

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen

D E C I S I O N
of 13 September 1994

Case Number: T 0601/93 - 3.3.1

Application Number: 90104235.8

Publication Number: 0387661

IPC: C07H 15/252

Language of the proceedings: EN

Title of invention:

New 3'-(4-morpholinyl)- and 3'-(2-methoxy-4-morpholinyl)-
anthracycline derivatives

Applicant:

FARMITALIA CARLO ERBA S.r.l.

Opponent:

-

Headword:

Re-establishment/FARMITALIA

Relevant legal norms:

EPC Art. 122, 108

EPC R. 65(1), 78(3), 83(4)

Keyword:

"Missed time limit for filing Statement of Grounds"

"All due care (no)"

Decisions cited:

T 0145/88, T 0250/89, T 0516/91, T 0715/91

Catchword:

-



Case Number: T 0601/93 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 13 September 1994

Appellant: FARMITALIA CARLO ERBA S.r.l.
Via Carlo Imbonati 24
I-20159 Milano (IT)

Representative: Giambrocono, Alfonso, Dr. Ing.
Ing. A. Giambrocono & C. S.r.l.
Via Rosolino Pilo 19/B
I-20129 Milano (IT)

Decision under appeal: Decision of the Examining Division of the European
Patent Office dated 4 December 1992 refusing
European patent application No. 90 104 235.8
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. Jahn
Members: P. P. Bracke
R. E. Teschemacher

Summary of Facts and Submissions

- I. European patent application No. 90 104 235.8 was refused by the Examining Division in a decision dated 4 December 1992. The reason given was that the subject-matter of the claims did not involve an inventive step.
- II. On 15 January 1993 the Appellant filed a Notice of Appeal against that decision and paid the appeal fee. By letter of 7 May 1993, received on 15 May 1993, he filed amended sets of claims. He requested allowance of the restricted application, giving reasons why the invention did involve an inventive step.
- II. On 22 September 1993 the Registrar of the Board of Appeal sent the Appellant a communication pursuant to Article 108 and Rule 65(1) EPC informing him that, as a Statement of Grounds had not been filed within the time limit provided for in Article 108 EPC, it was to be expected that his appeal would be rejected as inadmissible and drawing his attention to the possibility of filing a request for re-establishment of rights.
- III. In his reply of 30 September 1993 the Appellant referred to his letter of 07 May 1993, declaring that he did not understand the communication and that he had thought the application were in order for re-examination. After a telephone conversation with the Registrar the Appellant filed a request for re-establishment on 15 October 1993 and paid the corresponding fee on 22 October 1993.
- IV. In the grounds filed in support of his request the Appellant's professional representative stated that the Appellant had carried out difficult and time-consuming tests in order to overcome the objections made by the

Examining Division and that the submitted arguments were believed to be well-founded and could be used as a written statement during the appeal proceedings.

- V. In a communication the Board informed the Appellant that the reasons for the request for re-establishment did not show that the Appellant had taken all due care in order to observe the missed time limit. A reply has not been received.

Reasons for the Decision

1. The admissibility of the appeal depends principally on whether or not the time limit for filing the written statement laid down in Article 108 EPC has been observed. The Board accepts that the other requirements for admissibility are satisfied. A written Statement of Grounds must be filed within four months of the date of notification of the decision. In the present case this period elapsed on 14 April 1993 (Rules 78(3), 83(4) EPC).
2. The Notice of Appeal does not contain any information which can be regarded as Statement of Grounds, since it does not include the legal or factual reasons why the appeal should be allowed and the decision under appeal be set aside (Decisions T 145/88, OJ EPO 1991, 251, T 250/89, OJ EPO 1992, 355). The appeal's admissibility, therefore, depends on whether re-establishment of rights in respect of the time limit for filing the grounds is allowed or not.
3. The Appellant was informed by the communication of 22 September 1993 that a Statement of Grounds had not been filed within the applicable time limit. The cause

of non-compliance with the time limit was removed at the latest on receipt of this information. The application for re-establishment, which was deemed to be filed when the fee was paid on 22 October 1993, was therefore submitted in due time (Article 122(2), 1st sentence, (3), 2nd sentence, EPC).

4. The grounds stated in the application do not, however, show that the Appellant has exercised all due care required by the circumstances in order to observe the time limit.
5. From the letter of 30 September 1993 it might be concluded that the Appellant was not aware of the necessity to file a Statement of Grounds within the time limit of Article 108, 3rd sentence, EPC. Any legal error which may have led the Appellant to believe that the requirement was not to be observed would exclude the application of due care, considering the unequivocal provision in Article 108, 3rd sentence, EPC. His attention was specifically drawn to this requirement in the information as to means of redress on the cover page of the decision of refusal (form 2007), which also refers expressly to Article 108 EPC, the text of which was enclosed. An erroneous application of the law has not been excused in analogous cases, even if the error did not concern the requirement of filing the Statement of Grounds as such but only the applicable time limit (Decisions T 516/91 and T 715/91, cited in "Case Law of the Boards of Appeal of the EPO 1987 to 1992", EPO (ed.) 1993, p. 103 seq.).
6. The intention of an Appellant to base his case in appeal proceedings on new tests still to be carried out does not affect the requirement that a proper Statement of Grounds has to be filed in due time. If such tests are not finished early enough to be included in the

Statement of Grounds the Appellant has to indicate which tests he is carrying out and which results are expected in order to justify why the decision of the first instance should be set aside.

7. In any event the tests mentioned by the Appellant were carried out in the course of the proceedings before the Examining Division, i.e. before the application was refused. Therefore they had no effect on the preparation of the Statement of Grounds and could not delay its filing.

Order


For these reasons it is decided that:

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

The Registrar:


E. Gergmaier

The Chairman:


A. Jahn

Tc 13.9.
B 15.099