

Publication in the Official Journal Yes / No

File Number: T 516/91 - 3.3.3

Application No.: 84 301 680.9

Publication No.: 0 119 815

Title of invention: Composition of matter incorporating polyether ether  
ketone

Classification: C08L 71/00

DECISION  
of 14 January 1992

Applicant: AEPLC

Headword: Re-establishment of rights/AEPLC

EPC Article 108, 122

Keyword: "Admissibility of appeal (no)" - "Re-establishment of rights (no)"

Headnote



**Europäisches  
Patentamt**

**European  
Patent Office**

**Office européen  
des brevets**

Beschwerdekammern

Boards of Appeal

Chambres de recours

**Case Number : T 516/91 - 3.3.3**

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.3**  
**of 14 January 1992**

**Appellant :**

**AEPLC**  
**Cawston House**  
**Cawston**  
**Rugby**  
**Warwickshire CV22 7SA (GB)**

**Representative :**

**Rees, David Christopher**  
**Kilburn & Strode**  
**30 John Street**  
**London WC1N 2DD (GB)**

**Decision under appeal :**

**Decision of Examining Division of the European  
Patent Office dated 12 February 1991 refusing  
European patent application No. 84 301 680.9  
pursuant to Article 97(1) EPC.**

**Composition of the Board :**

**Chairman : F. Antony**  
**Members : H.H.R. Fessel**  
**G. Davies**

## Summary of Facts and Submissions

- I. Appellant's European patent application No. 84 301 680.9, filed on 13 March 1984, was refused by a decision of the Examining Division of the European Patent Office (EPO) dated 12 February 1991. Notification of the decision to the Appellant is deemed to have been effected on 22 February 1991 (Rule 78(3) EPC).
  
- II. By letter dated 20 March 1991, received at the EPO on 21 March 1991, the Appellant's representative filed a notice of appeal against this decision. The appeal fee was paid on 9 April 1991. In his letter giving notice of appeal, the Appellant's representative stated that Grounds of Appeal would be submitted by 12 June 1991.
  
- III. On 21 June 1991, the Appellant's representative sent a letter to the EPO by facsimile, which was received the same day, making the following request: "Due to the complexities of the issues in the present application, we would be grateful if an extension of two months might be granted for submitting our Grounds for Appeal."
  
- IV. On 24 June 1991, the EPO acknowledged receipt of the Appellant's representative's said letter of 21 June.
  
- V. On 30 July 1991, the EPO sent the Appellant's representative a communication pursuant to Article 108 and Rule 65(1) EPC pointing out that no written Statement setting out the Grounds of Appeal had been filed within the prescribed time limit (which had expired on 24 June 1991, 22 June being a dies non) and drawing his attention to the possibility of filing a request for re-establishment of rights under Article 122 EPC.

- VI. By letter dated 5 August 1991, received at the EPO on 7 August 1991, the Appellant's representative acknowledged receipt of the official communication dated 30 July and recalled that an application had been filed for an extension of the term for filing the Grounds of Appeal, receipt of which had been acknowledged by the EPO. The representative stated that he had computed the deadline for filing Grounds of Appeal to be 22 June 1991 and that his letter requesting an extension of time had been filed within the deadline. Since no communication had been received from the EPO refusing the request for extension, he had assumed the request to have been in order. He believed, therefore, that "we should still be within the time limit for submitting the grounds of appeal". Were that not to be the case, "the applicants may well wish to file a request for re-establishment of rights under Article 122".
- VII. On 12 August 1991, the Registry of the Boards of Appeal wrote to the Appellant's representative pointing out that the EPC does not provide the EPO with the power to extend the time limit laid down in Article 108 EPC for the filing of Grounds of Appeal (four months from the date of notification of the decision).
- VIII. By letter dated 30 September sent to the EPO by facsimile, and received on the same day, the Appellant's representative filed an application for re-establishment of rights under Article 122 EPC. The letter was accompanied by a separate document setting out the previously omitted Grounds of Appeal. The fee for re-establishment of rights was paid on 26 September 1991.
- IX. In support of the application for re-establishment of rights, the Appellant's representative submitted that the failure to file the Grounds of Appeal on time was due to

his mistaken belief that it would be possible to gain an extension of the period for filing the Grounds of Appeal. He said that both he and the Head of the Intellectual Property department of the appellant, Mr J.A. Crux, were aware that the deadline for filing the Grounds of Appeal was 12 June 1991 (actually 24 June). The Appellant's representative received instructions from Mr Crux in due time to file the notice of appeal and to pay the appropriate fee. Mr Crux had, however, mentioned the option of not proceeding further with the appeal (see letter of 8 March 1991). The representative understood, therefore, that he should await further instructions before filing Grounds of Appeal. No such instructions having been received, and being aware of the deadline, the representative mistakenly made a request for an extension of the period for submitting Grounds of Appeal.

