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Anmeldenummer / Filing No / N^o de la demande : 81 304 439.3

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Bezeichnung der Erfindung: Ammonia production process

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : CO1B3/02

ENTSCHEIDUNG / DECISION

vom / of / du 5 February 1987

Anmelder / Applicant / Demandeur : Imperial Chemical Industries PLC

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPO / EPC / CBE Article 122

Kennwort / Keyword / Mot clé : "restitutio in integrum"

Leitsatz / Headnote / Sommaire

**Europäisches
Patentamt**
Beschwerdekammern

**European Patent
Office**
Boards of Appeal

**Office européen
des brevets**
Chambres de recours



Case Number : T 105/85

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 5 February 1987

Appellant : Imperial Chemical Industries PLC,
Imperial Chemical House,
Millbank,
London SW1P 3JF
Great Britain

Representative : Chapman, Kenneth Hazel
Imperial Chemical Industries PLC
Legal Department: Patents
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Decision under appeal : Decision of Examining Division 025 of the
European Patent Office dated 02.10.1984
refusing European patent application
No. 81 304 439.3 pursuant to Article
97(1) EPC

Composition of the Board :

Chairman : K. Jahn
Member : F. Benussi
Member : R. Andrews

Summary of Facts and Submissions

- I. European patent application No. 81 304 439.3 was filed on 25 September 1981 and published under No. 0 049 967 on 21 April 1982.
- II. The European patent application was refused by the decision of the Examining Division of the European Patent Office dated 2 October 1984 for lack of inventive step.
- III. On 26 November 1984 the appellant's representative lodged notice of appeal, which was received on 30 November 1984, against the decision of 2 October 1984 and on 28 January 1985 presented a statement of grounds. The material part of the notice of appeal read as follows: "I hereby file Notice of Appeal against this Decision ...". It made no reference to payment of the appeal fee.
- IV. On 29 April 1985, the Registrar made a finding that the appeal fee had not been paid and therefore that, pursuant to Article 108 EPC, second sentence, the appeal must be deemed not to have been filed and he notified the appellant's representative in accordance with Rule 69(1) EPC, at the same time drawing his attention to Article 122 EPC.
- V. The appellant's representative did not ask for a decision under Article 69(2) EPC but by letter dated 2 May 1985 received on 6 May 1985, he applied under Article 122 EPC for re-establishment of rights and paid the requisite fee and the appeal fee. He admitted that he had personally overlooked the payment of the appeal fee at the time when he approved the notice of appeal.

- VI. In a communication from the Board, the appellant was requested to furnish more information about the facts to establish that all the due care required in the circumstances within the meaning of Article 122(1) EPC had been exercised.
- VII. In response to this request, the representative explained, in a letter dated 7 March 1986, that the letter giving notice of appeal was seen and initialled by a Miss Janet Roe, who, at the time, had replaced for over three months Miss Alison Black, the regular transmission clerk who was in hospital. Prior to taking over the duties of temporary transmission clerk, Miss Roe, a person qualified for university entry, had been instructed by Miss Black for two full days. Furthermore, the representative submitted that Miss Roe's work was also checked daily before dispatch by other staff and a senior Patent Agent; that the policy of the appellant to use debit orders is implemented on a considerable scale, in that the debit orders are compiled by six individual staff members; and that the appellant's system of dealing with correspondence requiring the payment of fees to the European Patent Office is reasonable.
- VIII. The appellant further maintained that the letter dated 26 November 1984 giving notice of appeal, could have been acted on by the Cash and Accounts Department of the European Patent Office as if it had been a debit order.

In this respect he made a reference to the decisions in Case T 152/82, in which it had been held that the European Patent Office is authorised to execute a debit order if the purpose of the payment is clear even when the amount of the fee is not indicated, and in Case T 17/83, in which it had been decided that a letter itself may be considered as a debit order.

IX. At the further request of the Board to file evidence from the relevant employees (preferably by way of affidavit) as to who holds the primary responsibility for the payment of fees such as the appeal fee in question, the representative presented affidavits of three employees : Miss Alison Black, Mrs. G. I. Duncan and Dr. Laird. It appears that Miss Roe, who had replaced Miss Black from September 1984 to January 1985, when asked by the appellant's representative about the instructions received from Miss Black, could not remember either the instructions or the notice of appeal dated 26 November 1984. She has given no evidence.

Reasons for the Decision

1. The appeal fee having been paid out of time, it is necessary for the appellant to have his rights re-established if the appeal is to be considered admissible, unless it is possible to regard the letter giving notice of appeal as equivalent to a debit order, as contended by the appellant.
2. According to Article 122(2) EPC, an application for re-establishment must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. The omitted act must also be completed within this period unless that has already been done.

In the present case, the omitted act was the failure to pay the appeal fee. It has been completed within the prescribed period, namely within two months of the removal of the cause of non-compliance by receipt of the Communication dated 29 April 1985 in which the Registrar of the Board of Appeal notified the appellant of the loss of rights.

The application for re-establishment of rights dated 2 May 1985 was consequently filed within the time limit.

3. However, Article 122(1) EPC, in effect, makes it a condition for re-establishment of rights, that the person applying for re-establishment shows that "all due care required by the circumstances" was taken.

The appellant's representative submits that in the business organisation of the appellant the handling of correspondence with the EPO concerning prosecution falls within the duties of the transmission clerk who also has to handle the equivalent correspondence with patent offices throughout the world by instructing overseas lawyers. In the present case the failure to give a debit order for payment of the appeal fee was due to a mistake of the temporary transmission clerk, Miss Roe, who replaced Miss Black, the regular transmission clerk, who was in hospital at the material time.

Since the responsibility for handling instructions relating to debit orders was that of the regular transmission clerk, the Board has normally to consider whether the employee concerned, replacing the regular transmission clerk, was carefully chosen, properly instructed and reasonably supervised (cf. Decisions of the Legal Board of Appeal in Case J 05/80, OJ EPO 1981, 343, and in Case J 16/82, OJ EPO 1983, 262).

4. In the present case, according to the evidence in the affidavits, the substitute employee, Miss Roe, whose general understanding of the nature of her duties the Board does not doubt, was instructed by Miss Black for only two days, because of Miss Roe's prior commitments. It is asserted by Miss Black that "to the best of her

knowledge" the instructions given included instructions relating to initiation of appeals, opposition proceedings and further processing but the documents that might confirm this have been destroyed. Furthermore, no witness has provided evidence about any other occasion during the period 20 September 1984 to January 1985 on which Miss Roe handled a notice of appeal or opposition or a request for further processing. If there had been such an occasion, evidence about Miss Roe's actions then might have shown that she had been given adequate instructions by Miss Black.

Contrary to the submissions of the representative, it does not appear from the submitted affidavits that Miss Roe's work was checked daily before dispatch by one or two more senior secretaries or clerks of the department familiar with the transmission duties and with the work of Miss Black.

Moreover, Miss Roe, when asked by the appellant's representative about the instructions received from Miss Black, could not remember either the instructions or the notice of appeal dated 26 November 1984.

5. In the Decision in Case J 16/82 (cited above) it was pointed out that the requirements for "all due care" relate not only to the selection and instruction but also to the supervision of a substitute employee. In the present case, such supervision was not properly exercised. A senior Patent Agent was responsible for final supervisory checking and it is admitted that this check failed, but for no particular reason. It is merely asserted that "appeal fees are rare", that the notice of appeal was so written as to resemble routine correspondence and that the representative's office has to handle a considerable volume of mail daily.

6. In the judgement of the Board of Appeal, it does not appear that the conditions for re-establishment of rights are met in the present case. The Board is not prepared to consider that the exercise of all due care required by the circumstances, within the meaning of Article 122(1) EPC, has been established. The appellant cannot therefore be granted re-establishment of rights in respect of the failure to meet the time limit for paying the appeal fee.

7. With reference to the submission advanced by the appellant's representative that the letter of 26 November 1984, should be regarded in substance as equivalent to a debit order, the Board of Appeal cannot see in this letter any basis for such a submission. It is not possible to read into it any instruction to debit the appellant's account or any assertion that a debit order had been issued. Therefore, the Board does not see any possibility to rely upon the decisions T 17/83 and T 152/82 mentioned by the appellant. Nor would it be a proper extension of these cases to accept the appellant's representative's argument that a debit order must be implied because the notice of appeal would have been frivolous if it had not been intended to pay the appeal fee. If such were the law, the debit order system would be open to abuse and the complications resulting from double-debitting could be serious both for applicants and for the EPO.

8. Since re-establishment of rights is not possible, the appeal must be deemed not to have been filed (Article 108, second sentence EPC) because the appeal fee was not paid within the time limit for appeal. There is no appeal in existence. The appeal fee must therefore be reimbursed, without the Board of Appeal having to make any specific order to that effect.

Order**For these reasons it is decided that:**

1. The application for re-establishment of rights, in respect of the time limit for paying the appeal fee, is refused.
2. The appeal against the Decision of the Examining Division of the European Patent Office dated 2 October 1984 is deemed not to have been filed.

The Registrar

The Chairman

Rbe
R. W. A.
R. W. A.

Palmer