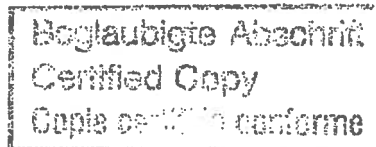


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D E C I S I O N
of 26 July 2001

Case Number: T 0447/00 - 3.4.1

Application Number: 95920997.4

Publication Number: 0761008

IPC: G21F 5/14

Language of the proceedings: EN

Title of invention:
STILLAGE FOR STORING DRUMS

Applicant:
British Nuclear Fuels PLC

Opponent:
-

Headword:
Restitutio/BRITISH NUCLEAR FUELS

Relevant legal provisions:
EPC Art. 86(2), 122(1)
EPC R. 71(2)
RPBA Art. 9

Keyword:
"Restitutio - all due care - no"
"Supervision of an assistant - not sufficient"
"Isolated mistake - no".

Decisions cited:
J 0016/82, T 0309/88

Headnote:
1. It is not excluded that, in certain circumstances, a chain of errors could be qualified as an isolated mistake within a normally satisfactory system (obiter dictum).
2. Reasonable supervision of an assistant cannot be limited to spot checks in a situation where a representative has become aware of an inadvertent deviation from the normal course of action.



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Boards of Appeal

Chambres de recours

Case Number: T 0447/00 - 3.4.1

D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 26 July 2001

Appellant:
(Opponent)

British Nuclear Fuels PLC
Risley
Warrington
Cheshire WA3 6AS (GB)

Representative:

Pawlyn, Anthony Neil
Urquhart-Dykes & Lord
Tower House
Merrion Way
Leeds
West Yorkshire LS2 8PA (GB)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 23 November 1999
rejection a request for re-establishment of
rights in connection with European application
No. 95 920 997.4.

Composition of the Board:

Chairman: G. Davies
Members: B. J. Schachenmann
G. Assi
U. G. O. Himmler
M. G. L. Rognoni

Summary of Facts and Submissions

- I. This is an appeal from the rejection by the Examining Division of a request for re-establishment of rights under Article 122 EPC in respect of the time limit for paying the renewal fee for the third year in connection with European patent application No. 95 920 997.4 (International publication No. WO 95/33268).

- II. In the contested decision, posted on 23 November 1999, the Examining Division found that, as the applicant itself had admitted, not only one but four mistakes in respect of the payment of the renewal fee had occurred. This excluded, by definition, that the mistakes could be qualified as occasional or isolated.

A first mistake had occurred when EPO form 1201.1 (entry of the international application into the regional phase before the EPO) was received by the applicant but a renewal record was not notified to the renewal agency used by it. A second failure had occurred when EPO form 2522 (notice drawing attention to Article 86(2) EPC concerning payment of the renewal fee plus additional fee) was not entered in the diary for action by the formalities officer of the applicant. A third failure had occurred when the person performing the cross-check confirmed that no diary entries for EPO forms 2522 was appropriate and a fourth failure had occurred as the instructions on the renewal of the case to the renewal agents contained an error in stating that the third year fee had been paid.

A system in which four mistakes could occur was not reliable or objectively appropriate since in the present case none of the cross-checks built into the system functioned.

- III. On 19 January 2000 the applicant lodged an appeal against the decision referred to above and paid the appeal fee. It requested that the decision under appeal be set aside and that the case be re-established.
- IV. In the statement of grounds of appeal received on 30 March 2000 the appellant submitted that its system for dealing with payment of annuities was a normally satisfactory system incorporating independent cross checks to ensure that payments of fees were completed in due time. The appellant's patent formalities officer, Mrs B., responsible for entering deadlines in the diary and liaising with the renewal agents had been properly instructed in the duties she performed including renewal procedures. Her work was supervised by a qualified representative.

An error had occurred in that a letter to the appellants's renewal agents instructed payment of the annuities for the fourth year, incorrectly stating that the fees for the third year had been paid. Accordingly, the renewal agents did not pay the outstanding annuities for the third year. This clerical error was an isolated error which lead to the inadvertent withdrawal of the application.

The normal function of a record system for patent formalities was that the back-up diary draws attention to a deadline which had slipped through the primary system. Restoration was only necessary when both or all of the diary systems had failed. Such failures arose due to a variety of chains of events. An interpretation of the term "isolated" to mean that only a single error had occurred in relation to a case for which restoration under Article 122 EPC was sought, would have the consequence that virtually all requests for restoration would be refused.

These submissions were supported by a number of Statutory Declarations already filed during the proceedings before the department of first instance.

In addition, the appellant requested that the appeal proceedings in relation to applications Nos. 95 920 997.4 (present case T 447/00) and 95 919 565.2 (case T 448/00) be consolidated, since the issues of both cases were substantially the same.

V. In a communication of 3 April 2001, issued together with the summons to oral proceedings, the Board informed the appellant that, since the conditions under Article 9(2) of the Rules of Procedure of the Boards of Appeal for the consolidation of appeal proceedings were satisfied, the appeals T 447/00 and T 448/00 would be dealt with in consolidated proceedings.

Concerning the substance of the case the Board confirmed that the case law of the Boards of Appeal tended to ensure that the loss of substantive rights did not result from an "isolated mistake within a normally satisfactory system". However, once the representative responsible for the case was aware of a potentially dangerous situation, the issue was no longer that of an isolated mistake within a normally satisfactory system but whether the representative reacted with all due care required by the particular situation. In the circumstances of the present case, the responsible representative, Mr C., when receiving EPO form 2522, had realised the importance of the matter and passed the form to the formalities officer, Mrs B., with the instruction to check the status of the case. However, the file did not contain any indication that he had ascertained whether she had followed his instructions. Thus, it appeared that he had not exercised reasonable supervision as required by the circumstances.

- VI. In response to this communication, the appellant filed another Statutory Declaration by Mr C. and supplemented the submissions of the statement of grounds. It was pointed out that Mrs B. had taken immediate action to resolve the question of the case's status. This resulted in verbal confirmation to Mr C. that the case should have its renewal fee paid but that the renewal agents had not received any notification of the case. As detailed in the new Declaration by Mr C., he then immediately indicated to Mrs B. that it was most important that appropriate action should be taken and that appropriate action was the dispatch to the renewal agents of immediate renewal instructions. Mr C. then sought from Mrs B. verbal assurance that the action had been taken and she confirmed that the letter had been prepared. At a later date he checked the fact that all instructions to the renewal agents had been safely acknowledged by them as having been received by checking that fact with Mrs B..
- VII. The appellant informed the Board that no representative for the applicant would be attending the oral proceedings scheduled for 26 July 2001. The oral proceedings were therefore held without the appellant on that date (Rule 71(2) EPC).

Reasons for the Decision

1. *Consolidation of appeal proceedings*

As already stated by the Board in its communication dated 3 April 2001 (point V, supra) the appeals T 447/00 and T 448/00 were dealt with in consolidated proceedings. Nevertheless, separate decisions are issued for each case.

2. *Admissibility of the appeal*

The appeal complies with the provisions mentioned in Rule 65(1) EPC and is therefore admissible.

3. *The requirement of "all due care"*

3.1 The appellant's application for restitutio in integrum meets the formal requirements provided for in Article 122(2) EPC. Thus, the only issue at stake is whether or not, according to Article 122(1) EPC, all the due care required by the circumstances of the particular case was taken to comply with the time limit.

3.2 The decision under appeal focussed attention on the question whether the failure to pay the renewal fee was due to an "isolated procedural mistake within a normally satisfactory system". In the opinion of the first instance, the admitted existence of four mistakes in respect of the same procedural act could not, by definition, be qualified as "isolated". The Board is not convinced that such an approach takes sufficient account of the issues to be considered in connection with Article 122(1) EPC. As the appellant correctly pointed out, the case law of the Boards of Appeal referring to an "isolated mistake within a normally satisfactory system" does not normally require that only a "single" error had occurred in relation to a case for which re-establishment of rights is sought. It is not excluded that, in certain circumstances, a chain of errors could well be qualified as "isolated".

3.3 However, this question does not need answering in the present case since, during the critical period, the representative, Mr C., was well aware of the fact that an inadvertent deviation from the normal course of action had arisen and realised the significance of this

(see point VI., supra). The relevant question is therefore whether, in view of these particular circumstances, all due care has been taken.

3.4 According to the case law of the Boards of Appeal, if a representative has entrusted tasks to an assistant, the former will be held liable for any mistakes on the part of the assistant unless he himself has met the following criteria: he must have chosen the assistant carefully, properly instructed him or her in the tasks and exercised reasonable supervision of those tasks (see e.g. decision J 16/82, OJ EPO 1983, 262). Whereas, in normal circumstances, supervision of an assistant by spot checks are considered to be sufficient (decision T 309/88, point 2.5 of the reasons), this is no longer true, in the Board's view, where a representative has become aware of an inadvertent deviation from the normal course of action as in the present case. In such a perilous situation reasonable supervision requires the representative to personally intervene in order to ensure that any loss of rights is avoided.

3.5 As follows from the facts of the case, the authorized representative, Mr C. asked Mrs B. to check the status of the case when he had seen the EPO form 2522 received on 11 July 1997. He understood that the response was that the case needed renewing and that the renewal agents had been instructed accordingly (point 4 of Mr C.'s Statutory Declaration of July 1998). In response to this verbal report he asked Mrs B. to dispatch to the renewal agents immediate renewal instructions (point 7 of Mr C.'s Statutory Declaration of June 2001). The letter to the renewal agents (containing the wrong statement that the third year fee had been paid) was sent on 22 July 1997. On that day Mrs B. was absent and as a result the letter was signed by the department's secretary (point 19 of Mrs B.'s Statutory Declaration of July 1998).

In the course of these events, Mr C. only relied on verbal reports by Mrs B. without personally checking e.g. if EPO form 2522 had been entered in the diary for action (which was not done) and if the instruction letter to the renewal agents was sent out correctly (which was not the case). In addition, there is no indication that he was aware of the fact that the letter was neither reviewed nor signed nor dispatched by Mrs B. herself but by a third person.

3.6 Consequently, the Board finds that the supervision exercised by the representative did not correspond to the standards required in the particular circumstances of the present case. Thus, according to the case law referred to above (point 3.4, supra), the errors on the part of the assistant must be imputed to the responsible representative. The Board therefore concurs with the conclusion of the department of first instance that the request for re-establishment of rights cannot be granted.

Order

For these reasons it is decided that:

The appeal is dismissed.

R. Schumacher

The Registrar:

R. Schumacher

R. Schumacher



The Chairman:

G. Davies

G. Davies