- X. The representative's request for re-establishment and his statement are supported by a statement from Mr Crux. The Appellant company, AE PLC was acquired by another company, T and N PLC in December 1986. The Patent Departments of the two companies were merged and the application in question was the responsibility of Mr A.M. Gould, who had instructed the representative originally. The merged Intellectual Property Department worked satisfactorily until early 1991. Mr Gould was scheduled to retire on 1 April 1991 and responsibility for his work, including the application in suit, was due to be passed on to a Mr Goddard. Mr Goddard, however, at short notice left the employment of T&N PLC on 29 March 1991, two days before Mr Gould retired. Furthermore, at the end of March 1991, it was announced that the Head of the Intellectual Property Department, Mr Hadfield, was to leave on 30 June 1991. Thus, both the persons responsible for the case in suit and the most appropriate person to take it over had left and the Head of the Department also began to

hand over his responsibilities. Only Mr Crux and one other qualified European Attorney, Mr Gibson, were left to take over the entire workload.

XI. In these circumstances, Mr Crux and Mr Gibson were overburdened with work and, in Mr Crux' case, this was compounded by the fact that in June 1991 he was appointed successor to Mr Hadfield as Head of the Intellectual Property Department. Moreover, prior to Mr Hadfield's departure, Mr Crux had been obliged to assume his administrative and professional duties in addition to the increased workload he had resulting from the departures of Messrs Gould and Goddard. As a result, Mr Crux had been content to leave the prosecution of the case in suit largely in the hands of the Appellant's representative.

Mr Crux states, however, that he believes that he spoke to a colleague of the representative, whose name he does not recall, and informed that person that the representative should proceed with the filing of the Grounds of Appeal. The representative has no recollection of such a conversation on the file and does not recall being informed of such a call. The Appellant submits, therefore, that an uncharacteristic and isolated breakdown in communication between the representative and Mr Crux had taken place and that an unfortunate combination of circumstances had resulted in the representative being left without sufficiently clear instructions up to the deadline of 12 June 1991 to which Mr Crux had endeavored to work; the latter assumed the representative would also endeavour to meet the deadline and would file the grounds of appeal without further instructions.

**Reasons for the Decision**

1. Since no Statement of Grounds of Appeal was filed within the time limit set by Article 108 and Rule 78(3) EPC, the appeal should be rejected as inadmissible in application of Rule 65(1) EPC unless the application for re-establishment of rights filed on 30 September 1991 is granted.
  
2. The application for re-establishment of rights fulfills the conditions laid down in paragraphs (2) and (3) of Article 122 EPC and therefore is admissible. The cause of non-compliance with the time limit was removed at the earliest on receipt of the EPO's first communication of 30 July 1991 (effective date of notification 9 August 1991). The application for re-establishment of rights was filed within two months of that date, on 30 September, and the fee for re-establishment of rights was paid on 9 October 1991. The omitted act, failure to file the Statement of Grounds of Appeal, was also completed within two months from the removal of the cause of non-compliance with the time limit.
  
3. Although the EPO Boards of Appeal recognise that Article 122 EPC is intended to ensure that in appropriate cases the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2/86, OJ EPO, 1987, 362), this does not mean that they automatically grant every application for re-establishment of rights, whatever the circumstances. This would be contrary to Article 122(1) EPC which makes it a condition for re-establishment of rights that all due care required by the circumstances was taken.

4. The Board, having duly considered the submission and affidavits filed in support of the application, considers that all the due care required by the circumstances was taken neither by the Appellant's representative nor by the Appellant.
  
