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**Datasheet for the decision
of 13 April 2015**

Case Number: J 0008/13 - 3.1.01

Application Number: 11176363.7

Publication Number: null

IPC: A01N

Language of the proceedings: EN

Title of invention:

Pest control composition

Applicant:

Sumitomo Chemical Company, Limited

Headword:

Relevant legal provisions:

EPC Art. 116(2), 109(1)

EPC R. 103(1)(a), 49(8)

Keyword:

Reimbursement of the appeal fee in the event of interlocutory
revision (refused)

Decisions cited:

G 0003/03, J 0029/95, T 0687/05, J 0007/83, T 0012/03

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: J 0008/13 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 13 April 2015

Appellant: Sumitomo Chemical Company, Limited
(Applicant) 27-1, Shinkawa 2-chome
Chuo-ku
Tokyo 104-8260 (JP)

Representative: Hofmann, Andreas
RGTH
Patentanwälte PartGmbB
Postfach 33 02 11
80062 München (DE)

Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on 12 October 2012
refusing European patent application No.
11176363.7 pursuant to Article 90(5) EPC.**

Composition of the Board:

Chairwoman C. Vallet
Members: W. Ungler
D. Rogers

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Receiving Section dated 12 October 2012, refusing the application under Article 90(5) EPC. According to the findings of the Receiving Section no application documents complying with the requirements of Rule 49 EPC were submitted within the time limit set in the communication pursuant to Rule 58 EPC of 27 September 2011. In particular it was held that the newly formatted application documents received on 2 May 2012 did not satisfy the minimum character height of 0,21 cm for capital letters as laid down Rule 49(8) EPC. Furthermore, the applicant's attention was drawn to Article 109 EPC and the fact that the decision could be rectified by the first instance provided that application documents in font size "9 pt" were filed and the corresponding additional fee pursuant to Article 2.1a RFees for the final number of pages was paid.

- II. On 2 January 2013, the appellant appealed against this decision and submitted newly formatted application documents in font size "9 pt". Furthermore, reimbursement of the appeal fee was requested. In that regard the appellant referred to the arguments provided in its letters dated 7 December 2011 and 2 May 2012 filed during the first instance proceedings. In addition it was pointed out that the originally filed application documents had been created by the Amyuni PDF converter, i.e. they were already text based for which reason an Optical Character Recognition (OCR) was not necessary. Apart from that substantial reasoning the appellant noted that the taking place of oral proceedings, although not requested by the applicant,

would have been expedient in order to prevent the refusal of the European patent application in suit.

- III. In response to a consultation by telephone the appellant confirmed by letter dated 14 February 2013 the maintenance of its request for reimbursement of the appeal fee and requested oral proceedings in case the Board of Appeal should not order the reimbursement of the appeal fee.
- IV. With a decision on rectification dated 28 February 2013, the Receiving Section granted interlocutory revision. The appellant's request for reimbursement of the appeal fee was considered not allowable and was therefore remitted to the Legal Board of Appeal.
- V. In a communication under Rule 100(2) EPC the Board informed the appellant about its preliminary view that in absence of a procedural violation, the request for reimbursement of the appeal fee had to be refused. Furthermore, the appellant was invited to indicate whether his request for oral proceedings was maintained, and a time limit of two months was set for the filing of further observations. With letter dated 30 May 2014 the applicant withdrew his request for oral proceedings, but maintained his request for reimbursement of the appeal fee.

Reasons for the Decision

1. Object of the appeal

The Receiving Section set aside the decision refusing the application under Article 90(5) EPC by granting interlocutory revision under Article 109(1) EPC and

remitted the request for reimbursement of the appeal fee to the Legal Board of Appeal (cf. G 3/03, OJ EPO 2005, 344). Thus, the scope of the present appeal proceedings is confined to the issue of reimbursement of the appeal fee.

2. Reimbursement of the appeal fee; Rule 103 EPC
- 2.1 In the event of interlocutory revision a request for reimbursement of the appeal fee is to be allowed only where such reimbursement is considered to be equitable by reason of a substantial procedural violation (Rule 103(1) (a) EPC).
- 2.2 It is long standing case law that in order to be considered as substantial a procedural violation must show an objective deficiency affecting the entire proceedings in the sense that the rules of procedure have not been applied in the manner prescribed in the EPC to the detriment of a party (cf. J 07/83, OJ 1984, 211; T 12/03, point 4.2 of the reasons).
- 2.3 In the present case the appellant based its request for reimbursement in essence on the allegation that the first instance did not apply Rule 49(8) EPC correctly when refusing the present application. Reference was made in particular to the letter dated 2 May 2012 wherein the applicant pointed out that the font size used for the application documents received by the EPO on 7 December 2011 was in full compliance with the requirements of Rule 49(8) EPC, since the height of the capital letters was 0,282 cm and thus greater than 0,21 cm as prescribed by said provision. Furthermore, in the statement of grounds of appeal it was noted that the originally filed application documents had been created by the Amyuni PDF converter, i.e. they were already

text based for which reason an Optical Character Recognition (OCR) was not necessary. Therefore, the appellant concluded, that point II.3(e) of the Notes on the preparation of OCR-readable patent applications (OJ EPO 1993, 59) cited in the impugned decision of the Receiving Section did not apply.

2.4 Considering the appellant's arguments the Board would like to emphasise that an incorrect interpretation of a provision of the EPC dealing with formal requirements of application documents, as alleged by the appellant, does not *per se* constitute a substantial procedural violation within the meaning of Rule 103 EPC. An error in the application of law cannot be equated with a procedural violation (cf. J 29/95, Reasons, point 10; T 687/05, Reasons, point 3.1). In essence the aforementioned arguments are directed against the substantive grounds of the refusal already set aside by interlocutory revision, but cannot justify the requested reimbursement of the appeal fee. However, as pointed out above the scope of the present appeal proceedings is confined to the issue of reimbursement of the appeal fee, and are not meant for reviewing the substantive ground for the refusal which was set aside by interlocutory revision under Article 109(1) EPC.

2.5 Furthermore the appellant underlined in the statement of grounds for appeal that oral proceedings would have been expedient to prevent the refusal of the European patent application in suit. According to the constant case law of the Boards of Appeal the refusal of a request for oral proceedings amounts to a breach of the right to be heard. In the present case, as confirmed by the appellant himself, oral proceedings have not been requested during the first instance proceedings. Moreover, under the specific provisions of Article

116(2) EPC oral proceedings must be arranged before the Receiving Section at the request of the applicant, only where the Receiving Section considers this to be expedient or where it envisages refusing the European patent application. However, in the absence of such a request there is no obligation for the Receiving Section to provide for oral proceedings. The failure of the applicant to file such a request can obviously not amount to a procedural mistake to be imputed to the department of first instance.

2.6 Thus, in the absence of a substantial procedural violation, the request for reimbursement of the appeal fee has to be refused.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated