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**Datasheet for the decision
of 27 September 2007**

Case Number: T 0261/07 - 3.3.08

Application Number: 91309596.4

Publication Number: 0481791

IPC: C12N 5/02

Language of the proceedings: EN

Title of invention:

Culture medium for CHO-cells and adapted CHO-cells

Patentee:

THE WELLCOME FOUNDATION LIMITED

Opponents:

Amgen Inc.
F. Hoffmann-La Roche Ltd.
Dr. André Kasche

Headword:

Culture medium/WELLCOME

Relevant legal provisions:

EPC Art. 108, 122
EPC R. 78

Keyword:

"Delivery to addressee (yes)"
"Appeal deemed not to have been filed"
"Referral of a question to the Enlarged Board of Appeal (no)"
"Restitutio in integrum (no)"
"Reimbursement of appeal fee (yes)"

Decisions cited:

T 0013/82, T 0191/82, T 0130/83, T 0030/90, T 0324/90,
T 0381/93, T 0949/94, T 0686/97, T 0247/98, T 0283/01,
T 0172/04, T 0743/05, J 0016/82, J 0012/84, J 0002/86,
J 0009/86, J 0017/89, J 0022/92, J 0035/97

Catchword:

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Case Number: T 0261/07 - 3.3.08

D E C I S I O N
of the Technical Board of Appeal 3.3.08
of 27 September 2007

Appellant:

(Patent Proprietor)

THE WELLCOME FOUNDATION LIMITED
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Middlesex UB6 0NN (GB)

Representative:

Sayce, Alastair
GlaxoSmithKine
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Respondents:

(Opponent 1)

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von Menges, Albrecht
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D-22607 Hamburg (DE)

(Opponent 2)

F. Hoffmann-La Roche Ltd.
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Representative:

White, Martin Paul
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(Opponent 3)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 19 October 2006
revoking European Patent No. 0481791 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: L. Galligani
Members: C. Heath
P. Julià

Summary of Facts and Submissions

- I. Subject of these proceedings is the question whether the patentee launched an admissible appeal against the decision of the opposition division of 19 October 2006 that revoked European Patent EP-B1-0481791.
- II. The above-mentioned decision was dispatched to the patentee, The Wellcome Foundation, as well as to opponent 1, Amgen Inc., opponent 2, F. Hoffmann-La Roche, and opponent 3, Dr André Kasche. While an acknowledgement of receipt for this decision is on file for all three opponents, it is missing for the patentee. Despite this, the European Patent Office on 31 January 2007 issued a communication to the parties that opposition proceedings had been terminated as no appeal had been filed.
- III. On 2 February 2007, the patentee sent a fax to the European Patent Office indicating that it had never received the above-mentioned decision of 19 October 2006 and had become aware of it only on 2 February 2007 due to an online file inspection. In said letter, the patentee took the view that for the above-mentioned reasons, the period of appeal had not yet started, but wrote that as a precaution, "we hereby appeal the decision and request that the EPO withdraw the required appeal fee from the GlaxoSmithKline deposit account." Meanwhile, enquiries by the Office for the whereabouts of the copy of the decision dispatched to the patentee led to a search by the Deutsche Post with the result that a copy of the decision had been delivered to the patentee on 26 October 2006. Deutsche Post's data sheet

for this specific registered letter *inter alia* mentions the following: "26.10.2006 08:59 Zustellung: TW 8A".

- IV. In a further letter of 2 April 2007, the patentee explained that the decision of 19 October 2006 had presumably never arrived at the patentee's premises, and requested the following: "To the extent that our letter of 2nd February does not already do so, we hereby complete the omitted act by requesting appeal of the decision of the Opposition Division", and, second, "we hereby apply for our rights to be re-established under Art. 122 EPC for the purpose of filing the Notice of Appeal." Authorisation was given for the required fees for *restitutio in integrum* to be withdrawn from the patentee's deposit account.

As to the completion of the omitted act, the patentee requested the following: "Specifically, we appeal the decision of the Opposition Division that the Main Request contravenes Rule 57a and Articles 123(2) and 123(3) EPC; and we also appeal the decision of the Opposition Division that the Auxiliary Request 1 contravenes Rule 57a and Articles 84, 123(2) and 123(3) EPC." Further grounds of appeal were provided only in the patentee's letter of 31 May 2007.

