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**Datasheet for the decision  
of 18 March 2013**

**Case Number:** J 0020/12 - 3.1.01

**Application Number:** ...

**Publication Number:** -

**IPC:** -

**Language of the proceedings:** EN

**Title of invention:**  
...

**Applicant:**  
N.N.

**Opponent:**  
-

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 67(4)  
EPC R. 36(1), 139

**Keyword:**  
"Divisional Application; Parent application pending after  
withdrawal (no)"

**Decisions cited:**  
G 0001/09, J 0003/01, J 0006/02, J 0001/11, J 0004/11

**Catchword:**  
An application is no longer pending as from the moment it has  
been withdrawn.



Case Number: J 0020/12 - 3.1.01

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.01  
of 18 March 2013

**Appellant:** N.N.

**Representative:** N.N.

**Decision under appeal:** Decision of the Receiving Section of the  
European Patent Office posted on 29 May 2012.

**Composition of the Board:**

**Chairman:** K. Garnett  
**Members:** C. Heath  
P. Guntz

## Summary of Facts and Submissions

- I. The subject of the appeal is the written decision of the Receiving Section of 29 May 2012 rejecting the appellant's request to state that European application 00000000.0 (hereafter: the parent application) was pending when European application XXXXXXXX.X (hereafter: the divisional application) was filed.
- II. On 27 July 2012 the appellant (hereafter: the appellant) filed an appeal against the above decision, paid the corresponding appeal fee and on 5 October 2012 filed the grounds of appeal with a request to set aside the decision under appeal and to allow the divisional application to proceed. Oral proceedings were requested in case the Board of Appeal was not minded to grant the appellant's request.
- III. The facts of the case can be summarised as follows. The parent application had been unconditionally withdrawn on 19 January 2009 but on 26 February 2009 the appellant filed a request to correct this withdrawal on the grounds that an error had been made: a withdrawal of an entirely unrelated application was intended. This request was ultimately denied by the Legal Board of Appeal (decision **J 1/11**, dated 28 June 2011), essentially because by the time the request for correction had been filed notice of the withdrawal had already been recorded in the European Patent Register (on 6 February 2009). Meanwhile, on 10 March 2009, that is, after the parent application had been withdrawn but while proceedings for correction of the withdrawal were pending, the appellant filed the divisional application to the withdrawn parent application. On 27 October 2011,

the appellant was informed by the Receiving Section by a notice of loss of rights that the divisional application was not being processed as the parent application had been withdrawn. This view was confirmed by the decision of the Receiving Section of 29 May 2012, in which it was stated that, according to Rule 36(1) EPC, an applicant could only file a divisional application "relating to any pending earlier European patent application." In the case at issue, the parent application was no longer pending as it had been unconditionally withdrawn.

IV. In the appeal proceedings, the starting point for the appellant's argument was that when an application is erroneously withdrawn (as was said to be the case for the parent application) Rule 139 EPC allows for the correction of errors. As at the time of the filing of the divisional application it had not been finally established whether the request for correction would be allowed or not, the parent application should have been considered as still "pending". In support of its view, the appellant relied on decision **G 1/09** (OJ EPO 2011, 336), as in the present case not all legal remedies had been exhausted when the divisional application was filed. In contrast thereto, decision **J 4/11** (OJ EPO 2012, 516) should not apply, as that decision dealt with a case where the application was "deemed to be withdrawn" rather than withdrawn by the appellant.

V. Oral proceedings were held on 18 March 2013. During these proceedings the appellant accepted that the starting point for the legal analysis should be decision **G 1/09** and the question was whether after its withdrawal, there were "substantive rights" in the

parent application that were "still in existence". The appellant argued that it was clear that in the past Rule 139 EPC could be used to correct a withdrawal, as was apparent from **Legal Advice 8/80, OJ 1981, 6,** point 5. There were thus circumstances in which the application could be reinstated. Also the decision rejecting the request for correction of the withdrawal of the parent application itself clearly indicated that there were rights that could be refused, otherwise this decision would have had no legal basis. According to the appellant, even after a request for withdrawal has been filed, the application should be considered still pending at least in cases where subsequently a request for correction has been filed, asserting a clear mistake, and until an adverse decision has been issued.

According to the appellant, this possibility should be distinguished from a case of *restitutio* based on a loss of rights (which was dealt with by decision **J 4/11**), as in the present case withdrawal of an entirely different application was intended.

As to legal certainty and the interests of third parties, the appellant argued that third parties could always stay on the alert in relation to a specific application and could thus know about a request for correction of the withdrawal, or the filing of a divisional application, with the corresponding possibility that these requests could be successful.

Further arguments of the appellant are referred to in the Reasons for the present decision, below.

VI. At the end of the oral proceedings, the chairman announced the decision of the Board.

### **Reasons for the Decision**

1. The Board agrees with the appellant that the starting point of the legal analysis should be decision **G 1/09**. According to this decision, point 1 of the Reasons:

"... the amended version of Rule 36 EPC which entered into force on 1 April 2010 is still based on the principle that a divisional application may be filed "relating to any pending earlier European patent application"."

Point 3.1 of Reasons goes on to state that:

"It is common ground that the European Patent Convention does not contain a definition of the notion 'pending European patent application'. In particular, the EPC does not define the points in time at which the pending status of an application begins and ends in all possible situations. An interpretation of the expression 'pending European patent application' is therefore necessary."

As to this, according to point 3.2.4:

"... a 'pending (earlier) European patent application' in the specific context of Rule 25 EPC 1973 is a patent application in a status in which *substantive rights* deriving therefrom under the EPC are (still) *in existence*."

Point 4.2.1 then goes on to state that:

"Article 67(4) EPC 1973 clearly indicates until when such substantive rights deriving from a European patent application are in existence if a patent is not granted. In particular, it provides that the European patent application shall be deemed never to have had the effects of provisional protection when it has been withdrawn, deemed to be withdrawn or "finally refused"... Substantive rights of the appellant under Article 67 EPC 1973 may therefore continue to exist after refusal of the application until the decision to refuse becomes final (rechtskräftig, passée en force de chose jugée). Third parties using the invention before the decision to refuse has become final incur the risk of becoming liable under national law based on Article 67 EPC 1973."

And, further, in point 4.2.3:

"Article 67(4) EPC ... is a self-contained provision indicating the point in time at which substantive rights conferred by a European patent application and therefore its pending status must end.

4.2.4 From the above the Enlarged Board of Appeal concludes that under the EPC a patent application which has been refused by the Examining Division is thereafter still pending within the meaning of Rule 25 EPC 1973 until the expiry of the period for filing an appeal and, on the day after, is no longer pending if no appeal is filed. The same conclusion applies to

Rule 36(1) EPC 2000 both in its former and its current version."

2. The subject matter of decision **G 1/09** was a divisional application filed after a decision refusing the parent application had been rendered, but before the appeal period had expired. According to decision **G 1/09**, such a decision only became final after the appeal period had expired without an appeal having been filed. The reason for this could be found in the wording of Article 67(4) EPC, which refers to an application that has been "finally refused". Only after the expiry of the appeal period could it be said that the application was finally refused. The Enlarged Board did not deal with the other two alternatives of the above provision, namely an application that had been withdrawn or was deemed to be withdrawn.
3. Decision **J 4/11** dealt with the case of a divisional application filed after the parent application was deemed to be withdrawn due to non-payment of the renewal fees. The Board in accordance with the above distinction made in Article 67(4) EPC noted that in such a case the withdrawal took place automatically on the occurrence of the relevant event (non-payment) and no decision of the Office was necessary to give effect to the withdrawal. Therefore, the case could be distinguished from the one in decision **G 1/09** in that no adverse decision had been rendered. In such a case, the application was held to be no longer pending as of the date of the deemed withdrawal.
4. In the present case the Board is faced with the third kind of situation referred to in Article 67(4) EPC,



namely where the application is voluntarily withdrawn. The present case can therefore be distinguished from those in **G 1/09** and **J 4/11** but the principles established by those cases can nevertheless be applied to the present case.

- 5.1 As to the position immediately after the application was withdrawn and before any request for correction under Rule 139 EPC was filed, the effect of the filing of the withdrawal was that the application was thereupon withdrawn. Such withdrawal took place without any action on the part of the Office. Prima facie, therefore, the application was thereafter no longer pending.
- 5.2 In writing, the appellant argued that the effect of a request under Rule 139 EPC was that the withdrawal was thereupon *ex post facto* rendered only provisional (page 2 of the statement of grounds of appeal, second paragraph), so that the application was then still pending until a final decision on the request.
- 5.3 The logical consequence of this argument would be that an application would potentially remain pending *ad infinitum* after it was withdrawn, because there is no time limit placed on the right to make an application under Rule 139 EPC. The appellant did not maintain this position at the oral proceedings, but rather refined its argument by saying that an application should be considered pending at least in those cases where a request for correction was filed and where such request was not completely without merits. This was said to be true for the present case by virtue of what the appellant asserted to be the somewhat conflicting case

law relating to correction under Rule 139 EPC. It was said that the application for correction was certainly not completely without merits because until the decision of the Board of Appeal on the request (decision **J 1/11**) it was not clear that rectification was no longer possible where the notice of withdrawal had been recorded in the European Patent Register, as opposed to its being published in the European Patent Bulletin (see point III, above). The appellant did not take a position on the status of an application before any such request is filed or where no request for correction is filed at all.

5.4 The Board would first remark that the argument appears to be without any legal foundation. It also does not deal with the position before a request for correction is made, nor where no such request for rectification is made at all, and so leaves these situations entirely open. Further, the distinction made is also wholly unworkable: there is no objective standard by which it can be judged whether a request for correction is "not completely without merits."

5.5 Turning rather to the substance of the point, as already noted, the decision **G 1/09** links the question of whether an application is pending with the existence of "substantive rights" in the patent application.

5.6 Decision **J 4/11** dealt in detail with the issue of "substantive rights" in this context:

"5. The question is thus whether substantive rights deriving from the grandparent application were still in existence when the parent application was filed. The Enlarged Board did not give any definition of

the expression "substantive rights" in this context. The Board nevertheless extracts the following points from the Enlarged Board's reasons:

(a) "Substantive rights" in this context include the provisional protection conferred after publication of the application by virtue of Article 67(1) EPC, which in turn refers to the protection conferred by Article 64 EPC. See point 4.2.1 of the Reasons. The combined effect of these two articles is to provisionally confer on an applicant the same rights in the designated Contracting States as would be conferred by a national patent granted in those States. The Board will refer to these rights as the Article 64 rights.

(b) The Enlarged Board did not expressly say (and did not need to say) whether there might be other relevant types of substantive rights.

(c) A patent application involves two different aspects. On the one hand a patent application is an object of property as set out in Articles 71 to 74 EPC, conferring on the applicant, *inter alia*, the provisional Article 64 rights. On the other hand it involves procedural rights which the applicant is entitled to exercise by virtue of Article 60(3) EPC 1973. The expression "European patent application" may therefore stand for substantive rights as well as for procedural rights of the applicant. See point 3.2.1 of the Reasons. Since Rule 25(1) EPC 1973 (see now Rule 36(1) EPC) refers to "any pending patent application" and not to pending proceedings before the EPO, it is not relevant for the purposes of Rule 25(1) EPC 1973 whether proceedings are pending before the EPO. Pending proceedings cannot be

equated with a pending application. See points 3.2.2 and 4.2.5 of the Reasons.

(d) Article 67(4) EPC provides for the point in time when the Article 64 rights must end and thereafter are no longer still in existence. This is when, in the words of Article 67(4) EPC, the application has "been withdrawn, deemed to be withdrawn or finally refused."

.....

*The prima facie effect of a deemed withdrawal on the Article 64 rights*

8. Article 67(4) EPC provides that a European patent application shall be deemed never to have had the effects set out in Articles 67(1) and (2) EPC when it has been (a) withdrawn, (b) deemed to be withdrawn or (c) finally refused. The Enlarged Board in G 1/09 was concerned with the case of the refusal of an application by the Examining Division: for the purposes of Article 67(4) EPC, at what point in time is an application to be considered as "finally refused" where no appeal is filed against the decision refusing the application? The Board concluded that this is when the time limit for filing an appeal against a decision refusing the application expires, since it is at this point that the decision to refuse the application becomes final. The retroactive effect of a decision dismissing the appeal does not alter the pending status of the application. See points 4.2.1 and 4.2.2 of the Reasons. Up until this point a substantive right under the application therefore still subsists. This was sufficient to answer the question which had been referred to the Enlarged Board.

