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**D E C I S I O N**  
of 13 March 1996

**Case Number:** T 0111/95 - 3.3.2

**Application Number:** 91305119.9

**Publication Number:** 0468627

**IPC:** C03C 27/06

**Language of the proceedings:** EN

**Title of invention:**

Method for bonding together hollow glass spheres

**Applicant:**

British Gas plc

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 116

EPC R. 71(1)

**Keyword:**

"Oral proceedings - Proposed date - Acceptance"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0111/95 - 3.3.2

**· D E C I S I O N**  
**of the Technical Board of Appeal 3.3.2**  
**of 13 March 1996**

**Appellant:**

British Gas plc  
Rivermill House  
152 Grosvenor Road  
London SW1V 3JL (GB)

**Representative:**

Morgan, David James  
British Gas plc  
Intellectual Property Department  
59 Bryanston Street  
London W1A 2AZ (GB)

**Decision under appeal:**

**Decision of the Examining Division of the European  
Patent Office posted 11 August 1994 refusing  
European patent application No. 91 305 119.9  
pursuant to Article 97(1) EPC.**

**Composition of the Board:**

**Chairman:** P. A. M. Lançon  
**Members:** M. M. Eberhard  
J. Van Moer

### Summary of Facts and Submissions

I. Patent application No. 91 305 119-9 was filed on 6 June 1991 and published on 29 January 1992 under EPO number 0 468 627.

II. On 23 June 1994 the examining division telephoned the applicant's professional representative in order to arrange a date for oral proceedings.

According to the examining division it suggested two dates in November and any date between 1 and 14 July 1994 (apart from 4 and 6 July), and the representative provisionally accepted the date of 12 July 1994.

Later on the same day, 23 June 1994, the representative telephoned the examining division. According to the examining division the representative indicated that the date of 12 July 1994 was no longer convenient, suggested instead either 14 or 15 July 1994 and asked the examining division to confirm one of these two dates.

III. The examining division says that it telephoned the representative on 24 June 1994, informing him that the date finally adopted was 14 July 1994 and says that the representative accepted this date.

IV. At 16.00 hrs on 28 June 1994, in a telefax to the examining division, the representative stated that he was no longer available in July or August and suggested agreeing on a date sometime in September or October 1994.

V. On 29 June 1994 the examining division summoned to oral proceedings on 14 July 1994. In a communication annexed to the summons it stated that the communication confirms the telephone conversation of 23 June 1994 between the

first examiner and the representative and that the representative informally accepted the first date suggested on the enclosed form.

- VI. On 30 June 1994 the examining division sent a telefax maintaining the date of 14 July 1994.
- VII. On 4 July 1994 the representative sent a telefax restating his disagreement, referring to his previous telefax and pointing out that a two-month period of notice for the summons was applicable.
- VIII. On 8 July 1994 the examining division sent a letter maintaining that the date of 14 July had been accepted on 24 June and that the other dates, 11 and 21 November, were no longer available.

It also stated that the two-month period of notice did not have to be respected if the date for oral proceedings had been accepted by the party.

- IX. On 12 July 1994 the representative sent a telefax confirming his position, stating that his acceptance of 14 July had been provisional and had subsequently been retracted. He cited Rule 71(1) and the period of notice it stipulates.
- X. On 13 July 1994, in a telefax sent at 16.05 hrs, the examining division maintained the date that had been fixed, claiming that it had been accepted unconditionally and that normally, once a summons had been issued, exceptional circumstances as outlined in the Notice from the European Patent Office in OJ EPO 4/1989, pages 132-134, are required to justify a change in the date.

XI. On 13 July 1994, in a telefax sent at 16.15 hrs, the representative's office informed the examining division that, for the reasons explained earlier, the representative would not be attending oral proceedings.

XII. By a decision dated 14 July 1994, given at 9.35 hrs in the absence of the representative and of the party and posted on 11 August 1994, the examining division refused the patent application.

According to the decision, there was no doubt that the representative had accepted the date of 14 July 1994 unconditionally and that Rule 71(1) therefore did not apply.

XIII. On 14 July 1994, in a telefax sent at 11.43 hrs, the representative re-stated his version of events and his arguments.

XIV. The applicants lodged an appeal with a statement of grounds on 24 September 1994, having paid the fee on 21 September 1994.

They request that the decision be set aside and that a patent be granted on the basis of the claims and description annexed to the statement of grounds.

XV. Reimbursement of the appeal fee is not requested.

### Reasons for the Decision

1. Rule 71(1) EPC stipulates that, unless the parties agree to a different period, at least a two months' notice must be given in the summons to oral proceedings provided for in Article 116 EPC.
2. As no such agreement was reached in the present case, the examining division had no right on 29 June 1994 simply to set a date for oral proceedings on 14 July 1994.
3. Clearly, the onus of proving that such an agreement was reached lies with the examining division as the party making the claim. Equally clearly, the fact that one of the parties (in this case the examining division) insists - repeatedly - that such an agreement existed does not constitute legal proof that this was so.
4. There is nothing on file to establish that the applicants' representative, at any time and unconditionally, accepted the date of 14 July 1994.

On the contrary, at 16.00 hrs on 28 June 1994, i.e. before receiving the summons, he sent a telefax stating that he was no longer able to attend oral proceedings in either July or August. He confirmed afterwards that his acceptance on 24 June had only been conditional.

Furthermore, even if the statements made by the representative could be construed as an admission that an agreement had been reached, this admission is not clear-cut, since the agreement was not given unconditionally.

Such an admission cannot be broken down and used against the person who made it except if the falsity of one or more of its elements, in this case the conditions attached to it, is established.

The onus of proving this point again lies with the examining division, and in the board's view it has clearly failed to do so. In these circumstances, whether or not, the examining division was aware of the fax of 28 June 1994 when the summons were sent is irrelevant.

5. The period of notice was not respected in the summons of 29 June 1994, which is therefore null and void, as are the actions that followed it and which were the result of it.
6. Accordingly the matter is to be remitted to the department of first instance in order to resume the proceedings at the stage reached prior to the action which has now been declared void.
7. Finally, given the circumstances of the case, and with a view to ensuring that proceedings can continue with the requisite calm and without arousing the slightest suspicion - however irrational and unjustified - the board suggests that the composition of the examining division be changed.

**Order**

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

1. The appeal is admissible.
2. The decision is set aside.
3. The summons issued on 29 June 1994 and all subsequent actions are declared null and void.
4. The matter is remitted to the department of first instance with the order to resume proceedings at the stage reached prior to the summons of 29 June 1994.

The Registrar:

The Chairman:

P. Martorana

P. A. M. Lançon