- V. In a communication of 27 April 2007, the Board took the preliminary view that, based on the facts on file, delivery of the decision to the patentee could not be established beyond reasonable doubt.
- VI. Subsequently, the patentee by letter of 31 May 2007 wrote that after the EPO had provided the patentee with the tracking number of the registered mail in question,

the patentee could "perform further internal checks of archived documents from which it has been established that a member of staff in the Proprietor's Mail Room signed for the receipt of this tracking number on 26th October 2007". This statement was accompanied by an Annex 5 which is a priority services delivery note of 26 October 2006 that indicates as "Delivery Office" the postal code the registered letter was sent to (TW 8A), and shows, amongst others, the receipt of a document with the tracking number corresponding to the one of the dispatched decision of 19 October 2006. At the bottom, it shows a signature of acceptance by a person whose name is not entirely legible.

- VII. After receipt of these facts, the Board dispatched another communication indicating that the acknowledgement of receipt of the decision by a member of staff *prima facie* appeared to be sufficient evidence that the letter had indeed been received by the patentee and that thereby the Office seemed to have discharged its burden of proof in this respect.
- VIII. In a further letter dated 24 August 2007, the patentee explained its position regarding both the timeliness of the appeal and the justification of the request for *restitutio*. Regarding the question of delivery of the decision of 19 October 2006, the patentee advanced the following arguments:

- (1) The letter was never received by the addressee; in the alternative
- (2) Those concerned had never been notified.

Rather, the letter only reached an intermediary delivery service, TNT UK Ltd, that received and distributed mail within the patentee's premises. TNT UK Ltd should, however, be regarded as a further intermediary postal service rather than the patentee's contracted staff. Employees of the patentee were those within the Central Intellectual Property Department (CIP Unit), where the letter had never arrived. Regarding the request for *restitutio*, the patentee submitted that all due care had been taken in order to receive written notices by the Patent Office. An effective system of both receiving and processing mail had been in place. In order to demonstrate this, the patentee attached two affidavits. In one of these, Dr Peter John Giddings explained how the CIP Unit of the patentee's monitored and managed incoming mail. The fact that a letter was not logged into the CIP's database, the so-called IP Master System, in his view was highly indicative of the likelihood that the letter was never received by the CIP Unit of the patentee. In the second affidavit by Mr Robert John Daubrey of TNT, the procedure for receiving mail was further explained. The company TNT UK Ltd was responsible for handling all mail collection and delivery to the patentee. Registered mail was entered into an incoming consignments database (CID), records of which were kept for half a year. The records of 26 October 2006 were thus deleted at the end of the six-month period and no longer existed. Mr Daubrey states that in the case of special delivery or registered mail, "my staff are aware, and are reminded, of the importance of this mail and are specifically instructed to deliver this mail only to the CIP Administration Department rather than to any individual who may be named on the letter."

Finally, the patentee argued that the request for *restitutio* made on 2 April 2007 in itself was filed in due time, as the relevant facts on which the request could be based only came to light in the course of the investigations made by both the European Patent Office and the patentee, and not earlier than 2 April 2007.

IX. All three opponents contested that, either, the appeal was filed in due time, or, in the alternative, that the request for *restitutio* was well-founded. The opponents took the view that due notification of the decision had occurred on 26 October 2006, that not all due care was taken by the patentee, and the request for *restitutio* consequently should be refused.

X. Oral proceedings were held on 27 September 2007 in order to decide the preliminary issues whether an appeal had been filed in time, or, in the alternative, whether the request for *restitutio in integrum* should be granted.

As to the first point, the patentee no longer relied on the distinction between an employee of the patentee having signed for the letter, or an employee of an outsourced company. Rather, the patentee accepted that the person employed by TNT who signed for the receipt of the letter on 26 October 2006 was authorised to do so by the patentee. The patentee also conceded that the absence of the pink advice of delivery in the file did not pose an irrevocable obstacle to the EPO to prove delivery by other means. Rather, the patentee advanced an argument based upon what it considered the proper reading of Rules 26, 78 and Article 119 EPC. As Rule 26

EPC required the patentee to indicate not only the representative in question, but also any administrative unit within the company, a proper reading of "notification of those concerned" in Article 119 EPC should in this case, where the CIP Unit of the patentee was indicated on the address, be construed to mean that the letter should at least have reached this CIP Unit in order to be deemed properly delivered. In other words, where there was a unit within the patentee's company, the white slip of delivery ordinarily signed by the responsible representative needed to be signed and returned by such unit in order to speak of a proper notice of those concerned. To that extent, the case before the Board was different from that of decision **T 743/05** of 12 October 2006, as that case concerned a firm of patent attorneys rather than a company with a specific administrative unit competent to handle patent matters. Should the Board find otherwise, the patentee requested a referral of the following question to the Enlarged Board of Appeal:

"Where an applicant or proprietor has complied with the requirements of Rule 26(2)(c) and (d) and provided the EPO with an address comprising all relevant administrative units, and, pursuant to EPC Rule 78(2) it is incumbent on the European Patent Office to establish that a letter has reached its destination or to establish the date on which the letter was delivered to the addressee, is it necessary for the European Patent Office to establish delivery to said administrative unit?"

The opponents on the other hand maintained that notification to an "authorised person" is sufficient

for delivery even in the absence of advice of delivery on file. They pointed to the decisions **T 247/98** of 17 June 1999, **T 743/05** (supra), **T 172/04** of 13 December 2005 and, *a contrario*, **J 35/97** of 7 June 2000. In their view, also the fact that neither the German nor the French versions of Rule 78(2) and Article 119 EPC made a distinction between delivery and "those concerned" spoke against the interpretation as advanced by the patentee. Furthermore, the notification as published in **OJ EPO 1991, 577/578** made clear that the return of the white slip could not create an additional requirement of proof for the Office.

The arguments for and against a *restitutio in integrum* were divided into three parts. First, whether the request and the reasons for it were filed in due time. Second, whether all due care had been taken, and, third, whether the omitted act had been performed in due time. In view of the Board's decision on the second count, only the first two issues were further elaborated in oral proceedings.

Regarding the first count of timeliness of the request for *restitutio*, the patentee argued that a removal of the obstacle only occurred in April once the appellant obtained knowledge that the decision of 19 October 2006 had indeed been delivered. Knowledge was obtained by the formalities officer's fax of 3 April 2007. The cause of non-compliance was the failure of notification and this was only remedied on that date. The appellant relied on the decisions **J 22/92** of 15 December 1994, **T 324/90 OJ EPO 1993, 33** and particularly **T 191/82** of 16 April 1985 that in the case of missed time limits held that the two months period would only run once the

appellant "is made aware that a time limit has not been observed." As the two months time limit set forth in Article 122 EPC was meant to allow the appellant to properly investigate the facts, such period could not have started on 2 February 2007, as at that stage a proper investigation would not have been possible. Only the additional information about the tracking number furnished with fax of 3 April 2007 allowed the patentee to make an investigation about the whereabouts of this letter and resulted in the patentee's acknowledgment that the letter had indeed been received and signed for by an employee of TNT on 26 October 2006.

The opponents on the other hand advanced the argument that the non-compliance with a time limit referred to the period of appeal, and the omitted act to the filing of such an appeal. However, the omitted act of filing an appeal could have been completed by the time the patentee became aware that the appeal had not been filed, and this was upon the file inspection on 2 February 2007. For the two month period of the request for *restitutio* it was not material when the patentee knew that an error had been made, but when the patentee had the possibility of completing the omitted act. This led to the conclusion that while the request for *restitutio* as filed on 2 April 2007 was in time, the patentee was barred from adding further points to its case by the letters of 31 May and 24 August 2007. The opponents in this respect relied on cases **J 17/89** of 9 January 1990 and **T 13/82** OJ EPO 1983, 411.

Regarding the question whether all due care had been taken by the patentee, the latter pointed to decision **T 30/90** of 13 June 1991 that had established the