9. The present Board is concerned with a different case, namely a deemed withdrawal of an application.

10. Article 67(4) EPC provides that an application is deemed never to have had the effects provided for under Articles 67(1) and (2) EPC when it is deemed to be withdrawn. The Enlarged Board took the position (point 4.2.3 of the Reasons) that Article 67(4) EPC is a self contained provision indicating the point in time at which "substantive rights conferred by a European patent application and therefore its pending status must end." ...

11. As to the point in time when this deemed withdrawal took place, Article 86(3) EPC 1973 (see now Article 86(1) EPC) simply provides that if the renewal fee (and any additional fee) is not paid in due time, the application shall be deemed to be withdrawn. Although the applicant must be informed of the loss of rights (Rule 69(1) EPC 1973, see now Rule 112(1) EPC) the withdrawal takes place at that point in time as a matter of law without any decision of the Office. As explained in G 1/90 (OJ EPO 1991, 275), in such a case the loss of rights occurs on expiry of the time limit that has not been observed (point 6 of the Reasons). See also G 4/98 (OJ EPO 2001, 131), point 3.3 of the Reasons.

12. Prima facie, therefore, the Article 64 rights under the grandparent application were no longer subsisting when the time for payment of renewal fee expired, which was before the date when parent application was filed.

*The effect of the possibility (and the fact) of the filing of a request to grant re-establishment of rights.*

13. If the Board were to accept the appellant's arguments, which are based on an analogy with the situation of "final refusal" of an application, it would follow that an application would remain pending after it had been deemed to be withdrawn for as long as the period for making a request to grant re-establishment of rights continued to run. Further, if and when such a request was made, the application would remain pending at least until the date when the request for re-establishment was finally determined.

14. By way, first, of a general remark, the wording in Article 67(4) EPC appears to the Board to have been chosen with care, particular the positioning of the word "finally". In the case of a refusal of an application, the filing of an appeal will have the effect of suspending the effect of the order refusing the application (Article 106(1) EPC). It is logical therefore to speak of the "final" refusal of an application in this context, since the effect of the refusal of the application by the Examining Division is suspended in the event of an appeal. In such a case the suspensive effect of an appeal is ended in the event of a decision dismissing the appeal, from which point the appealed decision retrospectively takes full effect. At the point of dismissal of the appeal, the application can be said to be finally refused and the decision of Examining Division is made final.

15. On the other hand, in a case where an application is deemed to be withdrawn under

Article 86(3) EPC 1973 for non-payment of a renewal fee it does not appear to the Board to be logical to speak of the "final" deemed withdrawal of the application. As already noted, the point in time when the application is deemed to be withdrawn is the point when the due time for payment of the renewal fee expires; the loss of rights occurs on the expiry of the time limit that has not been observed and, as such, is final in itself."

5.7 Thus far, the Board sees no difference between the case of an application deemed to be withdrawn due to the non-payment of fees and an application that has been voluntarily withdrawn by a communication from the applicant. In neither case is the withdrawal the result of a decision taken by the Office. In the case of a withdrawal, the Office simply complies with the instructions given by the applicant. It has to do so. Compliance with the applicant's instructions does not amount to a decision that adversely affects the applicant, and consequently the latter cannot appeal against the action of the Office in carrying out the instructions. The applicant could only do so if the Office were to decide not to comply with its request. As with an application which has been deemed to be withdrawn (as in **J 4/11**), Article 64 EPC does not speak of a "final" withdrawal of an application, nor is it logical to do so. Consequently, the Board concludes that the rights conferred on the parent application according to Article 67(4) EPC *prima facie* came to an end at the moment of withdrawal of the application.

5.8 The Board in **J 4/11** went on to consider whether this result might be any different in the light of any special provisions under the EPC that somehow altered

the result as provided for in Article 67(4) EPC, in particular by providing that the filing of a request for re-establishment had the effect of reviving the application. It concluded that there were no such provisions and that a failed request for re-establishment also did not have such an effect. It is not in dispute that there are no provisions in the EPC expressly providing that the filing of a request for correction of a withdrawal has suspensive effect on the withdrawal.

