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**D E C I S I O N**  
of 27 November 2002

**Case Number:** J 0002/98 - 3.1.1

**Application Number:** 92903207.6

**Publication Number:** 0602035

**IPC:** E06B 3/01

**Language of the proceedings:** EN

**Title of invention:**

Door

**Applicant:**

NOMAFA AB

**Opponent:**

-

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 122, R. 80, 90

**Keyword:**

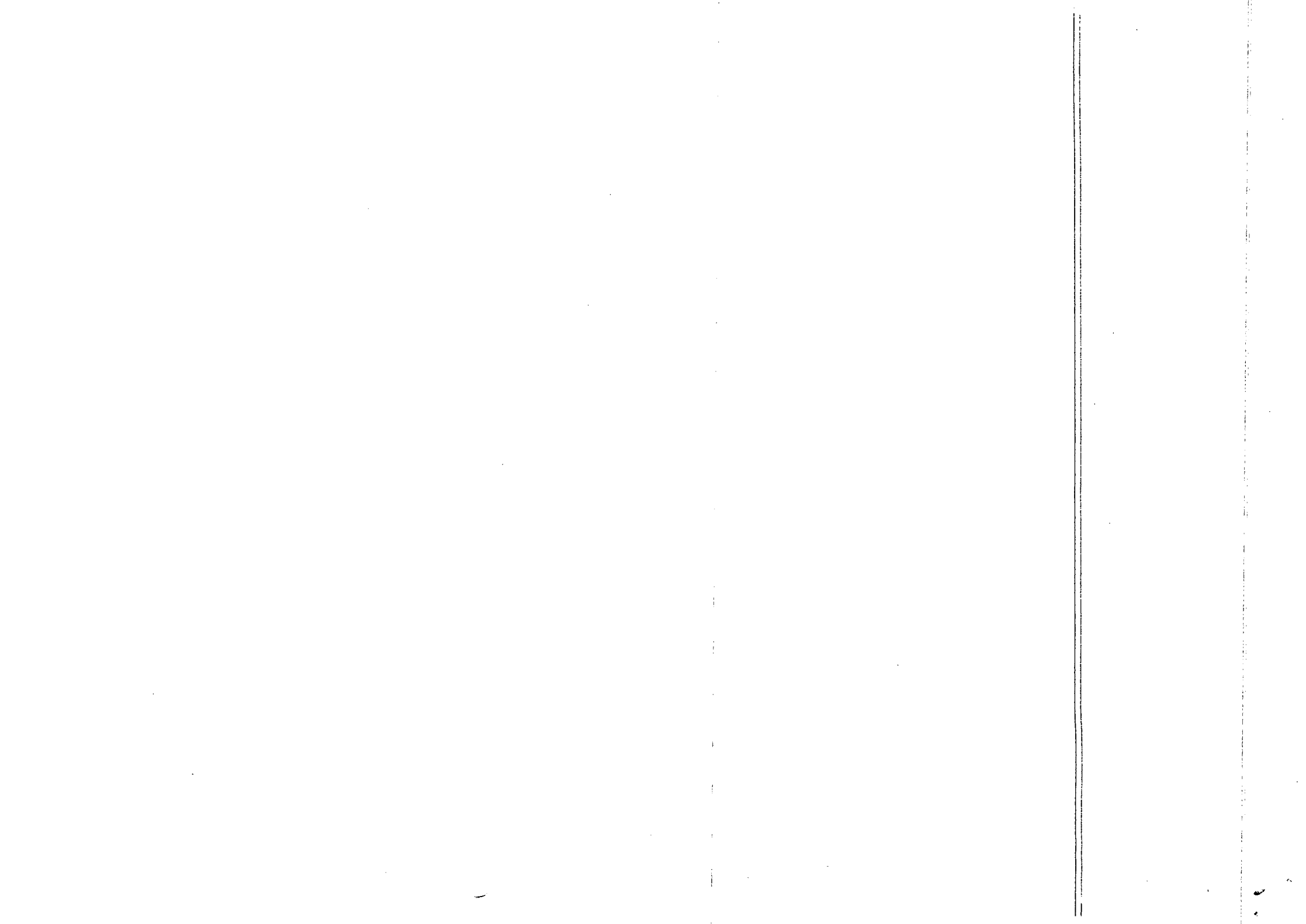
"Interruption of proceedings (no), legal incapacity of the representative (no), Restitutio in integrum (yes)"

**Decisions cited:**

J../85, J../86, J../87, J 0007/99, J 0005/99, T 0030/90

**Catchword:**

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European  
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Boards of Appeal

Chambres de recours

Case Number: J 0002/98 - 3.1.1

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.1  
of 27 November 2002

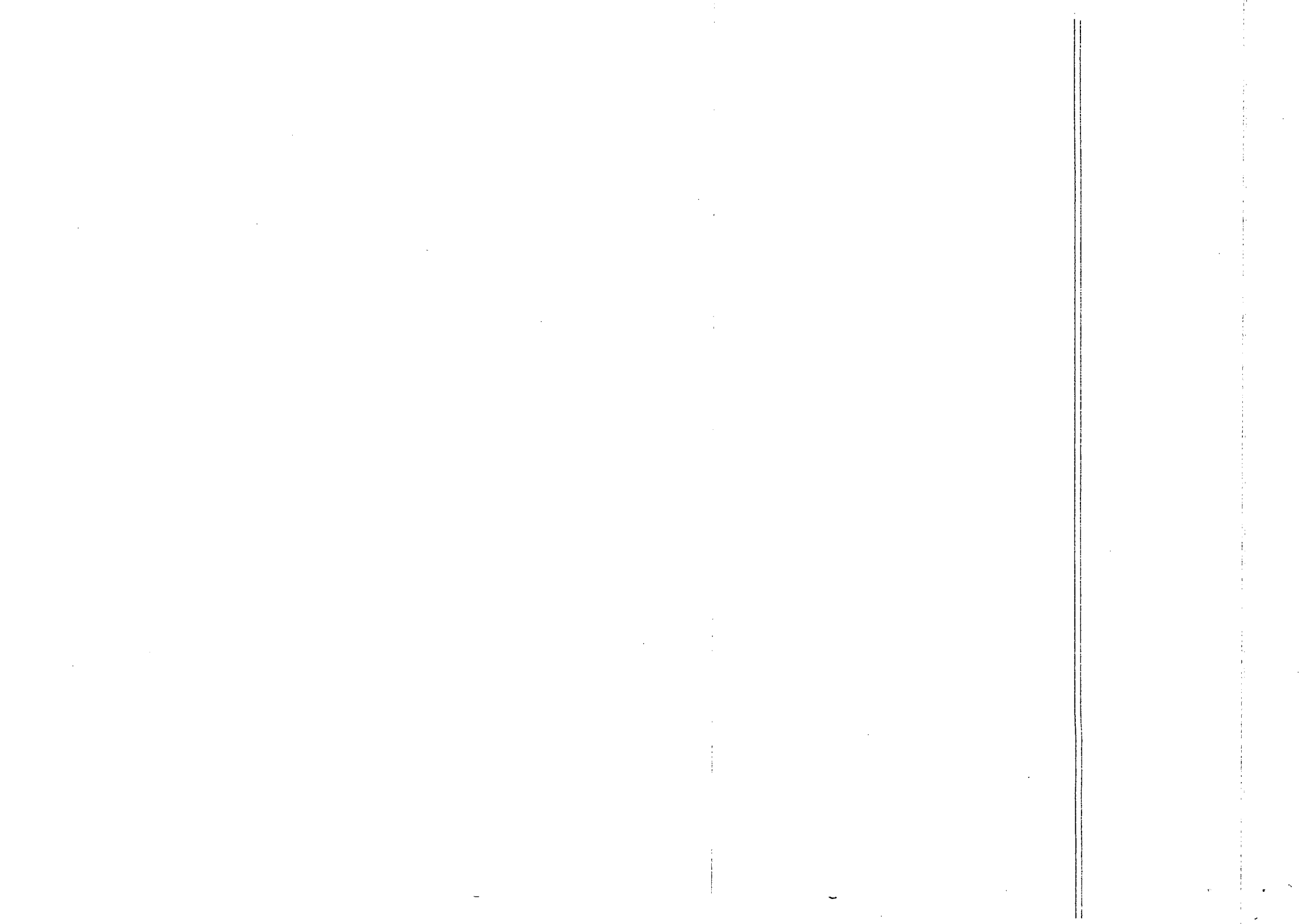
**Appellant:** NOMAFA AB  
Gamletullsgatan 37  
S-302 44 Halmstad (SE)

**Representative:** Wiebusch, Manfred  
TER MEER, STEINMASTER & PARTNER GbR.  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office dated 8 April 1997  
refusing a request for re-establishment of rights  
under Article 122 EPC relating to the patent  
application No. 92 903 207.6.

**Composition of the Board:**

**Chairman:** J. Saisset  
**Members:** V. Di Cerbo  
S. C. Perryman



## Summary of Facts and Submissions

- I. This appeal has been lodged against the decision of the ~~Examining Division dated 8 April 1997 to refuse a~~ request for re-establishment of rights under Article 122 EPC relating to the patent application No. 92 903 207, filed on 16 January 1992.
- II. The relevant matters concerning said request can be summarized as follows:
- (i) The renewal fee for the 5th year of the above quoted application, which fell due on 31 January 1996 was not paid by the due date; on 6 March 1996 a communication to the applicant's representative Mr H. was issued by the EPO, drawing his attention to Article 86(2) EPC; in particular it stated that the renewal fee could have been still validly paid up to the last day of the sixth calendar month following the due date, provided that the additional fee (10% of the renewal fee) was paid at the same time; moreover it stated that, pursuant to Article 86(3) EPC, if the renewal fee and the additional fee were not paid in due time, the patent application would be deemed to be withdrawn.
- (ii) On 23 April 1996 a communication under Rule 51(4) (EPC) was issued to Mr H. inviting him to state his approval of the text of the application within four months after the communication itself. The communication stated also that failure to do so would result in refusal of the application under Article 97(1) EPC, except as provided by Rule 51(5) EPC, second sentence.

- (iii) In spite of the communication quoted under (i) the renewal fee and the related additional fee were not paid in due time; consequently on 30 August 1996 a ~~noting of loss of rights (pursuant to Rule 69(1) EPC)~~ was sent to Mr H. informing him that the European patent application was deemed to be withdrawn.
- (iv) By letter dated 16 September 1996 sent by fax at the same date (and confirmation letter received by the EPO on 19 September 1996) Mr H. filed a request for re-establishment of rights under Article 122 EPC referring to the unobserved time limit for payment of the renewal fee for the 5th year and the additional fee; on 10 October 1996 he paid the fee for re-establishment of rights, the renewal fee for the 5th year and the additional fee.
- (v) The time limit fixed in the communication under Rule 51(4) EPC dated 23 April 1996 expired; the applicant's approval of the text specified in said communication was not filed; the EPO informed Mr H. accordingly by fax on 23 October 1996.
- (vi) By letter dated 23 October 1996, sent by fax in the same day, Mr H. filed a request for further processing under Article 121 EPC and completed the omitted act (approval of the text specified in the communication under Rule 51(4) EPC dated 23 April 1996); the fee for further processing was paid on 24 October 1996.
- (vii) By letter dated 8 November 1996, sent by fax on 10 November 1996, Mr H. submitted the statement of grounds relating to the request for re-establishment of rights and filed some documents to support the request. He submitted that the grounds of the omitted payment of the renewal fee for the 5th year (as well as of the omitted answer to the EPO communication pursuant to Rule 51(4) EPC) had to be found in his health problems

which occurred at the end of the year 1995. Such problems derived from economic and professional difficulties met between the end of the year 1994 and ~~the beginning of the year 1995. However since~~  
July/August 1996 the health problems had been substantially solved and therefore he was able to perform his professional duties normally.

(viii) By communication under Article 113 EPC dated 13 December 1996 Mr H. was invited to file further evidence showing that all due care required by the circumstances had been taken (Article 122(1) EPC); no comments were submitted as a reaction to said communication.

III. The grounds given by the Examining Division in the decision under appeal are summarized as follows: the request for re-establishment of rights did not satisfy the requirements provided for in Article 122 EPC, since no evidence was given that the applicant or the representative had taken all due care required by the circumstances. In particular, Mr H.'s medical problems could not be considered as a sufficient excuse since a representative must organise his work in such a manner that all time limits are observed, also in case of his absence. No medical certificate indicating the period of the representative's illness had been filed. Nor could the representative's financial problems be a reason for granting re-establishment of rights, since he should have taken the appropriate precautions in order to prevent the loss of rights. Moreover, even if the representative failed to inform the applicant about the payment of the renewal fee, the applicant should have asked his representative from time to time about the status of his application.

- IV. With fax dated and sent on 16 June 1997 a change of the representative was notified to the European Patent Office; accordingly the representation of the case was ~~taken over by Mr M. Wiebusch who replaced the former~~ representative Mr H.
- V. Notice of appeal against the above quoted decision, which had been notified pursuant to Rule 80 EPC (public notification) by means of publication in the European Patent Bulletin No. 26/97 of 25 June 1997, was filed on 22 August 1997. It was requested to cancel the decision rejecting the request for re-establishment of rights and to re-establish the applicant's rights under Article 122 EPC with reference to the payment of the renewal fee for the 5th year and the additional fee. The appeal fee was paid the same day.
- VI. In the statement of grounds, filed on 24 November 1997, the (new) appellant's representative requested: that the Board of appeal state that the proceedings had been interrupted because of legal incapacity of the former representative and that the 5th renewal fee and the additional fee had been paid in due time; subsidiarily that the decision under appeal be cancelled and that the appellant be re-established in his rights under Article 122 EPC "in view of non-observance of the time limit for the payment of the renewal fee for the 5th year + additional fee". Oral proceedings were requested if a decision in accordance with one of the above requests was not deemed possible.

The grounds of appeal are summarized as follows:

- (i) The behaviour of Mr H. in the past three years gives clear evidence that he was not capable of fulfilling his duties as a professional representative. Indeed a brief review of the file history reveals a remarkable accumulation of failures which normally cannot be



expected from a professional representative. In particular: although he was instructed by his client to pay the renewal fee for the 5th year (with fax sent by ~~the Norwegian representative of the applicant on~~

21 January 1996) he failed to pay; he omitted to report to his client the EPO communication of 6 March 1996 drawing attention to Article 86(2) EPC as well as the EPO communication under Rule 51(4) EPC sent on 23 April 1996; he became aware of the latter communication only on 13 September 1996 during a telephone consultation with the formal examiner of the EPO. This shows that Mr H. did not process regularly the correspondence received through a period lasting at least from April to September 1996. Even in September 1996 Mr H. was not able to locate the above quoted EPO communication under Rule 51(4) EPC in his files and therefore he had to contact the formal examiner by telephone (22 October 1996) to ask him for another copy of said communication. Moreover, with regard to the request for re-establishment of rights, filed by Mr H. on 8 November 1996, he omitted to answer the communication sent by the Examining Division pursuant to Article 113 EPC on 8 November 1996 which, among other points, invited him to file a medical certificate indicating the period of illness. Finally the decision rejecting the request for re-establishment had to be delivered by public notification under Rule 80 EPC since, both when it was dispatched for the first time on 14 March 1997 and for the second time on 8 April 1997, it was returned to the EPO as undeliverable. This shows that also in the period between March and April 1997 Mr H. was not able to receive any mail.

- (ii) A document filed as annex of the above quoted communication 8 November 1996 shows that in March 1995 Mr H. had to dismiss his secretary due to his financial

problems; thus since then he had to run his office alone, including all the work related to watching the deadlines.

- (iii) In the same communication the former representative declared that by the end of the year 1995 he suffered from health problems (described as pain in the stomach) and that those problems might be of psychic origin.
- (iv) When the new representative, appointed on 10 June 1997, met Mr H. on 1 August 1997 the latter confirmed that he had serious health problems which were not only of organic but at least partly of psychic nature; although he promised to provide the new representative with the medical certificate requested in the communication of 8 November 1996 he did not send one. A copy of said certificate, dated 30 January 1997, was given by Mr H. to the Norwegian representative of the applicant. Said certificate, although not written by a psychiatrist, states that Mr H. appeared to be depressive and apathetic. Although Mr H. was requested to give further evidence relating to his illness no other documents have been obtained by him.
- (v) A check of all the files handled by Mr H. for the applicant shows that there had been 11 cases in total and in 5 of these cases a total loss of rights had occurred which could no longer be remedied; in the remaining cases the former representative had also failed to observe several time limits, but these failures were remedied by him himself and were not fatal.
- (vi) In view of the above summarized facts it must be concluded that Mr H. has been suffering from episodic depressive attacks which began in 1995 and were particularly virulent in the first half of 1996, ie the time period which was decisive for the payment of the

5th annuity for the present application. During the depressive phases the former representative was not capable to take care of the correspondence and, more ~~generally, to work properly. In other words, due to his~~ mental state, he was incapable of fulfilling his professional obligations and of being responsible for the cases with which he had been entrusted.

(vii) The office of the Norwegian representative of the applicant had been working with Mr H. for many years and, until 1995 the latter handled his cases very carefully and reliably. As a result, the Norwegian representative had great confidence in the work of Mr H. and therefore in the year 1996 both the applicant and his Norwegian representative had no reason to doubt that Mr H. would do his work properly and would take care for the payment of the renewal fee in the usual way.

(viii) When a professional representative has been entrusted with watching the time limits for the payment of renewal fees, then, at least as long as there are no clear hints that the representative does not work reliably, it would be totally unreasonable for the applicant to assume that the representative might not fulfil his task and to regularly inquire about the status of all his applications in intervals sufficiently short to avoid a loss of rights.

VII. Following a communication of the Board of Appeal dated 14 September 1998, relating to the appellant's request that the statement of the grounds of appeal and the annexes be excluded from public inspection, the appellant's representative agreed with the Board's conclusion that the statement of the grounds could not be excluded from public inspection.

- VIII. With letter 31 May 1999 the appellant submitted to the Board that Mr H. was cancelled as authorized German patent attorney by the President of the German Patent Office pursuant to Section 181(1) No. 3 of the German Patentanwaltsordnung.
- IX. With a communication dated 28 October 1999 the Board of Appeal, among others, invited the appellant to produce further evidence relating to the factual circumstances which would support the appellant's assertions relating to the medical conditions of the former representative.
- XII. With letter 25 October 1999 a copy of a medical certificate dated 10 September 1999 was submitted, attesting the legal incapacity of Mr H.
- XIII. Further submissions from the appellant were submitted with letter 21 December 1999.

### Reasons for the decision

1. The appeal is admissible. Indeed, both the notice of appeal, filed on 22 August 1997, and the statement of grounds, filed on 24 November 1997, are to be considered as filed in due time, since the decision under appeal has been notified pursuant to Rule 80 EPC (public notification) by means of publication in the European Patent Bulletin No. 26/97 of 25 June 1997. Since, pursuant to Rule 80(2) EPC and according to the Announcement by the President of the EPO of 11 January 1980 concerning public notification, the decision has to be deemed to have been notified one month after the date of publication in the European Patent Bulletin, the terms provided for in Article 108 EPC for the

filing of the notice of appeal (two months) and the statement of grounds (four months) start running from 25 July 1997. The same applies for the appeal fee which ~~has been paid on 22 August 1997.~~

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2. The first issue to be decided upon is the appellant's main request that the Board declare that the proceedings had been interrupted because of legal incapacity of the former representative and that, accordingly, the 5th renewal fee and the additional fee had been paid in due time.
  
3. The appellant has supported this request maintaining that the behaviour of Mr H. during the relevant period, characterized by a considerable number of omissions and procedural failures, shows that he was in a situation of legal incapacity deriving from health problems (in particular of psychic origin). Medical certificates have been also filed in order to give evidence of said health problems. Finally documents have been filed showing that he was cancelled as authorized German patent attorney.

In particular, as to the first submission above the appellant refers to the number of failures characterizing the former representative's professional activity starting from the beginning of the year 1996, failures concerning not only the application in suit, but also other cases of the same client. In particular, with reference to the application under discussion: Mr H. omitted to pay the renewal fee for the 5th year notwithstanding the fact that he had been specifically instructed to do so by the Norwegian representative of the applicant; he omitted to answer in due time (within four months after the receipt of the communication) to the letter of the EPO sent pursuant to Rule 51(4) EPC referring to the approval of the text of the application, nor did he inform the Norwegian

representative of the applicant thereof; he let the time limit provided for in Article 86(3) EPC (for the case of late payment of the renewal fee) elapse.

~~Moreover with letter to the EPO sent on 8 November 1996~~

the representative himself admitted that starting from the end of the year 1995, due to increasing pain in the abdominal region, he was not able to perform his professional activity "wie erforderlich". With reference to the other cases of the same client, the appellant submitted that an investigation concerning these cases has shown that over eleven cases a total loss of rights had occurred for five of them; moreover also in the remaining six cases the former representative had failed to observe several time limits.

With reference to the allegation that the former representative suffered from health problems and in particular from psychic problems the appellant filed copies of a medical certificate dated 30 January 1997 signed by an internist and, following a communication of the Board, a second certificate dated 10 September 1999 signed by a specialist in neurology and psychiatry.

4. Pursuant to Rule 90(1)(c) EPC proceedings before the European Patent Office shall be interrupted ... in the event of ... legal incapacity of the representative of an applicant for or proprietor of a European patent ...

According to the EPO Boards of Appeal case-law, legal incapacity referred to by this provision refers to the representative's incapacity to carry out professional work before the EPO on behalf of a client. Moreover, since there is a unified European profession of representatives before the EPO, there has to be a uniform standard of judging such legal incapacity in order to avoid differences in the application of

Rule 90(1)(c) EPC depending on the nationality or domicile of the representative (J../85 OJ EPO 1985, 159). According to this case-law a reasonable ~~basis for decisions in the matter by the EPO is given~~

by testing if the representative concerned was in a fit mental state to do the work required of him at the material time or if he lacked the capacity to make rational decisions and to take necessary actions. In this context a reliable medical opinion is necessary, as well as all available reliable information about the representative's conduct at the material time. The mental state from which legal incapacity of the representative can be derived has to be such that the representative is so totally or nearly totally unable to take rational decisions that all his professional duties, and not just an isolated case, are affected by his mental state (J 7/99 unpublished). Said legal incapacity must be of a persistent nature (J../86 OJ 1987, 528); moreover, it has been decided (J ../87 OJ 1988, 323) that for the purpose of Rule 90(1)(c) EPC the EPO must establish whether and if so when the representative was legally incapable, and in the light of its findings specify the time limits which may have been interrupted. The latter decision also stated that EPO must apply Rule 90 EPC of its own motion.

5. The Board agrees with the principles as set out in the above quoted cases. Moreover it has to be pointed out that, since the declaration of legal incapacity of a patent representative has very serious consequences for his professional life, it needs to be based on factual circumstances and not on mere conjectures.
6. The application of the above principles to the facts of this case leads to the conclusion that the applicant's main request cannot be granted.

As can clearly be inferred from the summary of facts, the period to be considered as relevant for the request of interruption begins in January 1996 (the time limit ~~for the payment of the renewal fee for the 5th year~~ expired on 31 January 1996). Even if the appellant has not specified the termination date of such interruption, it seems appropriate to fix this term in the month of October 1996, since in this month (more precisely on 10 October 1996) the former representative paid the above quoted renewal fee and the additional fee. Indeed, since, according to the appellant's request, both the renewal fee and the additional fee have to be considered as paid in due time because the proceedings were interrupted due to the representative's legal incapacity, it would be illogical not to infer that the interruption ceased at the time the payment was made. Of course the previous and subsequent behaviour of the representative can be taken into account too, but only for the purpose of the assessment of his legal incapacity during the above specified period.

7. According to the case-law quoted under paragraph 4, a medical opinion is necessary in order to assess the representative's mental state. In the case in suit the medical certificates cannot be considered as a sufficient evidence of the alleged mental sickness of Mr H. in the period under consideration. The Board agrees wholly with the statement in J../85 according to which, since it may be difficult to determine how disturbed the mind of a person was at any particular date if he was not under medical care, it is necessary to consider very carefully all available reliable information about his conduct at the time and it may be helpful, though it should not be regarded as conclusive, if a medical opinion given at a later date takes into account such information. However it has to be pointed out that in the case in suit the first



medical certificate, dated 30 January 1997, shows only that the patient was "depressive", "verzweifelt" and "ohne jeden Antrieb". It can be inferred from this ~~certificate that the mental status of the~~

representative was not so seriously damaged, since the doctor (an internist) who visited the patient did not suggest that he go to a specialist (such as a psychiatrist) but invited him to learn and to practice "autogenes Training". The second medical certificate gives evidence of a serious mental illness ("schwere schizoide Persönlichkeitsstörung mit erheblicher Beeinträchtigung der Kritik- und Einsichtsfähigkeit bei reaktiv-depressiven Versagungszuständen und mangelnder Krankheit bedingter Selbsteinschätzung) and supports the conclusion of legal incapacity. However, it has to be pointed out that said medical certificate has been written in September 1999, and is based on an ambulant medical treatment started in August 1998. In the Board's opinion the temporal distance between the period considered in the certificate and the period relating to which the interruption of the proceeding has been requested is so great that that certificate cannot be treated as satisfactory evidence of mental illness during the relevant period in 1996. On the other hand, the first certificate above quoted can be relied on as showing that till the beginning of 1997 the mental condition of Mr H. was not seriously impaired.

8. Nor can the behaviour of the representative in his professional activity be considered as sufficient evidence of the alleged legal incapacity. Though it is true that a number of failures occurred in the period under consideration, it is also true that during the same period Mr H. was able to take adequate measures on some of the applications he dealt with for his client (see, for example, European application No. 95 911 490 where Mr H. paid the Examination fee on 21 March 1996,

and German application No. P 39 13 154, where he filed a request for examination on 1 April 1996) as can be inferred from the written evidence (Appendix III)

~~submitted by the appellant. Moreover also with~~

reference to the case in suit, he filed a request for restitutio in integrum (16 September 1996), a request for further processing under Article 121 EPC (23 October 1996) and completed the omitted act (approval of the text); furthermore he paid the fee for re-establishment of rights, the renewal fee for the 5th year and the additional fee as well as the fee for further processing (24 October 1996).

All these circumstances show that in the period under consideration the representative was not in the situation, considered as a necessary requirement for the request of interruption under Rule 90(1)(c) to be granted, that he was totally or nearly totally unable to take rational decisions related to his professional duties.

9. Nor, in the Board's view, can it be considered as evidence supporting the assumptions of the appellant that Mr H. has been cancelled as authorized German Patent Attorney by the President of the German Patent Office pursuant to Section 181(1) No. 3 of the German Patentanwaltssordnung. Said cancellation has taken effect starting only from 24 December 1998 and has no retroactive effect. That he is considered unfit to practice as a German Patent Attorney from 24 December 1998 onwards, cannot be taken as having any bearing on his being in a state of legal incapacity in 1996.
10. Therefore the main request of the appellant cannot be granted. The Board is aware that a different decision (J 5/99 unpublished) has been taken by the same Board, in a different composition, with reference to the same representative. However, since the different solution

adopted derives only from the different evaluation of the evidence available and to be considered in the two cases, and not from a different interpretation of the law, ~~no reason exists for a referral to the Enlarged Board of Appeal pursuant to Article 112 EPC.~~

11. With reference to the request for restitutio in integrum submitted by the appellant as auxiliary request, it has to be pointed out that the crucial question for deciding on the allowability of the request is whether or not the conduct of the appellant himself and/or of his representative throughout the whole relevant period amounted to the exercise of all due care required by the circumstances. Moreover, by all due care is meant all reasonable care, that is to say, the standard of care that a reasonably competent patentee/representative would employ in all relevant circumstances (see T 30/90).
  
12. Whereas as a general rule the negligence of a European professional representative will prevent a finding that all due care was taken, here the acts of Mr H. are not, in the Board's view, due to an isolated act of carelessness or negligence, but to his health condition, as emerging from the above quoted available evidence.

Indeed Mr H.'s health condition, while not allowing a conclusion of legal incapacity (for the reasons under paragraphs 6 to 8), has to be taken into consideration when assessing the requirements for the request of restitutio in integrum, since it definitely played an important role in determining Mr H.'s professional behaviour with reference to the omissions under consideration. In particular both the medical certificate dated 30 January 1997 (see paragraph 7 above), showing the existence of some health problems relating also to the mental sphere, and the number of

professional failures occurred in the period under consideration (see paragraph 8 above) must be considered as sufficient evidence that Mr H., for ~~reasons beyond his control, was not capable to run~~ properly some of the cases under his responsibility, although he took every effort to fulfil his duties. It follows that under these special circumstances the more restrictive criterion of isolated mistake generally used in the case-law of the Boards of Appeal does not apply and that the representative's negligence cannot be considered as a reason to refuse the request for restitutio in integrum. The latter finding prevents the applicant from suffering from this negligence unless he or his Norwegian representative had reason to suspect that Mr H. could not be relied on.

13. Evidence has been given that the Norwegian representative of the appellant explicitly invited Mr H. to pay the 5th annuity fee (see letter dated 24 January 1996) and that receipt of this instruction had been confirmed by Mr H. with facsimile dated 29 January 1996. After such request it seems logical that he could rely on a correct exercise of Mr H.'s professional duties, when the following considerations are also taken into account: in the period under consideration Mr H. had not completely ceased to work but was taking some pertinent actions relating to the appellant (see paragraph 6 above); (b) the Norwegian representative of the appellant had been working with Mr H. for many years and before the period under consideration Mr H. had handled his activity in a careful and reliable way.

For these reasons the Norwegian representative of the appellant had no reasons to suspect that his instructions relating to the payment of the 5th annuity fee would not be complied with and therefore it must be

inferred that the above quoted requirement of all due care has been fulfilled by the appellant.

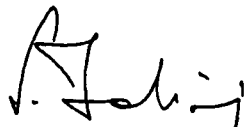
~~14. In conclusion, taking into account that the omitted act~~  
was completed within the time limit, the appealed decision is to be set aside and restitutio in integrum under Article 122 EPC is to be granted according to the appellant's auxiliary request.

**Order**

**For these reasons it is decided:**

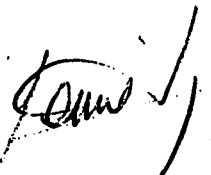
1. The decision under appeal is set aside;
2. The appellant is re-established in his rights.

The Registrar:



M. Fabiani

The Chairman:



J.-C. Saisset



