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D E C I S I O N
of 19 April 2000

Case Number: T 0971/99 - 3.3.4

Application Number: 90120364.6

Publication Number: 0427984

IPC: G01N 33/53

Language of the proceedings: EN

Title of invention:
Articles for use in enzyme immuno-assay techniques, and methods of making and using such articles

Patentee:
QUIDEL

Opponent:
1. Roche Diagnostics GmbH
2. Multilyte Ltd., Dept. Mol. Endocrinology, University College

Headword:
Restitutio in integrum/QUIDEL

Relevant legal provisions:
EPC Art. 122

Keyword:
"Restitutio - all due care (no)"
"Appeal deemed not to have been filed"

Decisions cited:
G 0001/86, J 0002/86, J 0003/86, J 0031/89, T 0210/89, T 0869/90, T 0111/92, T 1070/97

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0971/99 - 3.3.4

D E C I S I O N
of the Technical Board of Appeal 3.3.4
of 19 April 2000

Appellant: (Proprietor of the patent)
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Representative:
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Respondent I: (Opponent 1)
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Respondent II: (Opponent 2)
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 26 July 1999 concerning maintenance of European patent No. 0 427 984 in amended form.**

Composition of the Board:

Chairwoman: U. M. Kinkeldey
Members: C. Holtz
L. Galligani

Summary of Facts and Submissions

I. By the decision under appeal dated 26 July 1999, the Opposition Division maintained the patent in amended form, on the basis of the appellant's (patent proprietor) third auxiliary request.

II. The appellant filed a notice of appeal and paid the appeal fee on 6 October 1999. In a communication dated 20 October 1999, the registry of the board of appeal drew the attention of the appellant to the fact that the appeal fee had not been paid in time and that, pursuant to Article 108, second sentence EPC, the notice of appeal therefore was deemed not to have been filed. Attention was furthermore drawn to Article 122 EPC.

III. On 3 November 1999, the appellant requested restitutio in integrum in respect of the appeal. A statutory declaration containing the grounds for the request was attached to the request.

IV. In a communication, referring to the case law of the boards of appeal on due care under Article 122(1) EPC, the board of appeal expressed doubts whether the system for monitoring deadlines used by the appellant's representative could be considered satisfactory in view of the facts on file, which indicated that the monitoring system was manual and that the miscalculation seemed to have been based on a faulty application of the law. The board also noted that no details had been given about the system used.

V. The appellant's submissions may be summarised as follows:

- The appeal and the appeal fee were filed one day late because of a calculation error, which was an isolated error in an otherwise reliable system for monitoring deadlines. Loss of the right to have restitutio simply because of the miscalculation of the deadline by one day would be an unfairly draconian sanction. The miscalculation was not the result of a faulty application of the law. The representative had simply made a mistake. There was no computerised monitoring system. All deadlines were manually calculated and entered into the database of the computer. The representative's own manual calculation was not overriding any computer-based calculation. The computer simply served as a means for monitoring deadlines. A manual monitoring system was not in itself unsatisfactory.

- The basic two month deadline of 26 September 1999 was entered into the office computer records system by the records administrator and in the computer of the representative's secretary as a back-up. The appellant's American representative was immediately informed about the two month's deadline of 26 September 1999, ignoring the ten day notice period. They were again reminded on 17 September 1999, when the representative suggested to them that the appeal should be filed close to the end of the appeal period and asked for instructions by 30 September 1999. Last day for the appeal was quoted as 6 October 1999 instead of 5 October 1999. On 26 September 1999,

as a result of the date entered on the computer, the file was placed on the representative's desk for a day to day monitoring.

- On 1 October 1999 the representative spoke directly to the American representative to remind him of the deadline. The final instructions were only received on 6 October 1999. The notice of appeal was immediately completed and filed and the appeal fee paid on that day.

VI. Respondent I (opponent 1) requested that the appeal be rejected as inadmissible, submitting the following in summary:

- The failure to file a notice of appeal was not a deadline which was subject to the provisions of Article 122 EPC. Decision G 1/86 (OJ EPO 1987, 447) held that restitutio was available in respect of the deadline for the grounds of appeal. However, when the issue of the notice of appeal was later considered in decision T 210/89 (OJ EPO 1991, 433), the board of appeal held that the legal position of an opponent/appellant seeking restitutio for the deadline for filing the notice of appeal differed from the position where an appeal was in existence but the statement of grounds was filed out of time.