standard of the observant patentee. According to **J 2/86** of 21 October 1986, it was up to the patentee to show that there was an isolated mistake, according to **T 130/83** of 8 May 1984 that proper cross checks had been made, according **T 949/94** of 24 March 1995 that reasonable supervision had been in place and according to **T 381/93** of 12 August 1994 that a reliable carrier had been employed. For persons carrying out routine tasks, not the same diligence could be required as for a representative. In this particular case, the patentee pointed to the affidavits of Dr Giddings of the CIP Unit and of Mr Daubrey of TNT in order to show that both had properly working systems in place to make sure that any incoming, registered mail was properly accounted for and taken care of. Dr Giddings had pointed out that in his 24 years with the company, no such event as this had ever occurred, and the patentee concluded therefrom that the occurrence was indeed an isolated mistake. A cross check of TNT with the CIP Unit was proven by point 11 of Mr Daubrey's declaration, i.e. that a member of the TNT staff would present the mails and delivery notes to a member of staff of the patent administration team of the CIP Unit that verified the number of pieces identified with the number of items of mail being received. The fact that the mail room data base records of 26 October 2006 were no longer available, as these were routinely destroyed after half a year, in this case apparently after the request for *restitutio in integrum* was made, according to the patentee was lamentable, but by no means fatal or even relevant for the question if all due care had been taken. Asked by the Board, the patentee was unable to give any particulars about the name, professional background, or precise supervision of the person who

had signed for receipt of the letter on 26 October 2006.

The opponents argued that no due care had been taken already in view of the fact that the patentee could not indicate what had gone wrong in this particular case, who the employee was that had accepted the letter, and what his training and instructions were. The case **J 12/84** OJ EPO 1985, 108 required a sufficient supervision that had not been proven in this case. There were no failsafe mechanisms as required by **T 686/97** of 12 May 1998, or an individual control system as in **T 283/01** of 3 September 2002. The fact that records were deleted after the request for *restitutio* was made showed that there was incomplete supervision of the TNT postal department.

- XI. As main request the patentee (appellant) requested that the appeal be admitted, in the auxiliary that the question reported above be referred to the Enlarged Board of Appeal, further in the auxiliary that the request for *restitutio in integrum* be granted.

The opponents (respondents) requested that the appeal be considered inadmissible and that the request for *restitutio in integrum* be refused.

Reasons for the Decision

1. *Admissibility of the appeal*

- 1.1 The appealed decision was issued on 19 October 2006, and the appeal period of two months according to

Article 108 EPC expired on 29 December 2006, taking into account the 10 days period of postal delay as stipulated by Rule 78(2) EPC. The time limit so calculated is applicable "unless the letter has failed to reach the addressee or has reached him at a later date", Rule 78(2) EPC. The patentee indeed argues that the letter containing the decision never reached the addressee, and knowledge of the decision was only obtained by way of file inspection on 2 February 2007. It was then on 2 February 2007 that the patentee in a letter addressed to the Office indicated that "we hereby appeal the decision and request that the EPO withdraw the required appeal fee from the GlaxoSmithKline deposit account."

- 1.2 Decisions such as the one at issue are notified by registered letter with advice of delivery. Unlike in the case of the opponents, the patentee's pink advice of delivery was never returned to the Office. Neither did the Office receive the white standard acknowledgement of receipt mentioned in **OJ EPO 1984, 325** and **OJ EPO 1991, 577/578**. Absence of these two documents does not necessarily indicate failure of delivery, however (**T 247/98**, supra point 2.6 of the Reasons). The information in **OJ EPO 1991, 577** under point 1(b) specifically mentions that "as a result of differing delivery regulations in the individual Contracting States, advices of delivery are often either not returned to the European Patent Office at all or else returned without being completed at the receiving end." Absence of the advice of delivery or acknowledgement of receipt make it more onerous, however, for the European Patent Office to prove in the event of any dispute that a letter has reached its

destination. But also the party that contests proper notification is under a duty to investigate the whereabouts of the letter in question and is not entitled to "sit back and wait if the European Patent Office will probably succeed in finding out when the letter has been received by the party", **T 247/98** supra point 2.4 of the Reasons.

1.3 In this case, the patentee most helpfully conducted an enquiry, and the letter of 31 May 2007 indicated "that a member of staff in the Proprietor's Mail Room signed for the receipt of this tracking number on 26th October", thereby acknowledging that the decision was indeed received in the patentee's mail room within the 10 days period stipulated in Rule 78(2) EPC. The patentee later qualified this statement in that the person who signed for the letter was not an employee of the patentee, but of a company TNT that received letters on behalf of the patentee. Nothing turns on this difference, however. At no point did the patentee contest that the person who received the letter and whose name the patentee could not give to the Board was not authorised to receive mail on behalf of the patentee.

