

BESCHWERDEKAMMERN  
DES EUROPÄISCHEN  
PATENTAMTS

BOARDS OF APPEAL OF  
THE EUROPEAN PATENT  
OFFICE

CHAMBRES DE RECOURS  
DE L'OFFICE EUROPEEN  
DES BREVETS

**Internal distribution code:**

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

**D E C I S I O N**  
of 11. Dezember 1997

**Case Number:** T 1062/96 - 3.3.1

**Application Number:** 89122983.3

**Publication Number:** 0379691

**IPC:** C07C 57/04

**Language of the proceedings:** EN

**Title of invention:**  
Process for preparing unsaturated carboxylic acid or ester thereof

**Patentee:**  
Mitsubishi Gas Chemical Company, Inc.

**Opponent:**  
BASF Aktiengesellschaft

**Headword:**  
Re-establishment/MITSUBISHI

**Relevant legal provisions:**  
EPC Art. 108, 122

**Keyword:**  
"Late-filed statement of grounds"  
"All due care (yes)"  
"Re-establishment (yes)"

**Decisions cited:**  
J 0005/80, J 0002/86, J 0003/86

**Catchword:**



Case Number: T 1062/96 - 3.3.1

I N T E R L O C U T O R Y   D E C I S I O N  
of the Technical Board of Appeal 3.3.1  
of 11. Dezember 1997

**Appellant:** Mitsubishi Gas Chemical Company, Inc.  
(Proprietor of the patent) No. 5-2, Marunouchi 2-chome  
Chiyoda-ku  
Tokyo (JP)

**Representative:** Türk, Gille, Hrabal, Leifert  
Brucknerstrasse 20  
D-40593 Düsseldorf (DE)

**Respondent:** BASF Aktiengesellschaft  
(Opponent) - Patentabteilung - C6 -  
Carl-Bosch-Strasse 38  
D-67056 Ludwigshafen (DE)

**Representative:** -

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 25 October 1996  
revoking European patent No. 0 379 691 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** A. J. Nuss  
**Members:** R. E. Teschemacher  
P.-P. Bracke

## Summary of Facts and Submissions

- I. European patent No. 0 379 691 was revoked by a decision of the Opposition Division dated 25 October 1996.
- II. In a letter received on 6 December 1996, the Patentee's representative filed a notice of appeal against this decision, paying the appeal fee on the same day. In a letter dated 4 March 1997 and received on 5 March 1997, he filed the written statement setting out the grounds of appeal. In a communication dated 14 March 1997, the Registrar of the Boards of Appeal informed the Appellant that the statement of grounds of appeal had not been filed in due time and drew his attention to the possibility of filing a request for re-establishment of rights under Article 122 EPC.
- III. On 12 May 1997, the Appellant filed a request for re-establishment of rights, stating the grounds on which it was based, and paid the appropriate fee on the same date. He supplemented his submissions in reply to a communication from the Board.
- IV. The Appellant's submissions may be summarised as follows:

The statement of grounds of appeal was finished on 4 March 1997, the due date for it to be filed. After signing the letter, the representative handed it over to his secretary, Mrs. N., with the express order to transmit it on the same date by fax and thereafter as hardcopy by mail to the EPO. Contrary to this order, Mrs. N. transmitted the letter only as hardcopy by mail.

The course of action taken by the representative in this case had been taken in many cases before without causing any mistakes to be made by Mrs. N. who had worked as secretary for almost 10 years and more than 2 years in the representative's office. She had proven to be competent and reliable in her work. Regular supervision over her work by the representative had not given rise to any complaints.

The representative's submissions were corroborated by a declaration (eidesstattliche Versicherung) by Mrs. N. stating that she remembered the representative's oral instruction to send the letter on the same date by fax but that she could not remember why a fax had not actually been sent.

- V. The Respondent has abstained from commenting on the request for re-establishment of rights.

### **Reasons for the Decision**

1. The statement of grounds of appeal has not been filed within the time limit pursuant to Article 108, third sentence, EPC. The decision dated 25 October 1996 was deemed to be delivered on 4 November 1996 (Rule 78(3) EPC). Therefore, the time limit expired on 4 March 1997 (Rule 83(4) EPC). The non-observance of the time limit has the effect that the appeal is to be considered as inadmissible (Rule 65(1) EPC). *Restitutio in integrum* is available in this situation (Article 122(1) EPC).
2. The application for re-establishment of rights fulfils the formal requirements laid down in Article 122(2) and (3) EPC (see above III).

3. The request is allowable since the time limit was missed although all due care required by the circumstances had been taken (Article 122(1) EPC).
- 3.1 The only cause of non-compliance with the time limit was the fact that Mrs. N. did not carry out the representative's order to dispatch the statement of grounds of appeal by fax on 4 March 1997.
- 3.2 The posting of a letter prepared and signed by the representative is a typical routine task which the representative may entrust to an assistant. In the present case the assistant was expressly instructed to send the letter by fax on the same day. In a properly organized office the representative may rely on the correct execution of such an instruction. The sending of the fax did not require any specialised knowledge or qualification. Therefore, Mrs. N., a secretary who had proven to be reliable in the daily work of the representative's office, could be expected to do this job within her own responsibility (see J 5/80, OJ EPO 1981, 343). Since the order was to be carried out more or less immediately, a later check whether the fax had actually been dispatched was not necessary. In summary, the Board comes to the conclusion that the omission causing the loss of rights was an isolated mistake which cannot be excluded even in an effective system for monitoring time limits. Article 122 EPC is intended to ensure that, in appropriate cases, a loss of rights does not result from such a mistake (J 2/86 and J 3/86, OJ EPO 1987, 362, reasons 4).

**Order**

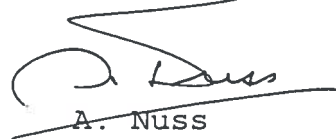
**For these reasons it is decided that:**

The rights of the Appellant are re-established in relation to the filing of the statement of the grounds of appeal within the time limit prescribed by Article 108, third sentence, EPC.

The Registrar:

  
E. Gorgmaier

The Chairman:

  
A. Nuss

$\beta$  10.12.96  
T 10.12.