

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen

D E C I S I O N
of 25 March 1998

Case Number: T 0732/96 - 3.3.1

Application Number: 88114801.9

Publication Number: 0308752

IPC: D21H 23/76

Language of the proceedings: EN

Title of invention:
Method for dewatering paper

Patentee:
Nalco Chemical Company

Opponent:
Eka Chemicals AB

Headword:
Re-establishment/NALCO

Relevant legal provisions:
EPC Art. 122(1)

Keyword:
"Due care on the part of the representative (no)"

Decisions cited:
-

Catchword:
-



Case Number: T 0732/96 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 25 March 1998

Appellant:
(Proprietor of the patent) Nalco Chemical Company
One Nalco Center
Naperville
Illinois 60563-1198 (US)

Representative:
Hartmann, Günter, Dr. Dipl.-Chem.
Ruschke Hartmann Becker
Pienzenauerstrasse 2
81679 München (DE)

Respondent:
(Opponent) Eka Chemical AB
445 80 Bohus (SE)

Representative:
Schöld, Zaid
Eka Chemicals AB
Patent Department
Box 11556
100 61 Stockholm (SE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 5 June 1996
revoking European patent No. 0 308 752 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: A. J. Nuss
Members: R. E. Teschemacher
P. Krasa

Summary of Facts and Submissions

- I. European patent No. 0 308 752 was revoked by a decision of the Opposition Division posted on 5 June 1996, due to lack of inventive step.
- II. In a letter received on 8 August 1996, the Proprietors' representative filed a notice of appeal and paid the respective fee on the same date. The statement of grounds of appeal was not received until 27 December 1996. On the same date, a request for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal was filed and the respective fee was paid.
- III. In support of this request, the Appellants submitted that, on receipt of the decision under appeal, the responsible secretary in the representatives' office had not entered the time limit into the diary system contrary to the instructions given for registering time limits. In the firm of representatives there existed two separate offices, one for the representatives H. and O. R., the other for the representatives B. and H.E. R.. The EPO had indicated in the address of the decision under appeal Mr. H.E. R. instead of Mr. O. R.. This may have caused the decision to arrive in the wrong office. Whereas in the end the decision was placed in the correct file, the time limit was not entered into the diary system. The reason therefor could no longer be ascertained. The secretary responsible could not remember this individual case. Nevertheless, the notice of appeal was filed by Mr. H. in due time in reaction to an instruction received from the clients. On 14 October 1996, Mr. O. R. left the

partnership, inadvertently taking the file with him. He returned the file on 29 October 1996. On checking the file, Mr. H. realised that the statement of grounds of appeal had not been filed in due time.

IV. In reply to a communication from the Rapporteur, the communication accompanying the summons and in the oral proceedings, the Appellants submitted the following in addition:

In the representatives' office the instruction was given to put a receipt stamp on communications from the EPO triggering a time limit. At the same time, the time limit was to be entered into the diary book and a handwritten note on the entering of the time limit was to be made on the communication below the receipt stamp. It was not possible to ascertain why the receipt stamp with the indication of the entry of the time limit was missing from the file copy of the decision under appeal. The document in the file was possibly a copy of the original.

When preparing the notice of appeal, there was no reason for the representative to check the correctness of the entry in the diary book, since the notice of appeal as well as the corresponding information letter to the client gave a clear indication to the secretariat that there was still an open time limit to be monitored. In addition, it was reasonable to assume that this time limit was noted on the original of the communication and registered correctly in the diary book. Finally, the representative could expect that the file would be resubmitted to him with the additional information for the grounds of appeal announced by the clients.

V. The Respondents submitted that not all due care required to comply with the time limit had been taken. There were several opportunities for the representative to check whether the time limit had been entered correctly. When the clients' instructions to file the appeal were received there were good grounds to check the data in the diary system. By not checking the diary system, the representative had taken an unjustified risk. Furthermore, there was no evidence that the secretariat had been properly instructed in respect of the registration of the time limit to be observed. The undefined roles of the several partners who were active in this case and the removal of the file from the office for a certain period involved additional risks. Finally, the representative who did not receive the announced information from the client should have tried to obtain clear instructions.

VI. The Appellants requested that their rights be re-established and that the decision to revoke the patent be set aside.

The Respondents requested that the request for re-establishment of rights be refused and the appeal be rejected as inadmissible.

Reasons for the Decision

1. The decision under appeal was posted on 5 June 1996 and was deemed to have been delivered on 15 June 1996 (Rule 78(3) EPC). The time limit for filing the statement of grounds of appeal, therefore, expired on

15 October 1996 (Article 108, third sentence, EPC and Rule 83(4) EPC). Thus, the statement of grounds of appeal was not filed within the prescribed time limit. The non-compliance with the time limit has the effect that the appeal is to be considered as inadmissible. *Restitutio in integrum* is available in this situation (Article 122(1) EPC).

2. According to the Appellants' submissions, the failure to observe the time limit was detected by Mr. H. after the file had been returned by Mr. O. R. on 29 October 1996. On that basis the request for re-establishment can be considered to have been filed within the time limit according to Article 122(2) EPC.
3. The Appellants have, however, not shown that all due care required by the circumstances was taken to comply with the time limit (Article 122(1) EPC).
 - 3.1 In essence, the request is based on the submission that there was an appropriate system for monitoring time limits on which the representatives could rely and that the failure to comply with the time limit was due to an isolated mistake on the part of an assistant. It may be left undecided whether the submissions justify the conclusion that the failure to enter the time limit in the diary system resulted from an isolated procedural mistake within a normally satisfactory system. There are certain doubts in this respect, in particular since the Appellants failed to submit a declaration by the assistant who is alleged to have made the mistake, or to request that she be summonsed as a witness. The fact that the assistant left the representatives' office is no reason to dispense with clarification of the relevant facts on the basis of what she herself has to

say about the matter. The Board abstained, however, from trying to obtain further clarification in that direction because the request has to fail for the reasons set out below.

3.2 A reliable system for monitoring time limits should ensure that the person dealing with a case is made aware in good time of the acts to be performed. It does not, however, exempt the responsible person from his own obligations when dealing with the case.

3.2.1 When the acting representative was preparing the notice of appeal on the basis of the file, he had to check the applicable time limit of two months, which was to be calculated starting from the date of the decision of the Opposition Division. At the same time the time limit of four months for filing the statement of grounds of appeal was already running, having in fact started together with the time limit of two months.

3.2.2 The representative confirmed in the oral proceedings that it was his obligation to perform both acts, the filing of the notice of appeal as well as the filing of the statement of grounds of appeal. When he was preparing the notice of appeal, the filing of the grounds of appeal was an imminent step. According to the instructions in force in the office, both time limits had to be noted on the cover page of the decision under appeal. The lack of such a note was contrary to what the representative normally had to expect if the relevant instructions had been followed. The missing note could hardly have been overlooked when the date of the decision under appeal was checked for calculating the time limit for filing the notice of appeal.

3.2.3 The representative argued that there was no reason for him to have the diary system checked because the file contained only a copy of the decision. He felt entitled to assume that the receipt stamp with the note on the time limit was on the original decision which, for unknown reasons, was not in the file. A possible explanation for the absence of the original decision from the file was that it had been inadvertently kept with the diary system among documents ready for filing. The Board cannot agree with this argument. The Appellants' representative conceded in the oral proceedings that the purpose of the usual note on documents triggering a time limit is that it can be seen from the file whether the time limit has been correctly registered. This makes sense only if a check actually takes place in particular in cases of doubt. This is especially true if there is no systematic cross-checking of the entries in the diary system, as in the present case. Therefore, the representative could not conclude from the content of the file that the time limit had been entered correctly into the diary system. There was no factual basis for him to rely on the work of the assistant. Rather he had to check why the file did not contain the note on entry into the diary system. This would have revealed that the time limit had not actually been entered and would have avoided the failure to comply with it.

3.2.4 Furthermore, the representative submitted that he had made the secretariat aware of the four months' time limit when, before leaving the office for two weeks, he sent a note to his colleague, Mr. O. R., asking him to check with the EPO whether the notice of appeal and the appeal fee had been received in good time. Annexed to this note were the file copies of the notice of appeal and an information letter to the client. It is true that both documents mention expressly and in emphasized form the time limit for filing the grounds of appeal.

Neither of the two documents is, however, addressed to the secretariat. Therefore, it was not to be expected that the secretariat would derive from it the instruction to check the diary system.

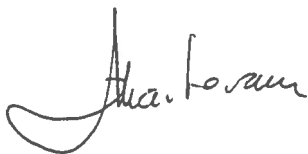
3.2.5 Finally, the representative alleged that he could expect the file to be resubmitted to him after receipt of the information announced from the client. It was, however, not unusual that a statement of grounds of appeal had to be drafted and filed without additional information from the Appellants. The representative was instructed to act in such a situation on the basis of the information available from the file. This shows that there was no certainty that the receipt of information from the client would prompt the secretariat to resubmit the file. This argument must, therefore, also fail.

Order

For these reasons it is decided that:

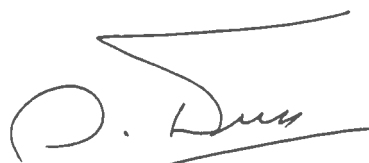
1. The request for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:



P. Martorana

The Chairman:



A. Nuss

T 0732/96

V. 23. 4.

