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File Number: J 10/91 - 3.1.1

Application No.: 89 305 452.8

Publication No.: 0 402 539

Title of invention: Detector units

Classification: G08B 25/00

D E C I S I O N
of 11 December 1992

Applicant: Maram, Morris

Headword: Lost cheque/MARAM

EPC Article 8(3)(a)(iii) RFees

Keyword: "Lost cheque"
"Burden of proof"
"Burden of risk"

Catchwords

If a letter, and said attached cheque for payment of fee, has been lost without further evidence or high probability that it has been lost in the Office, the risk is then borne by the sender.



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Boards of Appeal

Chambres de recours

Case Number : J 10/91 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 11 December 1992

Appellant : Maram, Morris
135 President Street
Johannesburg (SA)

Representative : Horton, Andrew Robert Grant
BOWLES HORTON
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Dower Mews
High Street
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Hertfordshire HP4 2BL (GB)

Decision under appeal : Decision of the Receiving Section of the European Patent Office dated 13 March 1991 rejecting the Applicant's request for re-establishment of rights pursuant to Article 122(5) EPC.

Composition of the Board :

Chairman : O.P. Bossung
Members : J.P.B. Seitz
S.C. Perryman

Summary of Facts and Submissions

- I. European patent Application No. 89 305 452.8 was filed on 31 May 1989 claiming no priority. According to Article 79(2) EPC the designation fees should have been paid within twelve months after filing.

- II. On 26 June 1990 the Receiving Section sent a communication to the representative of the Applicant informing him that pursuant to Rule 85(a)(1) EPC the unpaid designation fees could still be paid within a period of grace of one month after notification of afore-mentioned communication, failing this the Application would be deemed to be withdrawn.

- III. Since no payment was made within this period of grace which expired on 6 August 1990, a notification pursuant to Article 91(4) EPC was issued on 21 August 1990 informing the representative that the application was deemed to be withdrawn.

- IV. In a letter dated 17 August 1990 and received by the EPO on 21 August 1990, (i.e. on the same day on which the afore-said notification was issued) the representative of the Applicant explained that he had not yet received any acknowledgement of his letter dated 18 July 1990 accompanied by a cheque No. 0101660 of £1585 for the designation fees.

For reference he enclosed a copy of the alleged letter dated 18 July 1990 and copies of the cheque with the accompanying EPO Form 1010 also dated 18 July 1990.

- V. In a further letter issued on 28 August 1990 and received by the EPO on 3 September 1990 the representative acknowledged receipt of the notification pursuant to

Article 91(4) EPC and drew the Office's attention to his prior letter dated 17 August 1990 by which he sent a copy of the unreceived letter and cheque.

VI. On 20 September 1990 the representative was informed that inquiries in the Office's cash and accounts department had revealed that the letter dated 18 July 1990 and the cheque accompanying it were not received by it. He was then requested to provide the Office with further evidence that the cheque in question had been sent in due time to the EPO.

VII. On 25 October 1990 the representative requested "restitutio in integrum".

The designation fees with penalty totalling £1565 were paid on 26 October 1990, the remaining amount of £20 was paid on 5 December 1990.

VIII. In a decision issued on 13 March 1991 the Receiving Section rejected the Applicant's request for re-establishment of rights since Article 122(5) EPC excludes restitutio in integrum where the time limits provided for in Article 79(2) and Rule 85(a)(1) EPC are not observed.

As in the present case the letter from the representative dated 18 July 1990 and the enclosed cheque were never received by the EPO, and as the representative could not provide evidence that a letter bearing the address of the EPO was dispatched on that date, the payment of the designation fees was outside the time limits and therefore the application was deemed to be withdrawn.

IX. By a facsimile confirmed in a letter dated 21 May 1991 and received by the Office on 27 May 1991 the Applicant appealed against this decision.

The appeal fee was paid on 22 May 1991.

The Statement of Grounds of Appeal was filed on 18 July 1991 by telecopy and duly confirmed on 24 July 1991.

X. On 4 February 1992 the Rapporteur issued a communication pursuant to Article 110(2) EPC in which he drew the representative's attention to the following points:

- it is claimed that the designation fees were paid by cheque duly dispatched to the EPO on 18 July 1990 within the time limits;
- it appears, however, that searches carried out by the EPO have revealed no trace of the cheque or of its accompanying letter;
- according to the jurisprudence of the Boards of Appeal, it is in any case possible to prove that an act (in this case payment by means of a cheque) has been completed within the time limits if evidence is available to show that it is sufficiently likely that the act in question was completed in due time;
- the burden of the proof lies on the party claiming to have filed a document and made a payment and may be discharged by any means.

The representative was requested therefore to furnish such evidence.

XI. Referring to this communication, the representative answered in a letter dated 3 April 1992 enclosing copies of further documents:

- letter dated 28 June 1990 to the attorney acting in South Africa for the Applicant, reminding him that the designation fees were due;
- letter in reply from their attorney, dated 11 July 1990, allowing the payment of the fees;
- copy of a cheque stub for cheque No. 101660 sent with the letter dated 18 July 1990 of which the EPO already has a copy;
- copy of a relevant account ledger for July 1990, in which the cheque No. 101660 appears in its proper chronological place.

XII. In the Statement of Grounds of Appeal dated 24 July 1991 the Applicant had maintained that Article 122(1) EPC is applicable to a failure to respond in due time to a communication under Rule 85(a)(1) EPC.

He also requested reimbursement of the appeal fee since the refund by the Receiving Section of the oral proceedings he had requested, constituted a substantial procedural violation according to the letter and spirit of Article 116(1) EPC which gives the Applicant a right to oral proceedings where the Receiving Section, as in the present case, envisages refusing the application.

Reasons for the Decision

1. The appeal is admissible.
2. Article 122(5) EPC excludes "restitutio in integrum" not only where the time limits for payment of the fees

provided for in Articles 78(2) and 79(2) EPC are not observed, but by way of logic also where the period of grace laid down in Rule 85(a) EPC for the payment of the afore-said fee is not observed (see Decision of the Enlarged Board of Appeal G 3/91, point, 2, to be published).

Hence in the present case the decision only depends upon the question of whether the designation fees were paid in time.

3. According to Article 5(1)(d) of the Rules relating to Fees, the fees due to the Office can be paid by delivery or remittance of cheques which are made payable to the Office.

Pursuant to Article 8(1)(c) of the Rules relating to Fees, in the case referred to in said Article 5(1)(d), the date on which the payment shall be considered to have been made to the Office is the date of the receipt of the cheque at the Office, provided that this cheque is met.

It is clear that these provisions do not apply in the present case, since on the one hand no cheque has been received but on 26 October 1990 after the end of the period of grace, and since on the other hand the problem is precisely to know if the cheque dated 16 July 1990 sent with the letter dated 18 July 1990 was ever received by the office.

This also means that the provisions of Article (8)(3)(a)(iii) RFees cannot be of any help in the present case where the same essential condition of the receipt of the cheque is not fulfilled and since the Applicant himself admits that he is unable to give

absolute evidence that he sent a letter to the Office on 18 July 1990.

4. The case can therefore only be decided on the basis of the established jurisprudence of the Boards of Appeal.

This jurisprudence consists in four decisions:

- (a) J 20/85 (OJ EPO 1987, 102) "Missing Claims/ZENITH";
- (b) T 243/86 not published "Lost Statement of Grounds/AUDI";
- (c) T 69/86 not published "Lost Telex confirmation/RENK";
and
- (d) T 128/87 (OJ EPO 1989, 406) "Lost Cheque/MULTIVAC".

The cases to which these decisions relate have in common that at least documents sent by the Applicant were received by the EPO, and that one of them, essential for the continuation of the granting proceedings, was missing although according to the Applicant's assertion it had been filed with the others.

Three of them also have in common the fact that material indications existed that a missing document had been enclosed with those documents still in possession of the Office, so that there subsisted a very high probability that they had been lost in the Office:

- 4.1 - i.e. in case J 20/85 "Missing Claims/ZENITH" the filing receipt (EPO form 1031) prepared in the post room at the EPO and sent to the Appellant contained a printed entry "Claims" in which the number "3" had been typed to

indicate that three copies of the required claims had been filed.

- 4.2 - i.e. in case T 69/86 "Lost Statement of Grounds of Appeal/AUDI" an empty envelope bearing the address of the EPO and the date on which the Applicant stated to have sent it and which had obviously contained something, was discovered in the Office, so that the Board considered that it could not have been used for any other purpose, and therefore that the missing document had been lost somewhere in the Office.
- 4.3 - i.e. in case T 128/87 "Lost Cheque/MULTIVAC", the Board of Appeal instituted its own detailed enquiries within the Office and also questioned the Applicant extensively about his working procedures at his own office.

In the course of these enquiries, however, the Board came only to the conviction that a cheque had been made out before the letter of appeal had been submitted.

The Board could detect no reason to assume that the probability of the cheque having been lost in the Office was any greater than that of the Appellant having inadvertently failed to enclose it with the notice of appeal.

Then the Board reached the opinion that in such a situation the impossibility of furnishing proof must in principle go against the party performing the filing; otherwise a subsequent and irrefutable assurance that a document had indeed been submitted or that a particular enclosure had been present would always suffice to demonstrate that an act for which a deadline existed had been performed in due time.

5. In the present case the enquiries carried out by the Board itself within the Office could only demonstrate that a letter dated 18 July 1990 enclosing a cheque No. 101663 on Barclays Bank for £1572 was received in the Office on 20 July 1990. This letter sent by the same representative as in the present case related to the application PCT/GB89/01447. No indication could be found that this letter contained anything else.

The Board can therefore only come to the conclusion that a cheque had been made out in the representative's office, as no further evidence is given that the letter enclosing it had been sent to the EPO and consequently received by it.

Even if the Board were to consider that the representative did dispatch in due time a letter bearing the address of the EPO and enclosing the cheque, the fact remains that this letter might equally have been lost in the post anywhere in Germany or Great Britain.

In such a case the risk of the loss is borne by the sender.

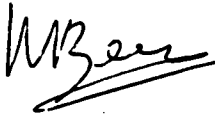
6. There is no provision in Rule 67 EPC for an appeal fee to be returned where the appeal is not allowed.

Order

For these reasons, it is decided that:

- The appeal is dismissed.
- The request for reimbursement of the appeal fee is rejected.

The Registrar:



M. Beer

The Chairman:



O. Bossung