Internal distribution code:
(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 18 June 2015

Case Number: J 0015/14 - 3.1.01

Application Number: 05820962.8

Publication Number: 1834135

IPC: F24J2/10, F03G6/06

Language of the proceedings: EN

Title of invention:
SOLAR ENERGY COLLECTION APPARATUS AND METHOD

Applicant:
Shec Labs
Solar Hydrogen Energy Corporation

Headword:

Relevant legal provisions:
EPC Art. 122(1)
EPC R. 136, 51(2)

Keyword:
Re-establishment of rights - all due care (no)
Re-establishment of rights - time limit for paying renewal fee

Decisions cited:
J 0019/04

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: J 0015/14 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 18 June 2015

Appellant: (Applicant)	Shec Labs Solar Hydrogen Energy Corporation 2214 Hanselman Avenue Regina Saskatchewan S4R 4K8 (CA)
Representative:	Maillet, Alain Cabinet Le Guen Maillet 5, place Newquay B.P. 70250 35802 Dinard Cedex (FR)
Decision under appeal:	**Decision of the Receiving Section of the European Patent Office posted on 1 April 2014.**

Composition of the Board:

Chairwoman	C. Vallet
Members:	D. Prietzel-Funk
	T. Karamanli

Summary of Facts and Submissions

I. This appeal lies against the decision of the Examining Division dated 1 April 2014 rejecting the appellant's request for re-establishment of rights into the time limit for payment of the renewal fee for the seventh year with surcharge, which expired on 30 June 2012 for the European patent application No. 05820962.8.

II. The renewal fee for the seventh year fell due on 31 December 2011 but was not paid. The period for paying the renewal fee with surcharge pursuant to Rule 51(2) EPC which expired on 30 June 2012 also passed without the fee being paid. On 23 August 2012, the Receiving Section sent a Notice of loss of rights pursuant to Rule 112(1) EPC to the applicant's European representative noting that the application was deemed to be withdrawn under Article 86(1) EPC. On 15 October 2012 the applicant filed a request for re-establishment of rights. On the same day the fee for re-establishment as well as the renewal fee for the seventh year together with the additional fee was paid.

III. The appellant submitted that all due care had been taken by both the European and the Canadian representative (MLT) involved. Both had taken the appropriate measures to safeguard the time limit expiring on 30 June 2012. MLT had sent an e-mail on 7 June 2012 to the European representative with the instruction to pay the seventh renewal fee with surcharge however this e-mail had never been received by the European representative's office. Also, the European representative's office had reminded MLT several times to the near expiry of the time limit and had waited for the necessary instructions, but it had

not received any reaction. The European representative's office by Mr Chevalier unsuccessfully had tried several times to get into contact with the responsible employee of MLT, Ms Schwebius, by telephone on 28/29/30 June 2012 in order to verify whether the fee at issue should be paid. But it was not possible to reach her throughout these days.

IV. By the impugned decision the Receiving Section refused the request for re-establishment. It was not convinced that all due care required by the circumstances had been taken. While the Receiving Section held that the European representative's office had exercised all due care required, it denied this point as to MLT's side. In particular a description of the workflow in MLT's office including a description of substitutes in case of absence of its employees had not been provided. Also there was no action taken by MLT when no confirmation of the receipt of instructions sent per e-mail of 7 June 2012 was received.

V. In the grounds of appeal the appellant submitted a "fuller statement of facts" regarding the actions taken by the European representative and MLT to safeguard the time limit in question. It stated that MLT's office had a normally effective system in place for monitoring time limits. The non-observance of the time limit was more due to an isolated mistake by the European representative's employee Mr Chevalier, doing since 30 years the job of taking care of fee management in the office of the European representative, because MLT did not in fact receive any telephone call from the European representative's office during the time period in question.

VI. In a communication dated 13 February 2015 the Board expressed its provisional opinion that the grounds of appeal contained no convincing arguments to justify a reversal of the impugned decision. The Board considered some of the new facts being irrelevant or contradictive. It also pointed out that still another reason for the failure could be taken into consideration being that the European representative should have paid the fee in question even in the absence of a particular instruction of MLT to do so.

VII. With a letter dated 9 April 2015 the appellant asked for extension of the time limit of two months to respond to the board's communication which was denied in view of the appellant’s previous request to accelerate the appeal procedure.

VIII. The appellant did not submit a particular request. However from its submissions it follows that the appellant requests that the impugned decision be set aside and the request for re-establishment of rights be granted in respect of the period for payment of the renewal fee for the seventh year and the additional fee.

IX. In absence of a respective request and also not seeing another reason to do so, the Board did not arrange oral proceedings.

Reasons for the Decision

1. The appeal satisfies the requirements of Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

2. The formal requirements of Rule 136(1) and (2) EPC are met. Thus also the request for re-establishment of rights is admissible.

3. Pursuant to Article 122(1) EPC an applicant for a European patent shall have his rights re-established upon request who, in spite of all due care required by the circumstances having been taken, was unable to observe the time limit vis-à-vis the EPO which has the direct consequence of causing *inter alia* the deeming of the application to have been withdrawn. The party (as well as its representative, if any) is expected to be diligent and careful and the non-observance of the time limit must have been caused by unforeseeable errors. Under the established case law of the Boards of Appeal, an isolated mistake within a normally satisfactory system in a representative's office is excusable. To this end, the applicant or its representative must plausibly show that, at the time before the time limit expired, there was a normally effective system in place for monitoring time limits and that the non-observance of the time limit was due to an isolated mistake.

3.1 Irrespective of whether the organisational plans for substitution of employees in case of their absence of MLT were further substantiated during the appeal proceedings also the Board is not convinced that MLT had taken all due care to safeguard the time limit in question. In MLT's e-mail to the European representative of 7 June 2012 with the instruction to pay the seventh renewal fee with surcharge the European representative was asked to "confirm receipt of this request and confirm to our office once renewal payment is made" which both did not happen. The appellant argued that the sending of confirmation e-mails was not

a standard international practice, and therefore failure by MLT to send a follow-up email when a confirmation e-mail was not received cannot reasonably be seen as a failure to exercise due care.

3.2 The Board does not agree to this view. In a proper workflow between two representative's offices where one has the function to give instructions to the other it is consequent to require a confirmation from the other representative that a particular instruction had been received and followed and in case that no confirmation is received a follow-up e-mail should be sent in order to safeguard the rights of the client. This applies at least in cases where the further existence of the patent application depends on the observance of the instruction as this is true for the payment of renewal fees. Had MLT done so the failure could have been precluded. Not having done so qualifies as not having taken all due care.

3.3 The Board further came to the conclusion that the European representative's alleged actions did not allow to establish that all due care required by the circumstances was applied.

3.3.1 With respect to the e-mail of MLT dated 7 June 2012 the appellant argued that at that time the European representative's office had problems with its e-mail system and these problems resulted in the loss of the e-mail. The Board finds this submission insufficient since no further details are given. In particular, it was not specified of what kind these problems had been, at what point of time these problems had come to the attention of the European representative, what he had arranged to fix the problems and finally whether he tried to contact his co-representative MLT to retrieve

if they had sent time-bound e-mail's in the time period concerned.

3.3.2 Regarding the telephone calls made by Mr Chevalier from the European representative's office on 28/29/30 June 2012, the various statements are – in summary - unclear and apparently contradictive. Initially the appellant explained that Mr Chevalier talked to the new assistant of the responsible Ms Schwebius at MLT and explained the situation on 29 June 2012, but she did not understand the urgency of the case and omitted to inform the responsible persons in MLT's office. Later it was argued Mr Chevalier contacted the assistant on two different days. Again later it was submitted that Mr Chevalier must have called a wrong telephone number because an automatic telephone responder system was installed at MLT while Mr Chevalier had never received a message from the telephone responder and MLT did not get a telephone call from him during the time period in question. This is not consistent to what was stated before. If it was true that Mr Chevalier was connected to the "new assistant of Ms Schwebius" and advised her to call back Mr Chevalier evidently dialled the correct telephone number, otherwise the person he reached would have told him contrarily. Notwithstanding that no evidence at all was offered during the whole proceedings the circumstances themselves remain unclear and do not allow a conclusion favourable for the appellant.

3.4 The Board also has taken into respect the following additional point indicated in the communication of the Board dated 13 February 2015. In an earlier e-mail of 14 December 2009 sent by MLT to the European representative and submitted as "pièce A" with the appellant's letter dated 15 October 2012 concerning the

patent application at hand there was not only stated by MLT that the European office should "take no further action with respect to this matter without our instructions to the contrary", but also was stated: "However please do not allow this matter to go abandoned without our explicit authorization to do so". The Board understands from the context of these sentences that the European representative was not allowed to abandon the application without explicit authorization of MLT to do so. Thus it was well within the responsibility of the European representative to prevent the patent application from an unauthorized abandonment.

3.4.1 According to the case law of the Boards of Appeal a representative is in general not obliged to pay a renewal fee on behalf of the applicant without a specific instruction to do so (see decision J 19/04 of 14 July 2005, Reasons, point 10). However, the present case is different. The European representative was - by the order of MLT - obliged to prevent the application from an unauthorized loss. Thus – in case of doubt or missing instructions – the European representative was to arrange on his own motion for timely payment of any fee needed to keep the patent application pending as the order told him to do.

3.4.2 The appellant argued that not the European representative's office but MLT was to give instructions regarding the payment of renewal fees. According to the appellant's view this was also reflected by the respective file of the European representative's data processing programme used in his office which showed the following internal remark ("pièce B" filed with the appellant's letter dated 15 October 2012): "Suite à instructions reçues de

MacPherson le 14/12/2009, ne rien entreprendre sans instructions de leur part."

3.4.3 It appears as a fatal error to have inserted only the first sentence of the e-mail into the file of the data processing programme of the European representative's office and to have disregarded the following sentence since the latter one contained the most important information. No explanations to the complete content of the e-mail have been given by the appellant who in contrast relied on "Pièce A" and "Pièce B" as evidence that its European representative had performed all due care.

3.5 Since the Board was not able to establish that all due care had been taken to safeguard the time limit to pay the seventh renewal fee plus surcharge the substantial requirements of Article 122(1) EPC are not fulfilled and the re-establishment of rights has to be denied.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairwoman:

C. Eickhoff C. Vallet

Decision electronically authenticated