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

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 4 March 1999

Case Number: T 1070/97 - 3.3.5

Application Number: 90907970.9

Publication Number: 0466836

IPC: C04B 35/48

Language of the proceedings: EN

Title of invention:
Ceramics with high toughness, strength and hardness

Patentee:
Ceram Tools A/S

Opponent:
Cerasiv GmbH Innovatives Keramik- Engineering

Headword:
-

Relevant legal provisions:
EPC Art. 108, 122, 125
EPC R. 78, 83, 85

Keyword:
"Admissibility of appeal (no) - restitutio - all due care (no)"

Decisions cited:
T 0869/90

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1070/97 - 3.3.5

D E C I S I O N
of the Technical Board of Appeal 3.3.5
of 4 March 1999

Appellant: (Opponent)
Cerasiv GmbH Innovatives Keramik-Engineering
Fabrikstr. 23-29
73207 Plochingen (DE)

Representative:
Uppena, Franz, Dr.
Dynamit Nobel AG
Patentabteilung
53839 Troisdorf (DE)

Respondent: (Proprietor of the patent)
Ceram Tools A/S
P.O. Box 221
4601 Kristiansand (NO)

Representative:
Rees, David Cristopher
Kilburn & Strode
20 Red Lion Street
London WC1R 4PJ (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 6 August 1997 rejecting the opposition filed against European patent No. 0 466 836 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: R. K. Spangenberg
Members: J. H. van Moer
G. J. Wassenaar

Summary of Facts and Submissions

I. Notice of Appeal was lodged by the opponents on 15 October 1997 against a decision of the Opposition Division dated 6 August 1997, rejecting an opposition against European patent No. 466 836.

II. By letter dated 27 February 1998 the appellants (opponents) admitted that the statement of grounds of appeal filed on 18 December 1997 had been filed two days too late and applied for re-establishment of rights.

III. On this matter only, oral proceedings were held on 4 March 1999. As announced in writing, the respondents did not attend.

IV. The arguments of the appellants, in writing and at the oral proceedings can be summarised as follows:

- a new computerised diary system had just been introduced in May 1997 and, contrary to the previous system, it took Rule 85(1) EPC (the weekend circumstance) into account
- at the time workload was important
- there had been hesitations whether to pursue the appeal or not which explained the use of the ten days period
- the error was an isolated one in an otherwise satisfactory system
- the time limit was missed by only two days and therefore the sanction i.e. inadmissibility of the appeal was not proportional to the error.

The appellants requested re-establishment of rights.

V. The respondents' written arguments can be summarised as follows:

- the appellants should have been familiar with their own diary system

- in view of the importance of the time limit concerned, the appellants, when using the last day(s), should, as an elementary precaution, have (re)calculated the deadline on the basis of the official documents on file.

The respondents requested that the application for re-establishment of rights be rejected.

Reasons for the Decision

1. The application for re-establishment of rights is admissible, having regard to Article 122(2), (3) and (4) EPC.

2. The legal provisions to be considered are Articles 108, 122(1) and (2) EPC, 125 EPC, Rules 78, 83 and 85 EPC.

3. The wording of Article 122 EPC implies that it falls to the Board to determine:

- the cause(s) of non-compliance with the time limit

- the relevant circumstances

- the due care required by said circumstances.

3.1 The cause of non-compliance is here - if the appellants' explanations are, to their benefit, considered as supported by the evidence - that the appellants were not aware that, for the calculation of the expiry of the 4 month time limit set in Article 108 EPC, their new computerized system took Rule 85(1) EPC into account.

3.2 The relevant circumstances are in the Board's opinion only the following:

- the appellants had to fulfil the basic task of filing an appeal in accordance with the provisions of the EPC

- the appellants decided, in this context, for reasons of their own, to file the statement of grounds on the day they considered to be the last before the time limit expired.

3.3 In view of these circumstances the Board considers that they implied for the appellants nothing other than identifying the relevant provisions of the EPC and applying them correctly.

The appellants admitted that they applied the legal provisions as follows:

- application of the time limits of Article 108 EPC on the basis of the notification of the impugned decision in accordance with Rule 83(1) and Rule 85(1) which led to 8 December 1997 as the last day of the time limit and subsequently

- application of Rule 78(3) on the basis of said deadline and, without checking, assuming that 8 August 1997 was the date of the impugned decision for determination of the very last day of the decisive time limit.

They should have done as follows:

- apply Rule 78(3) on the basis of the notification of the impugned decision and subsequently,

- apply Article 108 EPC in combination with Rule 83(1) and Rule 85(1).

3.4 The above-mentioned legal provisions are clear and require no interpretation. In the Board's judgement, their incorrect application by the appellant is equivalent to an error in law, which, by definition, necessarily implies the absence of due care.

Furthermore, the Board considers that taking the risk of using the very last day(s) of a mandatory time limit without checking the deadline on the basis of the decision itself is not a careful attitude.

4. This lack of due care cannot be remedied by the further facts and arguments submitted by the appellants, for the reasons set out below:

4.1 The fact that the appellants were not aware of or familiar with a basic feature of their diary system - whether new or not - would rather have called for an additional check to be made, and cannot therefore be an excuse or justification for the non-compliance with the time-limit.

4.2 The allegation that the workload was unusually heavy was not supported by evidence and is in any event, if not completely unpredictable, a situation a well organised system must be able to deal with. If the system applied in such a routine situation fails, this fact would, therefore, rather demonstrate that the functioning of the system was not satisfactory.

4.3 No evidence was provided in support of the allegation that there was hesitation as to whether to pursue the appeal or not and, even if this were so and whatever the reasons, this forms a routine situation in legal proceedings.

4.4 Modifications and improvements to the diary system - as explained at length during the oral proceedings - **after** the error occurred are irrelevant to the issue to be decided here. Rather these facts would reveal that the system, applied at the time the error occurred, suffered from a systematic deficiency in the computer program. Thus, even if the Board were to accept, in the appellant's favour, that the error had occurred for the first time in the present case such a systematic defect cannot be regarded as an isolated error in an otherwise satisfactory system.

Therefore, the jurisprudence of the Boards of Appeal which takes into consideration that the error was an isolated one in an otherwise satisfactory system, is not applicable here.

4.5 Moreover, even if this Board were to accept, in the appellants favour, that the system was satisfactory, the mere fact that an isolated error had occurred, would not have changed the situation, for the following reasons:

The Board considers Article 122 EPC to be clear i.e. without lacunae, obscurity or contradiction and that accordingly its wording leaves no room for interpretation.

This wording requires the Board to evaluate the due care required in the light of the circumstances and the due care and circumstances can only be those of the specific case to be decided.

Consequently, what has happened previously, i.e. whether a number of previous time limits have been properly met, even in similar circumstances is irrelevant and is without legal effect.

Therefore, the mere fact of having previously had a satisfactory system can not, as such, suffice to support the conclusion that all due care was taken. On the contrary, in order to establish whether the due care required by Article 122 EPC is present it is necessary to take into account the relationship between the particular circumstances of failure and the care taken, the former having to be balanced with the latter.

Logically, to establish that relationship the Board must first determine the circumstances and secondly evaluate whether due care was effectively taken or, if a so-called system is relied upon, whether this system was **correctly applied** in practice. In this context, the Board observes, that the correct application of a satisfactory system should not normally produce failures. If, however, as in the present case, the system fails for specific reasons related to a faulty application, then it is not relevant whether the system

is otherwise satisfactory. What matters is only whether the faulty application occurred although all reasonable care had been taken. As set out above, this was not the case here.

4.6 Furthermore, the appellants submitted that the Board should apply the "principle of proportionality" and allow re-establishment of rights in view of the fact that the time limit was only missed by two days, and that this short period would not justify the loss of the right to appeal. In support of this submission he referred to decision T 869/90 of 15 March 1991. The Board observes, however, that the said principle was only mentioned in this decision as a subsidiary consideration.

Moreover, this Board considers that the only legal basis for taking this principle into account in the context of Article 122 EPC would, possibly, be under Article 125 EPC if one were to admit that the principle relates to procedural law.

The Board has no doubt that it is a generally recognised principle of law that the judge should impose a sanction in proportion to the error. However, the fact must be taken into account that the judge can only apply the principle of proportionality if the law authorises him to do so, i.e. if the law does not itself establish the relationship between error and sanction.

In the present case the legal provisions to be considered are either Article 122 EPC or Article 108 EPC in combination with Rule 65(1) EPC.

If Article 122 EPC is considered then the cause of the non-observation of the time limit is here the lack of the due care required by the circumstances, as set out in 3.3 above, and the sanction is the rejection of the application for *restitutio in integrum*.

Evidently, Article 122 EPC defines, without any room for proportionality, that if the Board finds that due care has not been taken, the application must be rejected.

If Article 108 EPC and Rule 65(1) EPC are considered then the error is the non-observance of the time limit under Article 108 EPC for filing the statement of grounds of appeal.

By how many days the time limit is missed is irrelevant since the sanction applies immediately after expiry of the time limit.

The sanction is here defined by Rule 65(1) EPC and again the provisions of the law leave no room for proportionality or, in other words, the relationship between error and sanction is established by law and therefore mandatory.

Consequently, the Board considers the principle of proportionality to be inapplicable in the present case.

5. For these reasons, the application for *restitutio in integrum* has to be rejected.

6. As the application for *restitutio in integrum* has failed, the appeal is inadmissible since the statement of grounds was filed too late (Article 108 EPC and Rule 65(1) EPC).

Order

For these reasons it is decided that:

1. The application for re-establishment of rights is rejected.

2. The appeal is dismissed.

The Registrar: The Chairman:

S. Hue R. Spangenberg