1.4 According to the patentee, the letter was not properly delivered, as this would require notification to "those concerned", as stipulated by Article 119 EPC. The patentee argued that notification of those concerned would have required the letter to reach if not the representative, then at least the CIP Unit as the "Administrative Unit" mentioned in Rule 26 EPC. To the extent that Rule 26 EPC required that such Administrative Unit, here the CIP Unit, be mentioned in

the address, proper notification according to Article 119 EPC would require receipt of the letter by this Unit.

- 1.5 The most relevant case law seem to be the decisions **T 172/04** (supra) and **T 743/05** (supra). In both cases, an authorised person had received notifications from the EPO that were addressed to a specific representative. In both cases, the latter had received these notifications only sometime later, but this was deemed immaterial. The relevant passages in **T 172/04** (point 4 of the Reasons) read as follows:

"The notification system by registered letter under Rule 78(c) of the EPC implies that such a notification is delivered at the addressee and in the present case the appellant has never disputed that the correct addressee was the firm of its representative and has admitted that the notification concerned was received by an employee authorised to receive post on behalf of the appellant.

The circumstance that the representative himself only had knowledge of the notifications several days or weeks later is not evidenced and, furthermore, even if it was the case, would be irrelevant as in the present case the only legal condition to consider i.e. delivery at the addressee is established."

In the case **T 743/05** (supra), the EPO's notification bore the correct name of the professional representative on file and it was never argued that the person who signed the advice of delivery had not been authorised to act on behalf of the professional

representative. Under these circumstances, the Board rejected the appellant's view that "delivered to the addressee" meant that the notification had to be actually brought to the attention of the professional representative in person:

"The circumstance that the professional representative himself had knowledge of the notification only several days later than the tenth day after posting is irrelevant since the only condition to be fulfilled is the delivery to the addressee, i.e. to the firm of the appellant's representative.

The appellant's interpretation would lead to an inextricable situation which would have as a consequence uncertainty for all the users of the European patent system.

The answer to the question whether notification has effectively taken place could in that case depend entirely on the honesty, goodwill or organisational skills of the professional representative.

When receiving a notification of a decision at his office he could unilaterally decide when to accept delivery of the decision and thus determine at will when the time limit for lodging an appeal or filing a statement of grounds of appeal would start to run.

Thus, decisions adversely affecting the party in question might never have been delivered to the addressee. This cannot be the case." (points 1.6 and 1.7 of the Reasons).

1.6 The two above-mentioned decisions stipulate that when a letter is addressed to a representative, delivery is deemed to have been effected once a person authorised by the representative signs for receipt of the letter. In the case at issue, the addressee of the letter was also an authorised representative, Mr Stott. Mr Stott, however, was not working for a firm of professional representatives, but was an employee of the patentee. Still, the Board fails to see why for the question of proper delivery it should make a difference whether the representative was organised in a firm of representatives or working in house, and what the organisational addition of an in house Central Intellectual Property Unit should change in this respect. If the patentee was correct in its approach, proper delivery and proof thereof would depend on the internal organisation of the addressee's company that, taken to the extreme, could set up quite a number of administrative units indicated in the address, thereby ring fencing the addressed representative and, again in the extreme, "unilaterally decide when to accept delivery of the decision" (T 743/05, supra). But this is exactly what Article 119 and Rule 78 EPC are meant to avoid. For reasons of legal certainty, delivery to the addressee is effected once a person authorised by the addressee has received the letter. Everything else belongs to the internal organisation of an addressee's firm or company, and is not of the EPO's concern.

1.7 Thus, the decision of the opposition division of 19 October 2006 has been received by the patentee within the 10 day period stipulated in Rule 78(2) EPC, and the appeal period ended on 29 December 2006. The appeal of 2 February 2007 was therefore filed out of

time, and the appeal fee was paid late, too. Bar a *restitutio in integrum*, and in line with decisions **J 16/82** OJ EPO 1983, 262 and **T 324/90** (*supra*) the appeal is deemed not to have been filed and the appeal fee has to be reimbursed.

1.8 Since the position taken by the Board in this case in no way deviates from previous case law, there is no justification for a referral to the Enlarged Board of Appeal. The corresponding request by the patentee is thus refused.

2. *The request for restitutio in integrum*

2.1 The request for re-establishment of rights according to Article 122 EPC is allowable on three conditions. First, the request must have been filed within two months from the removal of the cause of non-compliance, second, all due care must have been taken, and, third, the omitted act must have been completed within the two months time period.

