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**Datasheet for the decision
of 11 November 2022**

Case Number: T 2012/20 - 3.3.05

Application Number: 17177646.1

Publication Number: 3415222

IPC: B01D53/34, B01D53/50

Language of the proceedings: EN

Title of invention:

AUTOMATIC AMMONIA-ADDING SYSTEM AND METHOD FOR AMMONIA-BASED
DESULFURIZATION DEVICE

Applicant:

Jiangnan Environmental Protection Group Inc.

Headword:

Ammonia-adding system/Jiangnan

Relevant legal provisions:

EPC Art. 110, 111(1), 113(2), 122
RPBA 2020 Art. 12(6)

Keyword:

Re-establishment of rights - (yes)
Late-filed request - should have been submitted in first-
instance proceedings (yes)

Decisions cited:

G 0012/91

Catchword:



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Case Number: T 2012/20 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 11 November 2022

Appellant: Jiangnan Environmental Protection Group Inc.
(Applicant) Harneys Fiduciary (Cayman) Limited,
4th Floor, Harbour Place,
103 South Church Street,
P.O. Box 10240,
Grand Cayman (KY)

Representative: Croce, Valeria
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 18 September
2020 refusing European patent application No.
17177646.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman E. Bendl
Members: G. Glod
P. Guntz

Summary of Facts and Submissions

- I. The examining division refused European patent application EP 17 177 646.1 on 18 September 2020 for non-compliance with Articles 83 and 84 EPC.
- II. The applicant (appellant) filed notice of appeal on 13 November 2020 and paid the reduced appeal fee according to Article 2(1), item 11, of the Rules relating to Fees.
- III. On 24 November 2020 the examining division informed the appellant that no declaration concerning whether the appellant was an entity according to Rule 6(4) and (5) EPC had been submitted.
- IV. On 23 December 2020 the board issued a communication asking the appellant to provide, within a period of two months, sufficient information and evidence to prove that the prerequisites of the aforementioned Rules were in fact fulfilled.
- V. On 18 January 2021 the appellant requested re-establishment of rights with respect to payment of the appeal fee and paid said fee as well as the fee for re-establishment of rights. In addition, the grounds of appeal were filed together with a main request. The following documents were also submitted:

A1: Ministero della Salute, Ordinanza, 4 November 2020

A2: Il Presidente del Consiglio dei Ministri, decreta,
3 November 2020

A3: Fee for appeal, information from the examining
division, 24 November 2020

- VI. In response to the communication pursuant to Article 15(1) RPBA 2020 of 6 July 2022, the appellant filed a reply and further arguments on 6 September 2022.
- VII. Oral proceedings took place on 11 November 2022, during which the appellant submitted an email exchange between the appellant's representative and her assistant. This email exchange is part of the file excluded from inspection (Rule 144(d) EPC).
- VIII. The arguments of the appellant relevant to the present decision concerning re-establishment of rights are reflected in the reasoning below.

Concerning the amended claim request, the appellant pointed out only that the wording of the amended set of claims was clear and that the requirements of Article 83 EPC were met.

- IX. The appellant requested that the re-establishment of rights be granted and that the appeal be deemed filed. In the alternative, they requested that the appeal fee be deemed to have been paid within the relevant time limit. The appellant also requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request as submitted with the statement of grounds of appeal.

Reasons for the Decision

1. Article 122 EPC: Re-establishment of rights
 - 1.1 Considering points III. and V. above, the requirements of Rule 136(1) and (2) EPC are met and the request is thus admissible.
 - 1.2 Under Article 122(1) EPC, for re-establishment of rights to be allowed the applicant must show that they missed the time limit despite taking all the due care required by the circumstances.

The case law has established the criterion that due care is considered to have been taken if non-compliance with the time limit results, for example, from exceptional circumstances (see Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, III.E.5.3).

- 1.3 In the present case the representative had instructed the assistant via email (13 November 2020, 10:41 hrs) to promptly file an appeal. It was also indicated in the email that filing the appeal well before the expiry of the time limit would allow any possible shortcomings to be addressed, if needed. In view of the representative's submissions and the wording used in that email, it is accepted that the representative and the assistant had already been working together for a long time and that the assistant was apparently familiar with filing an appeal. It is also apparent from the file that, as a result of the representative's email, the appeal was filed on the same day (electronic receipt of the appeal generated on 13 November 2020 at 14:00 hrs) and an appeal fee was paid. In the notice of appeal "the appeal fee" is mentioned, whereby no reference is made to a reduced fee. The board concludes

from the evidence presented that the assistant knew how to file the appeal and how to pay the appeal fee, but, for whatever reason, paid the reduced fee instead of the normal fee.