- The error resulted from a mistaken application of the law which precluded restitutio. On the issue of due care, the respondent noted that the error was made by a professional representative and that the deadline including the ten day period allowed by Rule 78(2) EPC was never entered in the primary

diary system at the representative's office.

VII. Respondent II (opponent 2) submitted observations on the appeal procedure, requesting that the issue of restitutio in integrum be decided separately, but did not comment on the appellant's request in this respect.

Reasons for the Decision

1. The objection of respondent I relying on decision G 1/86 is unfounded, for the reason that the issue in that decision was whether an *opponent* could at all avail itself of Article 122 EPC, since this provision expressly only applies to *applicants or patent proprietors*. This decision is not applicable to the present case, in which the *proprietor* is seeking restitutio. The board must therefore examine the substance of the request for restitutio, namely whether all due care required by the circumstances was exercised, as required under Article 122(1) EPC.

2. Under Article 122(1) EPC, a party who in spite of all due care taken as required by the circumstances was unable to meet a time limit may have his rights re-established. The case law of the boards of appeal considers that this requirement has been met, if the failure to meet the time limit was due to an isolated mistake in an otherwise reliable system for monitoring time limits (see eg. decisions J 2/86 and J 3/86, OJ EPO 1987, 362). A miscalculation may be considered as an isolated mistake, having regard to the other circumstances in the specific case, and thus excusable (cf. decisions T 869/90 of 15 March 1991 and T 111/92 of 3 August 1992, in which the respective boards

referred to the principle of proportionality in arriving at the conclusion that the applicant should not be punished and allowed re-establishment). However, if the failure to meet the time limit was due to an incorrect application of the law, the question of due care would not arise and such incorrect application cannot excuse the party (see eg. decision J 31/89 of 31 October 1989).

3. Decision T 1070/97 of 4 March 1999 addressed the principle of proportionality - which had been applied in cases where a miscalculation had resulted in one or two days delay only - and noted that this principle only applied if the law allows it. Referring to Article 122(1) EPC as specific and leaving no room for proportionality, the board in decision T 1070/97 concluded that the number of days by which a time limit had been missed was irrelevant since the sanction of missing a time limit immediately applied. The board in T 1070/97 concluded that what mattered was whether the faulty application occurred **although** "all reasonable care had been taken". The present board agrees with this analysis of the issues arising from Article 122 EPC. Only the character of the conduct *before* the time limit expires is decisive for the consideration of the due care issue, not the length of the ensuing delay.

4. In the present case, an unsatisfactory monitoring system and a faulty application of the law contributed to the missing of the time limit. While a manual system is not in itself unacceptable, it must contain controls. In the present case, even though deadlines had been entered into the computer system, the representative was the only one responsible for the monitoring of the added ten days under Rule 78(2) EPC.

Under the case law of the boards of appeal, in particular decision T 869/90, a satisfactory monitoring system must have built-in checks, to prevent a calculation mistake like the present one to go unnoticed. In a manual system, the check needed could be that a secretary or other employee in the office has to note and monitor all relevant data independently of the representative, being instructed to call his attention if the action needed had not been carried out, and to do this at such a time that it could still be done in time.

6. The date of 26 September 1999 was considered as the basic two months deadline and entered into the office computer records system by the office records administrator and to the computerised diary of the representative's secretary as a back-up. On that day the secretary placed the file on the representative's desk. These two occurrences both indicate a faulty application of the law because this date fits with a calculation from the date of the decision, ie. 26 July 1999, without taking the ten days notification period into account. The correct method of calculation would have been to add the ten days notification period first, and only then to calculate the two month period for the notice of appeal under Article 108 EPC. An independent check would have required the computer based data to include the correct calculation of the ten day rule, adding it first to the date of the decision in question. Applying this method to the present case would have resulted in 5 August 1999, from which two months for the notice of appeal would have given 5 October 1999 as the correct last day for the notice of appeal to be filed and the appeal fee to be paid.

5. In sum, the board has found that all due care was not exercised as required under Article 122 EPC. Accordingly, the request for restitutio cannot be allowed and the appeal must be deemed not to have been filed, with the consequence that the appeal fee has to be reimbursed.

Order

For these reasons it is decided that:

1. The request for restitutio in integrum in respect of the time limit for paying the appeal fee is refused.

2. The appeal is deemed not to have been filed.

The Registrar: The Chairwoman:

M. Beer U. Kinkeldey