2.2 The decision of the opposition division revoked the European patent at issue. The non-observance of the time limit for filing an appeal thus has as its direct consequence a loss of the patent right. Under these circumstances, the patentee has missed a time limit that is open to a request for *restitutio* under Article 122 EPC.

2.3 In view of the sequence of events in this case, the Board needs to ascertain when the cause of non-compliance was removed. The respondents have argued that this was on the 2 February 2007 when the

patentee's representative due to an online file inspection had become aware that something must have gone wrong. The patentee, on the other hand, takes the view that it had only become aware of an oversight when it could be established that the decision of the opposition division had indeed been received. Although it is undisputed that the patentee has indeed made a request for re-establishment of rights on 2 April 2007, the reasons given for the error were only submitted later, once the patentee was in possession of further and better particulars. The patentee relies on the decision **T 949/94** (supra) that sets the date of removal of the cause of non-compliance at the point in time when a party has become aware "that a time limit has not been observed" (point 2.1 of the Reasons). While this may often be so, taken to the extreme in the case at issue it could well mean that such date was only reached once the Board of Appeal decided that the patentee had indeed received notice of the Opposition Division's decision, as up to this point in time the appellant had maintained the view that it had indeed observed all time limits. This view can certainly not be correct. Rather, and in line with the decision **J 9/86** of 17 March 1987, "the 'cause of non-compliance' with the time limit was the fact that the representative was not aware...of the existence of the communication or its contents. The factual situation continued until...the representative investigated the relevant records in relation to this patent application." (point 8 of the Reasons). Thus, the cause of non-compliance was removed once the patent attorney via a file inspection noticed "that something was amiss" (decision **J 17/89** supra, point 4 of the Reasons). This is also in line with other decisions such as

T 191/82 (supra) that set a relevant time limit at the point the representative concerned became aware of the relevant facts. Upon the file inspection on 2 February 2007, the representative became aware that under ordinary circumstances and based on Rule 78 EPC, the period for filing an appeal had been missed. At this point in time he was put in a position to complete the omitted act. It is another matter whether the patentee within two months from 2 February 2007 was able to ascertain all the facts of the case. This was not so. For that reason, and contrary to the position of the opponents, the patentee must be able to complete its case even beyond the period of two-months, and indeed the decision **J 2/86** (supra) supports this view: "In relation to the further evidence filed with the Grounds of Appeal and during the oral hearing, it is noted that, according to Article 122(3), "the application...must set out the facts on which it relies". The admission of further evidence during the appeal stage is a matter of discretion under Article 114(2) EPC, and this discretion is normally only exercised so as to submit further evidence which clarifies the facts which were set out in the application for re-establishment. In the present case the board considers the further evidence to be by way of clarification and therefore admissible." (point 2 of the Reasons). This position was also taken by decision **T 324/90** (supra).

The Board has no doubt that the patentee communicated the facts relevant to its case for re-establishment of rights without delay once it had been in possession of these, and on 2 April 2007 gave an account of all the relevant facts to the best of its knowledge. The Board therefore regards it as appropriate to allow the

patentee to adduce further clarifying evidence supporting its case, as filed on 31 May and 24 August 2007.

- 2.4 In the following, it has to be ascertained whether the patentee has taken all due care in setting up a system for properly monitoring incoming mail. In this respect, the patentee has filed two affidavits in order to prove that both the mail delivery room and the CIP Unit were properly organised and well run.
- 2.5 According to Article 122(3) EPC, it is incumbent upon the patentee to show that all due care has been taken. The patentee therefore has to point out where the mistake or omission occurred and that the occurrence happened despite all due care being taken. In the case at issue, it has been established that the decision of the Opposition Division was duly received by an employee of TNT acting on behalf of the patentee, yet nothing further is known of the whereabouts of this letter. The patentee has demonstrated that the letter was never put into the database of the CIP Unit. The letter might therefore have gone amiss even before it was inserted into the database of the mail room (possibility 1), between the mail room and the CIP Unit (possibility 2), or in the CIP Unit prior to its insertion into a database (possibility 3).
- 2.6 The procedure of forwarding mail to the addressee, i.e. the representative in charge of the case, involved a number of both automated and manual steps. The information to start from is the database by the Royal Mail. Part thereof was the priority services delivery note handed to an authorised person in the mail room,

together with other letters indicated on that list. For the relevant date of 26 October 2006, this delivery note has been provided by the patentee and gives information that the letter in question was delivered together with many others. The next step (presumably carried out by the person signing for the receipt of the letters) would be to log these letters into the incoming consignments database (ICD). The ICD would further identify to which departments the respective registered letters should go. Data of the ICD would then be printed out and taken to the CIP Unit together with the relevant letters in question.