- 5.9 What the appellant in effect appeared to argue was that the possibility of requesting correction could be regarded as a substantive right in relation to the application that had been mistakenly withdrawn, since it meant that the appellant still had a right of redress and thus the withdrawal was not final. The issue of what amounted to a right of redress in this context was considered by the Board in **J 4/11**:

"17. In G 1/09 the Enlarged Board, when dealing with the issue of when an application should be considered to be (finally) refused, referred to and relied on the jurisprudence of Contracting States, pursuant to which "decisions do not become final until the expiry of the respective period for seeking ordinary means of legal redress." (See point 4.2.2 of the Reasons). In effect, the appellant argues that the right to seek re-establishment is a right of redress, so that while the period for seeking such redress against the deemed withdrawal of the application was still running, the deemed withdrawal was not a final withdrawal. The Board considers that this is not a correct analysis. First, the argument overlooks the distinction, already



discussed, between a refusal, which requires a decision by the Office which is then challengeable by way of an appeal, and a deemed withdrawal, which takes place automatically by operation of law. The above statements by the Enlarged Board in G 1/09 were made in the express context of a decision by a department of first instance refusing an application: see point 4.2.2 of the reasons. Second, the Board considers that the concept of redress is appropriate only in the context of correcting a wrong. Thus while it is appropriate to speak of seeking redress against an allegedly wrong decision of the Office refusing an application, it is not appropriate to speak of seeking redress against the deemed withdrawal of an application. A person requesting re-establishment of rights does not seek correction of a wrong, ie allege that the deemed withdrawal was wrong as a matter of law. Rather he requests that he should be excused the consequences of the withdrawal in the particular circumstances of the case. In contrast, the procedure under Rule 69 EPC 1973 (now Rule 112 EPC) by which a person can challenge a notice of loss of rights (see point 22, below) is a process for seeking ordinary means of legal redress against an alleged wrong of the Office. This conclusion appears to be fully consistent with the position under French, German and Swiss national law, as summarised in D1, points 4.1 to 4.3."

- 5.10 The Board thus came to the conclusion that the possibility of re-establishment of rights did not alter the finding that an application which has been "deemed to be withdrawn" under Article 67(4) EPC was no longer pending as of the time it was deemed to be withdrawn. The Board considers that for the same reasons the possibility of making a request for correction is not a

means of legal redress and that a withdrawn application cannot be considered as still pending merely where a request for correction has been filed. First, whereas a refusal requires a decision by the Office which is then challengeable by way of an appeal, a withdrawal takes place by virtue of the act of the applicant. Second, a person requesting rectification of a withdrawal does not seek correction of a wrong, i.e. allege that the withdrawal was wrong as a matter of law. Rather he requests that he should be relieved from the consequences of the mistaken withdrawal in the particular circumstances of the case.

5.11 In conclusion, from the wording of Article 67(4) EPC ("withdrawn" in contrast to "finally refused"), and the further clarification given in decision **J 4/11** as cited above, it can be concluded that an application is no longer pending as from the moment after it has been withdrawn. This is not altered by the possibility of filing a request for correction under Rule 139 EPC, nor by the actual filing of such a request. In other words, an application is not pending because a correction of a withdrawal under rule 139 EPC has been requested.

5.12 The mere possibility that a filed request for correction might be successful does not lead to a different conclusion. Any result of a potential decision to grant correction comes only into effect as from the time of such decision and for the future. In **J 3/01** the Board said:

"... the so-called retrospective effect of a correction under Rule 88 EPC [1973] does not cancel previous procedural events, but only causes the document corrected to be considered from the time of

correction and for the future as filed *ab initio* in the corrected version. Correction under Rule 88 EPC [1973] does not reverse the effect of decisions already taken on the basis of the uncorrected document and does not re-open a procedural phase already terminated ... In other words, a procedural loss of right only indirectly caused by the incorrect document will not be remedied by a later correction of the document pursuant to Rule 88 EPC [1973]. This principle also characterises the functional and essential difference between a correction under Rule 88 EPC [1973] on the one hand and *restitutio in integrum* pursuant to Article 122 EPC on the other hand."

Also decision **J 6/02** emphasises that Rule 139 EPC only concerns errors in documents and that correction under the rule does not allow previous procedural effects to be set aside. Rather, it only causes the document corrected to be considered from the time of correction and for the future as filed *ab initio* in the corrected version, as is set out in great detail in point 15 of the Reasons:

"15. When regarding a request for correction under Rule 88 EPC the Board has furthermore to consider the limited function of this Rule in the system of legal remedies provided for in the EPC (see above point 4, functional restriction). As already mentioned above, Rule 88 EPC concerns the correction of errors in documents filed with the EPO. According to the first sentence a correction is limited to linguistic errors, errors of transcription and mistakes in any documents filed with the EPO. Therefore a correction under Rule 88 EPC is a procedural means available to rectify misleading

information caused by such an error. The established case law of the Boards of appeal also allows correction under Rule 88 EPC of the content of a document filed with the EPO even if the correction leads to an amendment or to a revocation of the procedural declaration or act relative to this document, whereby rights of the party concerned can arise or a waiver of rights can be rescinded.

But such a correction cannot have any effect on the procedural situation that has already ensued in direct or indirect consequence of a written error by failure to meet a time limit during the pending proceedings. In the present case, appellant's request for correction is aimed at cancelling the legal effect under Rule 108(2) i.e. at reversing the legal effect that the designation of France was deemed to be withdrawn since there was no designation fee dedicated to France and no additional fee was paid within the period of grace under Rule 85(a) by 20 December 2000.

To cancel procedural effects after failure to meet a time limit would be to apply Rule 88 EPC beyond its clear and unambiguous wording (cf. J 25/01 supra) and would violate the scope of application of Article 122 EPC which stipulates specific requirements for grant of re-establishment of rights. This conclusion is confirmed by Article 122(5) EPC which strictly forbids re-establishment of rights after failure to meet the time limit under *inter alia* Article 79(2) EPC. Article 122 EPC provides for a re-establishment of rights where the applicant or proprietor of a European patent was unable to observe a time limit *vis-à-vis* the EPO and in consequence a loss of rights occurred. If the requirements of this provision are met - other than

by a correction under Rule 88 EPC - the procedural effect is cancelled, and the former procedural situation reinstated, so that the applicant's rights are re-established. Thus, such a request for *restitutio in integrum* is the appropriate means to restore the procedural situation before the failure to meet a time limit. But according to Article 122(5) EPC *restitutio in integrum* is excluded after failure to meet a time limit under Article 79 or Rule 104(1)(b) in conjunction with Rule 85a EPC (see G 3/ 91 OJ EPO 1999, 8). In other words, the remedy of *restitutio in integrum* is not available to redeem the applicant's loss of rights that has occurred as a consequence of the failure to pay the designation fee for France at the end of the period of grace under Rule 85a(2) on 20 December 2000.

The strict provisions of Article 122(5) EPC must not be circumvented by the so-called retroactive effect of a correction under Rule 88(1) EPC. The conclusion that the so-called retroactive effect of a correction under Rule 88 EPC does not set aside the previous procedural effects, but only causes the document corrected to be considered from the time of correction and for future as filed ab initio in the corrected version is already stated in the Board's decision J 03/01 (see particularly point 10 of the reasons for the decision). Furthermore in decision J 27/96 (not published in OJ EPO) the Board stated that a correction by the addition of a designation does not mean - despite its ab initio effect - that the applicant is reinstated into the procedural phase where designations can be made and fees paid, meaning that the whole procedure of that phase becomes available to the applicant again. The Legal Board stressed that a correction of a mistake is an isolated procedural measure and not a case of re-

establishment into a defined procedural phase as a whole. The same conclusion was reached by the Legal Board in its decision J 21/84 (OJ EPO 1986, 75; see also T 152/85 OJ EPO 1987, 191)."

In the present case no correction has been granted. Hence the request for correction had no effect whatsoever on the status of the withdrawn parent application.

- 5.13 It is not necessary for the Board to decide what the position would have been if the request for correction pertaining to the parent application had been allowed.
- 5.14 Contrary to the view taken by the appellant, it is immaterial in this respect whether the withdrawal was intended to apply to a different application, or whether the representative misinterpreted the appellant's instructions in some other way. The Board cannot see any provision or case law that would support the appellant's point of view in this respect. Nor did the appellant cite any. A document such as a withdrawal must be construed objectively and its effect cannot vary according to the subjective intentions of its author.
6. In the absence of a pending parent application, the appellant was not entitled to file a divisional application. The decision under appeal was therefore correct in arriving at this result, and accordingly the appeal must be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

C. Eickhoff

K. Garnett