

ET0097.98 - 013120014

## **DECISIONS OF THE BOARDS OF APPEAL**

**Decision of Technical Board of Appeal 3.3.5 dated 21 May 2001**

**T 97/98\***

(Language of the proceedings)

Composition of the board:

Chairman: R. K. Spangenberg

Members: M. M. Eberhard

M. B. Günzel

**Patent proprietor/Respondent: MINNTECH CORPORATION**

**Opponent/Appellant: Fresenius Medical Care Deutschland GmbH**

**Headword: Spinning process/MINNTECH**

**Article: Art. 107, 100(b), 54, 56 EPC**

**Rule: 64(a), 65(2), 26(2)(c) EPC**

**Keyword: "Admissibility of the appeal (yes)" - "Sufficiency of disclosure (yes)"  
- "Novelty and inventive step (yes)"**

*Headnote*

*Correction of the name of the appellant to substitute a natural or legal person other than the one indicated in the appeal is allowable under Rule 65(2) EPC in*

*conjunction with Rule 64(a) EPC, if it was the true intention to file the appeal in the name of said person and if it could be derived from the information in the appeal, if necessary with the help of other information on file, with a sufficient degree of probability that the appeal should have been filed in the name of that person (point 1 of the reasons).*

### **Summary of facts and submissions**

I. European patent No. 0 579 749 based on application No. 92 910 588.0 was granted on the basis of 21 claims.

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II. The appellant (opponent) filed a notice of opposition requesting revocation of the patent on the grounds of lack of novelty and inventive step and insufficiency of disclosure. ...

III. The opposition division decided to maintain the patent in an amended form, on the basis of the amended set of claims filed on 17 October 1997. ...

IV. An appeal was lodged against this decision by the representative having represented the opponent before the opposition division. ... In a communication issued shortly before the oral proceedings the board raised the question of the admissibility of the appeal in view of a different name stated in the notice of appeal for the opponent as well as in further written submissions. Oral proceedings were held on 21 May 2001. The appellant's arguments can be summarised as follows:

The appeal was admissible. It was not filed in the name of "Fresenius AG". This firm name was erroneously indicated in the notice of appeal as being the name of the opponent. The true intention was to file the appeal in the name of the opponent "Fresenius Medical Care Deutschland GmbH". Correction of the appellant's name was requested. The present situation corresponded to that in case T 340/92. The

appellant provided a copy of the commercial register of Bad Homburg v.d. Höhe, a copy of a letter to the representative dated 16 January 1998 and a copy of an authorisation to Dr Ludt dated 2 September 1996.

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V. The respondent put forward inter alia the following arguments ...

The appeal was filed in the name of the firm "Fresenius AG". No reliable evidence was provided that the intention of the representative was to file the appeal in the name of "Fresenius Medical Care Deutschland GmbH". The additional papers submitted at the oral proceedings made the situation more confused since it was not the same firm which gave the authorisation to Dr Ludt. Therefore, the appeal was inadmissible.

...

VI. The appellant requested that the decision under appeal be set aside and that the patent be revoked. The respondent requested that the appeal be dismissed.

### **Reasons for the decision**

1. Concerning the admissibility of the appeal the question has arisen whether or not the appeal was filed by a person entitled to appeal.

1.1 According to Article 107 EPC only a party to proceedings may appeal the decision. The opposition against the patent-in-suit was filed by "Fresenius Medical Care Deutschland GmbH" and the decision of the opposition division was given to the said company as opponent. In the notice of appeal filed by the representative who had represented the opponent before the opposition division there was no name explicitly indicated as being the name of the appellant, but a "Fresenius AG", i.e. a

different legal person from the opponent, was indicated as "opponent". Such way of designating the appellant is, as a matter of fact, not unusual in notices of appeal, where the opponent becomes appellant. Such an indication is normally intended to be and also accepted as constituting the indication of the name of the appellant as required by Rule 64(a) EPC, in situations where the same representative who represented the opponent before the opposition division filed the appeal (for the corresponding situation where the appellant was only designated as "patentee", see T 867/91 dated 12 October 1993, point 1.1 of the Reasons).

1.2 In response to a communication by the board drawing attention to the fact that the appeal appeared at first sight to have been filed in the name of a legal person other than the opponent and outlining what the legal situation might be depending on the circumstances of the case, which were at that time not known to the board, the representative submitted that "Fresenius Medical Care Deutschland GmbH" and "Fresenius AG" were indeed separate legal persons both existing within the "Fresenius" group of companies. There was no question of any transfer of the opposition. The indication "Fresenius AG" in the notice of appeal simply constituted an error. Although he was authorised generally to act for both companies, it was quite clear from the circumstances of the case that nothing else could have been his true intention than to file the appeal in the name of the opponent who was actually the party to the proceedings before the opposition division, i.e. Fresenius Medical Care Deutschland GmbH, which he had represented in these proceedings. It was thus clear that the name "Fresenius AG" had erroneously been indicated in the notice of appeal as being the name of the "opponent". The representative requested correction of the name of the appellant in accordance with Rule 65(2) EPC to read "Fresenius Medical Care Deutschland GmbH". He referred in this respect to decision T 340/92 dated 5 October 1994, which had been cited by the board in its communication.

1.3 In order to secure correct identification of the appellant and to allow establishment of whether or not the appeal was filed by a party to the proceedings

within the meaning of Article 107 EPC as well as for other, more administrative purposes, Rule 64(a) EPC prescribes that the appeal shall contain the name and address of the appellant in accordance with the provisions of Rule 26 (2)(c) EPC. If the appeal does not comply with Rule 64(a) EPC, according to Rule 65(2) EPC such a deficiency can be remedied within the period specified in the invitation inviting the appellant to remedy the deficiency, even after expiry of the time limit for filing the appeal.

It is the position of the board that there is a deficiency in the indication of the name and address of the appellant within the meaning of Rule 65(2) EPC not only when no such express indications at all have been made in the notice of appeal but also when incorrect indications have been made. Such an understanding corresponds to the normal meaning of the term "deficiency" and to the construction of Rule 65(2) EPC. By referring to Rule 64(a) EPC, which rule again refers back to Rule 26(2)(c) EPC, Rule 65(2) EPC defines when a deficiency exists by reference to all the details of the required indications of name and address laid down in Rule 26(2)(c) EPC. When so many details are required, it is clear that errors may occur which should be corrected. This interpretation of the term "deficiency" underlies the decisions of the boards of appeal which have allowed corrections of wrong indications of the name of the appellant according to Rule 64(a) EPC in conjunction with Rule 65(2) EPC, see e.g. T 340/92 dated 5 October 1994, point 1 of the reasons, and T 1/97 dated 30 March 1999, in particular point 1.4 of the Reasons.

Correction of errors in the name or address of the appellant may be of varying nature. As is the case here, their correction may lead to a different natural or legal person to the one indicated within the time limit for filing the appeal having, after correction, to be regarded as the appellant.

The cited rules of the EPC refer to deficiencies in the indication of the name or address, generally. No distinction is made as to their nature. In the board's view there is nothing in said rules which would allow them to be applied only to certain

kinds of deficiencies and as a matter of principle not when the correction of a wrong indication of the name or address of the appellant leads to a different person to the one originally expressly named in the appeal having to be regarded as the appellant. As has been rightly stated in decision T 1/97, point 1.3 of the Reasons, and as is also the reasoning underlying decision T 340/92, point 1 of the Reasons, it would indeed be inappropriate, if not contradictory, if on the one hand according to Rule 64(a) EPC in conjunction with Rule 65(2) EPC the name of the appellant could expressly be given for the first time after expiry of the time limit for filing the appeal, where no express indication at all was made within the time limit, but on the other hand no correction of the name of appellant were allowable to substitute the name of the person for whom the appeal was actually intended to be filed when the original indications made in this respect were incorrect. In both cases the situation is that on expiry of the time limit for filing the appeal the appeal does not expressly indicate the true name of the person in whose name the appeal was intended to be filed.

What is required under Rules 64(a) and 65(2) EPC is that there was indeed a deficiency, i.e. that the indication was wrong, so that its correction does not reflect a later change of mind as to whom the appellant should be, but on the contrary only expresses what was intended when filing the appeal. It must be shown that it was the true intention to file the appeal in the name of the person, who is, according to the request, to be substituted.

Furthermore, Rules 64(a) and 65(2) EPC cannot be construed as forming an exception to the basic principle that - the requirements for an admissible appeal having to be met on expiry of the time limit for filing the appeal - the appellant must be identifiable at that point in time. It must then be possible to determine whether or not the appeal was filed by a person entitled to appeal in accordance with Article 107 EPC. However, in the Board's judgement, and in accordance with the jurisprudence of the boards of appeal it is sufficient therefor that it is possible to derive from the information in the appeal with a sufficient degree of probability, where necessary with the help of other information on file, e.g. as they appear in the impugned decision, by

whom the appeal should be considered to have been filed, see e.g. T 1/97, point 1.1 of the Reasons and the further decisions cited therein.

1.4 Accordingly, correction of the name of the appellant to substitute a natural or legal person other than the one indicated in the appeal is allowable under Rule 65(2) EPC in conjunction with Rule 64(a) EPC, if it was the true intention to file the appeal in the name of said person and if it could be derived from the information in the appeal, if necessary with the help of other information on file, with a sufficient degree of probability that the appeal should have been filed in the name of that person.

In the present case the appellant's attention was drawn for the first time to the presence of a deficiency by the board's communication dated 17 May 2001. The appellant has therefore by its faxed letter on 18 May 2001 and its submissions and evidence presented during the oral proceedings on 21 May 2001 asked for correction of the appellant's name in time.

1.5 As regards the question of the true intention of the representative who filed the present appeal, the following circumstances can be derived from the evidence submitted:

From the submissions of the representative of the appellant, which were not contested, and from a copy of a commercial register submitted during the oral proceedings it can be concluded that at the time of filing the present appeal several companies existed within the "Fresenius" group of companies. As far as they play a role in the present case these were a "Fresenius AG", a "Fresenius Medical Care AG" and the opponent "Fresenius Medical Care Deutschland GmbH". "Fresenius AG" being the parent company, "Fresenius Medical Care AG" was a subsidiary company and the opponent was in turn a subsidiary company of "Fresenius Medical Care AG".

In a letter dated 16 January 1998 addressed to the representative, the company "Fresenius Medical Care AG" had asked the representative to file an appeal against the decision of the opposition division in the opposition case Fresenius/Minntech Corp. having the reference FR 3033. As can be seen from the notice of opposition the reference FR 3033 is the representative's opposition reference. The letter is signed by a Dr Ludt and a Dr Mathieu. During the oral proceedings the representative also submitted a "Vollmacht" (authorisation) dated 2 September 1996 given by the opponent to Dr Ludt. It appears from the text of the "Vollmacht" that within the "Fresenius" group of companies the patent department of "Fresenius Medical Care AG" was internally entrusted with the task of looking after the patent affairs of the opponent and was authorised to act for the opponent in all patent matters. Therefore, the fact that the instruction to appeal was given to the representative by a person from the patent department of Fresenius Medical Care AG, cannot be understood as meaning that the appeal should be filed in the name of a person other than the opponent, but rather that by giving the instruction to appeal the decision of the opposition division the patent department carried out its internal function of looking after the patent matters of the opponent. There is also no indication that the representative had understood the instruction received differently and intended to act in the name of a person other than the opponent. In the absence of any indication to the contrary it can be presumed that it is clear to a representative that, unless a transfer of rights has been established, an appeal can only be filed by the legal person who was the party to the opposition proceedings and not by another legal person even if belonging to the same group of companies. It can also be presumed that it is the intention of the representative to act in such a way as to ensure that the appeal is admissible in order for it to be dealt with in substance; see in this respect e.g. decision T 920/97 dated 19 December 2000, point 1 of the reasons, where it was stated that in the absence of any clear indication to the contrary a professional representative who was authorised to act for a party adversely affected by a decision and then filed an appeal against this decision must be presumed to be acting on behalf of the same party that he acted for in the first instance proceedings and not on behalf of someone else not entitled to appeal.



Similar considerations underlie decision T 340/92 already cited. During the oral proceedings before the board the representative also submitted, which was again not contested as such, that at the time of filing the appeal the parent company "Fresenius AG", named in the notice of appeal, was no longer active in the field of dialysis and membranes, this having been taken over by the opponent. There is therefore no apparent reason why the representative would have wanted to file the appeal in the name of a company other than the company which was party to the first instance proceedings.

In summary, the overall factual picture of all these elements sufficiently supports the conclusion that the indication "Fresenius AG" in the appeal constituted a genuine error and did not reflect the wish to file the appeal in the name of "Fresenius AG" but that it was the intention of the representative to appeal in the name of the opponent.

1.6 As regards the question of what could be derived from the appeal the board is satisfied that a person not knowing all the details considered here, presented later to the board, could have derived from reading the appeal with the help of the indications in the impugned decision that the party on behalf of which the appeal was intended to be filed was the opponent, i.e. Fresenius Medical Care Deutschland GmbH, since this was the sole opponent, represented before the opposition division by the representative who had filed the appeal. Furthermore, there were no indications on file that a transfer of rights might have taken place in the meantime. Thus, in the present case it could be inferred by a third person from the circumstances of the appeal with a sufficient degree of probability that the opponent should be the appellant.

1.7 The requested correction for the appellant's name to be that of the opponent must therefore be allowed and the appeal is to be regarded as having been filed in the name of the opponent.

The appeal is accordingly admissible.

...

## **Order**

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

The appeal is dismissed.

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\* This is an abridged version of the decision. A copy of the full text in the language of proceedings may be obtained from the EPO Information Office in Munich on payment of a photocopying fee of EUR 0.60 per page.