At the CIP Unit, the letters would be opened, classified according to which action would be needed, and the information entered into yet another database that is called the IP Master. The fact that the patentee cannot provide any information of what has happened between the delivery of the letter and the certain fact that it was never entered into the IP Master database is partly due to the fact that the ICD data were kept for half a year only. Data for 26 October 2006 thus were deleted on or around the 26 April 2007, long after the patentee had recognised that something had gone amiss, and even after the request for *restitutio* was made. This as such is not fatal to the patentee's case. However, it makes it more onerous for the patentee to prove that all due care has been taken, as the patentee has to demonstrate this for all the intermediate steps.

- 2.7 Where the patentee relies on persons carrying out duties on its behalf, case law requires proof that these persons have been properly selected, trained and

supervised (**J 2/86** supra, point 3 of the Reasons; **T 949/94** supra, point 3.2 of the Reasons). According to the decision **J 12/84** (supra), "the representative has to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision of the work." (Point 6 of the Reasons). In the case at issue, the patentee was not even able to name the person who had signed for the receipt of the letter, let alone demonstrate that such a person was properly qualified for the tasks he or she was entrusted with. Due to the routine deletion of data, it cannot be demonstrated that the person who signed for the receipt of the letter duly entered the letter into the mail room's database ICD. Neither was it demonstrated that the other persons who worked in the mail room and who might have taken the letter from the mail room to the CIP Unit were properly chosen or trained. Finally, weight must be given to the requirements of a failsafe system (**T 686/97** supra, point 8 of the Reasons), or an effective cross-check as required by **J 9/86** supra, point 9 of the Reasons. Such a failsafe system in the case at issue would have required a regular comparison between the ICD and the IP Master database as run by the CIP Unit in order to discover whether all registered letters logged into the ICD were subsequently also logged into the IP Master. In the system as described by the two affidavits, there is no computerised or manual cross-check between the two databases. Thus, a letter may well be entered into the mail room's database, yet subsequently not into the IP Master without this omission being discovered in due time. It seems to the Board that the two systems as described above do not function as a well organised, uniform entity, but rather as unconnected individual

units whose exchange of information is not such that inconsistencies could be appropriately monitored.

2.8 Each of the above omissions leads the Board to conclude that the patentee cannot be said to have taken all due care in avoiding the letter getting lost and thus in missing the period for filing an appeal.

2.9 On 2 February 2007, the period for filing an appeal had been missed, yet the period for filing the grounds of appeal - had the appeal been filed in time - was still open until the end of that month. On 2 April 2007, the appellant paid one fee for *restitutio* (although at that point in time, also the period for filing the grounds of appeal had been missed), and made the following request:

"to the extent that our letter of 2nd February does not already do so, we hereby complete the omitted act by requesting appeal of the Decision of the Opposition Division (dated 19 October 2006) revoking the patent and request that it is reversed in its entirety. Specifically, we appeal the decision of the Opposition Division that the Main Request contravenes Rule 57a and Articles 123(2) and 123(3) EPC; and we also appeal the decision of the Opposition Division that the Auxiliary Request 1 contravenes Rule 57a and Articles 84, 123(2) and 123(3) EPC."

This undoubtedly was a completion of the omitted act of *filing* an appeal. However, the above statement can hardly be interpreted as *grounds* of appeal, and a corresponding fee for the *restitutio* in this respect was not paid, either.

While this may well be prejudicial to the patentee's case of *restitutio*, the issue can be left open in view of the fact that the patentee has not succeeded in showing that all due care had been taken.

2.10 Accordingly, the patentee's request for *restitutio in integrum* must be refused.

Order

For these reasons it is decided that:

1. The request for a referral to the Enlarged Board of Appeal is refused.
2. The appeal is deemed not to have been filed.
3. The request for *restitutio in integrum* is refused.
4. The appeal fee is reimbursed.

The Registrar:

The Chairman:

A. Wolinski

L. Galligani