proprietor, which however did not come about.

The first condition under Article 122 EPC explicitly states that the party in question must have been unable to observe the time limit. The word "unable" (in the French version "n'a pas été en mesure", and German version "verhindert worden ist") implies an objective fact or obstacle preventing the required action. Such an obstacle could e.g. consist of a wrong date inadvertently being entered into a monitoring system, or an outside agency influencing the observance of the time limit (for example a delay in delivery service). Only when such a fact made

the party unable to observe the time limit would the circumstances of the case be examined as to the second condition "in spite of all due care".

Restitutio in integrum is an extraordinary means of judicial remedy. It offers no choice to a party as a substitute for the proper action to be taken, nor does it imply any right to have the fatal effect of an intentional step cancelled, even if this step later on proved to have been a mistake. A party thus cannot deliberately abstain from fulfilling the conditions for a valid appeal, and then achieve an appellate review through the back door of a restitutio request. The party in question must have been objectively unable to observe the time limit.

The Appellants of the present case however chose not to file any statement of grounds. The reason given, that the counterparty was not behaving as expected, is irrelevant, as it would not have objectively prevented the Appellant from filing a statement of grounds within the time limit given by the EPC. Thus, the Appellants have not fulfilled the first condition under Article 122 EPC of being unable to observe a time limit.

The request for restitutio is therefore refused.

5. This decision has been taken without any prior communication from the Board, having regard to the nature of the ground referred to by the Appellants. No subsequent evidence or elaboration on this ground could heal the above deficiency.
6. As the Statement of Grounds, given the above refusal, has to be considered as not filed on time, the appeal must be declared inadmissible.

Order

For these reasons, it is decided that:

1. The request for restitutio in integrum is refused.
2. The appeal is inadmissible.

The Registrar:



P. Martorana

The Chairman:



P.A.M. Lançon



02329



Beschwerdekammern
Boards of Appeal
Chambres de recours
Geschäftsstelle/Registry/Grefe

Please find enclosed a copy of the corrected catchword
of the decision of 25 June 1992.

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

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of 25 June 1992

Proprietor of the patent: UNION CARBIDE CORPORATION

Opponent: BÜHLER GmbH

Headword: Restitutio/BÜHLER

EPC Article 122

Keyword: "Admissibility of appeal (no)"
"Re-establishment of rights (no) - unable to observe a time limit (no)"

Catchwords

The requirement "unable to observe a time limit" implies an objective fact preventing the required action. Restitutio in integrum is an extraordinary means of judicial remedy, which offers no choice to a party as a substitute for the proper action to be taken. A party who has deliberately chosen not to file a Statement of Grounds for the Appeal cannot achieve an appellate review through the back door of a request for restitutio in integrum.