5. It is clear from the documents on file that both the Appellant's representative and the Appellant were aware that the time limit for submitting the Grounds of Appeal expired at the latest on 24 June 1991, including the 10-day notification period. So far as the Appellant's representative is concerned, his mistake was to request an extension of the time limit by two months on 21 June 1991. The time-limits set by Article 108 EPC, however, are not extensible. According to long-established principles of law, an error regarding the law is not excusable. In particular, a mistake of law regarding the provisions of the EPC on calculation of time limits, does not, as a general rule, constitute grounds for re-establishment of rights. The obligation to take "all due care required by the circumstances" means that persons engaged in proceedings before or involving the European Patent Office must acquaint themselves with the relevant procedural rules (D 06/82, OJ 1983, 337). The Appellant's representative, as an European Patent Attorney, should have known that the time-limits set by Article 108 cannot be extended and, in mistakenly believing that an extension of these time limits was possible, he failed to exercise due care. The fact that the Appellant's representative persisted in his error after receipt of the EPO's communication of 30 July 1991, as is shown by his letter of 5 August 1991, is further evidence of failure to exercise all due care in the circumstances.
  
6. The Board has considered the submission of the Appellant's representative (see letter of 5 August 1991) according to



which, since no communication had been received from the EPO refusing the request for an extension of the time limit, he had assumed that the request was in order.

According to the jurisprudence of the Boards of Appeal, principles of good faith govern the relations between the European Patent Office and applicants for European patents over procedural matters laid down in the implementing regulations. A party to proceedings before the EPO cannot suffer a disadvantage as a result of having been misled by a communication which could fairly be regarded as misleading to a reasonable addressee. However, in all normal circumstances, parties to proceedings before the EPO - and their professional representatives - are expected to know the relevant provisions of the EPC (J 3/87, OJ 1989, 3). In the Board's opinion, it was unreasonable for the Appellant's representative to have been misled by a lack of response from the EPO, having regard to the knowledge of the law expected from parties before the EPO and their representatives. Had he received a clear and unambiguous communication from the EPO agreeing to an extension of two months, the opinion of the Board may have been different, but a lack of response from the EPO cannot be regarded as misleading in the circumstances of the case. Furthermore, the letter from the Applicant's representative requesting an extension of time did not ask for any confirmation or acknowledgement of the request from the EPO and it was not reasonable for him to infer from the fact that he received no response to his letter that his request was in order. The Board, therefore, concludes that the principle of good faith was not violated by the EPO.

7. Re-establishment of rights may only be granted when not only the representative, but also the Applicant for or Proprietor of the European patent has taken all due care (Article 122(1) EPC).

In the present case, although the Appellant's representative had informed the Appellant of the necessity to file a Statement of Grounds of Appeal within the time limit, the Appellant failed to give any instruction to the representative within that deadline. The Board has taken into consideration the changes of personnel and the increased workload of those remaining in the Intellectual Property Department of the Appellant company at the time in question. However, it considers that a firm with a substantial Patent Department has a duty to take all due care during reorganisation of its Patent Department to observe all the time limits during patent granting procedures. No evidence has been provided which would indicate that the Appellant company had established a normally satisfactory system for observing time limits. As stated in T 324/90 (to be published) "In a large firm, where a considerable number of deadlines have to be monitored at any given time, it must normally be expected that at least an effective system of staff substitution in the case of illness and for absences in general is in operation in order to ensure that official documents such as decisions by the European Patent Office, which start periods within which procedural steps have to be carried out, are properly complied with". From the evidence submitted, no information is available as to what steps, if any, were taken to ensure observance of time limits in this and other cases and the Board cannot, therefore, consider failure to observe the time limit in this case as an isolated mistake in an otherwise satisfactory system. Had the outcome of this case depended solely on the absence of such information, the Board could have issued a communication giving the Appellant the opportunity to supplement his evidence. However, for the reasons given in paragraphs 5 and 6, above, this would have served no useful purpose owing to the lack of all due care on the part of the Appellant's representative.

8. In view of the foregoing, the Board is bound to conclude that neither the representative nor the Appellant have taken all due care required by the circumstances. Consequently, re-establishment of rights in respect of the time limit for filing the Statement of Grounds of Appeal cannot be granted. Since the appeal does not comply with Article 108 EPC, it has to be rejected as inadmissible in application of Rule 65(1) EPC.

**Order**

**For these reasons, it is decided that:**

1. The application for re-establishment of rights in respect of the time limit for filing the Statement of Grounds of Appeal is refused.
2. The appeal is rejected as inadmissible.

**The Registrar:**

  
E. Görgmaier

**The Chairman:**

  
F. Antony