- 1.4 The European Patent Office provides on its home page a section containing FAQ (Frequently Asked Questions) concerning amended Article 2(1), item 11 RFees relating to the reduction of the appeal fee (<https://www.epo.org/service-support/faq/procedure-law/appeal-fee-reduction.html>). The question "*What does the EPO do if a declaration appears to be missing on the date of payment of the reduced fee for appeal?*" is answered as follows:

"If an appellant pays the reduced amount of the appeal fee without filing the necessary declaration, the EPO will proceed as follows: If the period for paying the appeal fee has not yet expired, a warning letter will be issued to inform the appellant that no declaration has been received by the EPO. If the time limit under Article 108 EPC has not yet expired, the appellant can either pay the missing amount to the full fee or file the missing declaration. Should the appellant omit to pay the missing amount or not file the declaration within the time limit under Article 108 EPC, the appeal may be deemed not to have been filed or the appeal may be considered inadmissible."

This information was already available when the notice of appeal was filed in the present case, as transpired from a check with the Wayback Machine "archive.org".

- 1.5 It is evident that a representative reading this information expects to be promptly warned if a deficiency is apparent. In the case at hand, such a deficiency was readily recognised by the

European Patent Office, as can be seen from EPO Form 2901 (see A3). The latter was generated on 17 November 2020 (date at the bottom of the form), but post-dated 24 November 2020 - which is the normal procedure within the EPO (see, for example, G 12/91, Reasons 9.1) - and sent via registered mail. It was received by the appellant on 9 December 2020. Although registered mail was the official way of communication of the EPO, a representative reading the above response of the EPO to the FAQ would have expected the warning to be forwarded by the fastest possible means, especially if the time limit for paying the appeal fee had not yet expired, but was close to expiry.

This is all the more applicable, since at that time the restrictions due to the COVID-19 pandemic were highly likely to impact the normal functioning of postal services (see also A1 and A2). In particular, the EPO itself used electronic means, namely the Zoom platform, to hold oral proceedings, and it is thus very surprising that appropriate electronic means were not used to warn applicants. In addition, the change in format of oral proceedings before the examining division to videoconference was announced by telephone on 9 July 2020 and this was promptly confirmed via email by the appellant. Registered mail was not used in either case. This undermines the understanding that there was a legitimate expectation on the part of the representative that the office would (additionally) communicate at that time by other means rather than normal postal service if a warning was to be issued close to the expiry of a time period.

- 1.6 The fact that the representative specifically indicated in her email to the assistant that the appeal should be filed some time before expiry of the time limit to

allow possible shortcomings to be overcome indicates that the representative probably relied on the information provided by the EPO. The principle of the protection of legitimate expectations applies to courtesy services provided by the EPO where these are not worded so as to rule out any misunderstanding on the part of a reasonable addressee (see Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, III.A.3.2).

- 1.7 In view of all these factors (COVID-19, information provided in FAQ, electronic means previously used by the EPO, filing of appeal more than two weeks before deadline), the board considers that in the particular situation of the case at hand there are exceptional circumstances leading to the conclusion that due care had been taken and consequently justifying the re-establishment of rights.

As a consequence thereof the appeal is deemed to have been filed (see also point V. above).

2. Article 12(6) RPBA 2020

According to Article 12(6) RPBA 2020 the board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal unless the circumstances of the appeal case justify their admittance.

The request at hand was only submitted with the grounds of appeal and there has been no indication as to why that request was only submitted at the appeal stage. It is apparent from the minutes of the oral proceedings before the examining division that the representative

stated and confirmed that no other requests would be filed (see points 9. and 12.). This was also not contested during appeal proceedings.

The decision under appeal does not contain any surprising content which would justify the filing of a new request only at the appeal stage. The objections under Articles 83 and 84 have been present throughout the examination proceedings. It is the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020). Appeal proceedings do not constitute a continuation of examination proceedings.

The request at hand should have been submitted at the latest during oral proceedings before the examining division. All the objections were known and the applicant was explicitly given the opportunity to respond to these objections during the oral proceedings.

Therefore, the board does not admit this request pursuant to Article 12(6) RPBA 2020.

3. No valid request being on file, there is no basis for a patent to be granted (Article 113(2) EPC) and the appeal cannot be allowed (Articles 110 and 111(1) EPC).

Order

For these reasons it is decided that:

1. The appellant is re-established in their rights.
2. The appeal is dismissed.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated