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**Datasheet for the decision
of 28 June 2017**

Case Number: J 0007/16 - 3.1.01

Application Number: 11812841.2

Publication Number: 2625361

IPC: E05D11/00, E06B5/11

Language of the proceedings: EN

Title of invention:

DEVICE IN FITTINGS FOR WINDOWS AND DOORS FOR PREVENTING
BURGLARY

Applicant:

Svenska Bo-Produkter AB

Headword:

Relevant legal provisions:

EPC Art. 122(1)

EPC R. 136(1) sentence 1, 136(2) sentence 2, 142(1) (c)

Keyword:

Interruption of proceedings (no)

Re-establishment of rights - time limit for filing notice of
appeal - time limit for filing statement of grounds - time
limit for paying renewal fee - all due care (yes)

Decisions cited:

J 0900/85, J 0902/87, J 0023/88, J 0002/98, T 0445/98,
J 0007/99, T 0832/99, T 0854/12, T 1402/13, J 0023/14

Catchword:



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 0007/16 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 28 June 2017

Appellant: Svenska Bo-Produkter AB
(Applicant) Skräddarebo 3
330 15 Bor (SE)

Representative: Bergensträhle Group AB
P.O. Box 17704
118 93 Stockholm (SE)

Decision under appeal: Decision of the Receiving Section of the
European Patent Office posted on 29 July 2015
rejecting a request for re-establishment of
rights under Article 122 EPC relating to
European patent application No. 11812841.2.

Composition of the Board:

Chairwoman P. Schmitz
Members: W. Ungler
T. Bokor

Summary of Facts and Submissions

- I. The applicant's appeal is directed against the decision of the Receiving Section dated 29 July 2015 to reject a request for re-establishment of rights under Article 122 EPC concerning European patent application 11812841.2.

- II. The renewal fee for the third year, which fell due on 30 June 2013, was not paid by the due date. By communication dated 2 August 2013 notified to the applicant's former representative Mr E. (in the following 'former representative') the applicant was informed that the renewal fee could still validly be paid up to the last day of the sixth calendar month following the due date provided that the additional fee was paid at the same time. Furthermore it stated that the patent application would be deemed to be withdrawn pursuant to Article 86(1) EPC if the renewal fee and the additional fee were not paid in due time.

- III. Since the renewal fee and the related additional fee were not paid in due time a noting of loss of rights - pursuant to Rule 112(1) EPC - dated 12 February 2014 was sent to the former representative informing him that the European patent application was deemed to be withdrawn. With letter dated 10 April 2014, received by the EPO on 15 April 2014, the former representative informed the EPO that he was still waiting for a "return call". In that letter he referred to the deaths of his wife, his uncle and one further person, and their funerals. With letter received by the EPO on 17 April 2014 the former representative informed the EPO that he had got the return call from the EPO when he was "in a car to the hospital" travelling at "high speed on the highway" and summarised the information he

had received from the EPO, namely that the request for re-establishment had to be filed and the related fee had to be paid "on or before" 22 April 2014.

Furthermore, he noted that he was still at the hospital waiting for a surgery. In addition he asked for the amount of the renewal fee to be paid.

IV. With letter dated 15 April 2014, received by the EPO on 18 April 2014, the former representative requested re-establishment of rights and submitted that the grounds for the omitted payment of the third renewal fee were to be found in his health problems caused essentially by having to move from his office within 24 hours, pack all his file documents in boxes and carry them out, resulting in physical injury (rupture and hernia). While he was still waiting for surgery his uncle had died and one day after the funeral his wife had died unexpectedly. Also a guest at the funeral as well as a close friend had died about the same time. Furthermore he pointed out that he had not been able yet to unpack his files due to the hernia caused by moving from his office and that he had - according to the information of the hospital - to wait a further 9 to 10 months for surgery. The fee for re-establishment of rights was paid in full on 15 April 2014.

V. With letter dated 26 June 2014 the former representative informed the EPO again that he had not yet been able to return to his office due to his hernia surgery having to be postponed twice in view of his poor state of health. On the same date the third renewal fee and the additional fee were paid.

VI. By communication under Article 113 EPC dated 16 December 2014 the former representative was invited to file further statements or supporting evidence, in

particular relating to the date of removal of the cause of non-compliance with the missed time limit.

- VII. No reply was filed. By decision dated 29 July 2015, the request for re-establishment of rights was rejected as inadmissible since the applicant had failed to provide sufficient information about the date of removal of the cause of non-compliance.
- VIII. With two letters received by the EPO on 26 August 2015 the former representative informed the EPO *inter alia* that he had not been able to return to his office since he was still recovering from his surgical operation and was now suffering from shingles.
- IX. By communication dated 4 December 2015 the applicant was informed that the fifth renewal fee had not been paid by the due date, i.e. 30 June 2015, and could still be validly paid up to the last day of the sixth calendar month following the due date provided that the additional fee was paid at the same time.
- X. In reaction to that communication the former representative paid the fifth renewal fee and the related additional fee and filed two letters, both received by the EPO on 24 December 2015, noting that he was still suffering from shingles and had not returned to his office, but was working one hour per day. In his second letter he informed the EPO about a burglary of three letter boxes in 2014, supported by a copy of a newspaper article, and said he would be contacting the police.
- XI. On 29 January 2016 the present appeal was filed together with a request for re-establishment of rights in respect of the time limit for filing the appeal. On

the same day, the appeal fee as well as the fee for re-establishment were paid and the statement of grounds of appeal was submitted. Furthermore, the EPO was informed about a change of the applicant's representative.

The appellant's arguments essential for the present decision can be summarised as follows:

The applicant had used the services of the former representative for many years and trusted that he would perform all actions necessary in order to keep the application in force. Reports on progress in the different cases were often given orally. The applicant paid all the fees, including the renewal fees, to the former representative on request and in advance. In the present case, the former representative was in charge of all communications with the EPO and had repeatedly assured the applicant that everything was in order with the application. The former representative also had received the third renewal fee in advance to cover the payment of that fee. The applicant had no reason to assume that the third renewal fee had not been paid in time. During the last week of November 2015, the applicant had heard rumours of another applicant who had used the same representative and whose application was allegedly mismanaged. Therefore the applicant had checked the status of its own application and realised on 30 November 2015 that the renewal fee for the third year had not been paid in time and that the decision of 29 July 2015 rejecting the request for re-establishment of rights had not been duly appealed.

As regards the question whether the former representative has taken all due care the appellant questioned the former representative's ability to perform his professional duties in view of his obvious health problems which were apparent from his various letters which were part of the file (cf. points III,

IV, V, VIII and X above) and from his overall procedural behaviour. The appellant concluded that the former representative had health problems which had seriously reduced his capacity to perform his duties as representative for a considerable period of time.

XII. With letter received by the EPO on 3 March 2016 the former representative noted that he had failed to act properly as an authorized representative, that he was not aware of how his gradual loss of the ability to take due care of his clients' applications had come about and that he was prepared to undergo a medical examination to identify his disorder caused by extreme mental pressure during the last few years.

XIII. With letter dated 28 July 2016 the appellant filed two extracts from the former representative's medical files relating to the postponement of the hernia surgery envisaged in 2014 and to the treatment of shingles in 2015. The reason for the postponement of the surgical operation was indicated in the document filed as being that "the patient has been extremely stressed with the death of his wife, and several other deaths in his circle of acquaintances". Furthermore, the appellant noted that the former representative had in the meantime resigned as a representative. Moreover, the appellant stated that it had tried to obtain a medical certificate but, in the absence of medical files describing the extreme mental pressure in detail, no medical officer was willing to assess the former representative's condition retrospectively. Reference was made also to the case J 2/98 in which the health condition and the professional failures of the representative had been "considered as sufficient evidence that (the representative) was not capable to run properly some of the cases under his

responsibility".

- XIV. The appellant requested re-establishment into the time limit for filing the appeal and into the time limit for paying the third renewal fee.

Reasons for the Decision

1. Admissibility of the appeal

- 1.1 According to Article 108 EPC the notice of appeal has to be filed at the European Patent Office within two months and the statement of grounds of appeal within four months of notification of the decision. The notice of appeal is not deemed to have been filed until the fee for appeal has been paid.
- 1.2 In the present case the decision under appeal was handed over to the postal service provider on 29 July 2015. Thus, according to Rules 126(2) and 131(4) EPC, the time limit for filing the notice of appeal and the statement of grounds of appeal expired on 8 October and 8 December 2015, respectively.
- 1.3 The notice of appeal together with the statement of grounds of appeal was filed and the appeal fee was paid on 29 January 2016, i.e. after expiry of the respective periods under Article 108 EPC.
- 1.4 Since the notice of appeal and the statement of grounds of appeal were not filed in due time, the appeal can only be considered admissible if the appellant's request for re-establishment of rights into these periods is allowed. Furthermore, in view of the submissions on file relating to the former representative's health problems and the appellant's

conclusion that these health problems seriously reduced his capacity to perform his duties as a professional representative for a considerable period of time, the Board first has to address *ex officio* the issue of interruption of proceedings pursuant to Rule 142(1)(c) EPC (cf. J 902/87 of 17 August 1987, J 23/88 of 25 April 1989, T 854/12 of 8 August 2016), which could have an impact on the issue of the admissibility of the appeal.

2. Interruption of proceedings

2.1 Pursuant to Rule 142(1)(c) EPC, proceedings before the European Patent Office are interrupted *inter alia* in the event of legal incapacity of the representative of an applicant for a patent.

2.2 According to the case law of the Boards of Appeal, legal incapacity under this provision refers to the representative's incapacity to carry out professional work before the European Patent Office on behalf of a client (J 900/85 of 1 March 1985). A reasonable basis for decisions in the matter by the European Patent Office is given by testing if the representative concerned was in a fit mental state to do the work required of him at the material time or if he lacked the capacity to make rational decisions and to take necessary actions. In this context a reliable medical opinion is necessary, as well as all available reliable information about the representative's conduct at the material time. The mental state from which legal incapacity of the representative can be derived has to be such that the representative is so totally or nearly totally unable to take rational decisions that all his professional duties, and not just an isolated case, are affected by his mental state (J 7/99 of 17 May 2000).

2.3 In view of the fact that declaration of the legal incapacity of a professional representative has serious consequences for his professional life, it needs to be based on factual circumstances and not only on mere allegations or assumptions. Therefore, a medical certificate is indispensable in order to assess the representative's mental state. In the present case extracts from his medical files have been submitted from which it is apparent that hernia surgery had to be postponed in the first half of 2014 due to the mental and physical condition of the former representative and that he suffered from shingles in 2015. However, according to the appellant, a medical certificate evaluating the former representative's health condition retrospectively could not be obtained, due to the fact that the patient did not seek particular medical attention for his mental state and in the absence of detailed medical files. The aforementioned extracts of the medical file cannot be regarded as satisfactory evidence of a serious mental illness during the relevant period starting at least from the end of 2013 to the end of 2015, since it can be inferred from one of the aforementioned documents only that he suffered from severe stress caused by the death of his wife and several other deaths in his circle of acquaintances. However, this piece of evidence is not sufficient to draw the conclusion that the former representative was totally or nearly totally unable to take rational decisions related to his professional duties.

2.4 Consequently, in the absence of satisfactory evidence, in particular an appropriate medical evaluation of the former representative's mental state, the Board came to the conclusion that the proceedings were not interrupted pursuant to Rule 142(1)(c) EPC.

3. Re-establishment of rights in respect of the time limits for filing the notice of appeal and the statement of grounds of appeal
 - 3.1 According to Rule 136(1), first sentence, EPC a request for re-establishment must be filed within two months of removal of the cause of non-compliance, and at the latest within one year after expiry of the unobserved time limit. In the present case, the cause of non-compliance lay in the fact that the former representative was not in a position to act properly in the proceedings due to his state of health (cf. in detail points 3.3 to 3.6 below). Thus, the date of removal of the cause of non-compliance can only be regarded as the date on which the applicant inspected the file and realised (i.e. 30 November 2015) that its former representative had not acted properly and had not taken the appropriate procedural steps against the decision under appeal. Thus, the request for re-establishment was filed and the omitted acts (i.e. filing of the notice and the statement of grounds of appeal as well as paying the appeal fee) were completed in due time. Only one re-establishment fee was paid, although the time limit for filing the notice and the time limit for filing the statement of grounds of appeal were missed. However, the non-observance of both time limits is intrinsically linked to the same hindrance. Both periods are triggered by the same event, i.e. the notification of the decision, and the hindrance to complying with them is based on one unitary factual basis, i.e. the health condition of the former representative. Re-establishment in respect of both periods has to be examined together and the result will inevitably be the same. In this situation, the Board considers one re-establishment fee to be

sufficient. This is in line with the approach taken in T 832/99 of 17 September 2004.

- 3.2 Under Article 122 EPC, a request for re-establishment is only to be allowed if the party in question was unable to observe the time limit in spite of having taken all due care required by the circumstances.
- 3.3 In principle, negligence on the part of a European professional representative will prevent a finding that all due care was taken. However, in the present case the procedural behaviour of the former representative was not due to negligence, but due to his state of health. This conclusion can be drawn from the various letters and declarations of the former representative himself, which are part of the application file, and also by taking into account the aforementioned extracts from his medical files. All those pieces of evidence read together and in the light also of his procedural behaviour sufficiently demonstrate that the former representative's health condition prevented him from fulfilling his professional duties properly. In that regard it is to be taken into account that the former representative was - according to the submissions on file - running a one-person office.
- 3.4 In view of the appellant's submissions and the former representative's letters it is regarded as sufficiently proven that the former representative's health problems began to adversely affect his professional work at least as from the end of 2013, caused essentially by the death of his wife, of his uncle and of a close friend and by having to move from his office at short notice, resulting in physical injury (rupture and hernia). These health problems are supported by the extract from his medical file dated 16 September 2014

relating to the postponement of the envisaged hernia surgery. As a reason for postponing the surgery it was indicated that "the patient has been extremely stressed with the death of his wife, and several other deaths in his circle of acquaintances". This is also in line with the letters sent by the former representative to the EPO on various occasions. From his letter dated 15 April 2014 it is derivable that he was suffering from health problems at least as from the end of 2013, insofar as he stated that he had already been waiting for more than 12 weeks to get a date for the surgery on the rupture and hernia. Furthermore, he referred to all the incidents cited above and noted that the "last 10 months have been extreme/extra chaos/unusual difficult and unexpected for the agent".

3.5 As from April 2014 he repeatedly referred to his bad health condition. In addition he also mentioned in almost all of his handwritten letters that he could neither cope with the need to organise his wife's burial nor could he even return to work or unpack his files relating to his work as professional representative. Moreover, from the style and content of his various handwritten letters it is clear to the Board that they were written under severe mental stress. Taking into account his letters received on 26 August 2015 and 24 December 2015 respectively (cf. points VIII and X above) it is obvious that his health problems persisted also during the relevant period of time for filing the appeal. In his letter received by the EPO on 3 March 2016 he admitted that he had "failed to act properly as an authorized representative before the European Patent Office. Unfortunately [he] was not aware of the process leading to [his] successive loss of the ability to take due care of [his] clients applications." This retrospective self-evaluation of

his health condition and its effect on the handling of the application is in line with his procedural behaviour as from the end of 2013. In addition, the allegations relating to the former representative's health problems are highly credible also in view of his resignation as professional representative in 2016.

- 3.6 In view of all these circumstances the Board came to the conclusion that due to his state of health the former representative was neither capable of prosecuting the present application properly nor of recognising that he was no longer in a position to perform his duties and needed to withdraw from representation. For reasons beyond his control, he was not capable to run this case in a proper way although he took every effort to fulfil his duties.
- 3.7 The above finding prevents the applicant from suffering from the inappropriate procedural conduct of his former representative unless he had reason to suspect that he could not be relied on.
- 3.8 According to the credible submissions of the appellant, which are supported by the affidavits of Mr Hildemar Svensson and Mr Ulf Annvik, the services of the former representative had been used for many years. The latter was in charge of all communications with the EPO and of all payments. The applicant paid all the fees, including the renewal fees, to the representative on his request and in advance. The former representative repeatedly assured the applicant that everything was in order with the application. In particular, he did not inform the applicant that the request for re-establishment of rights relating to the payment of the third renewal fee had been rejected, that the application was deemed withdrawn, and about the need to

file an appeal. It has also been credibly submitted that during the last week of November 2015 the applicant heard rumours of another applicant who had used the same representative and whose application was allegedly mismanaged, and that it checked the status of the application and became aware on 30 November 2015 that the renewal fee for the third year had not been paid in time and that the decision of 29 July 2015 rejecting the request for re-establishment of rights had not been duly appealed. As from 30 November 2015, which is regarded as the date of removal of the cause of non-compliance with the time limit for filing the appeal (cf. point 3.1. above), the appellant took all the necessary procedural steps to further pursue its application.

- 3.9 In view of the fact that the appellant has exercised all due care required by the circumstances, in accordance with Article 122(1) EPC, re-establishment of rights in respect of the time limits for filing the notice and the statement of grounds of appeal is granted and thus the appeal is admissible. Reference is made to decision J 2/98 of 27 November 2002, where the Board allowed a request for re-establishment of rights under comparable circumstances.

- 4. Request for re-establishment of rights in respect of the time limit for payment of the third renewal fee and the related additional fee
 - 4.1 Admissibility of the request
 - 4.1.1 Re-establishment in respect of the time limit pursuant to Rule 51(2) EPC, as in force until 31 December 2016, is admissible also after decision T 1402/13 for the sake of protecting the legitimate expectations of users

of the European patent system (cf. J 23/14 of 15 December 2016).

- 4.1.2 According to Rule 136(1), first sentence, EPC, a request for re-establishment must be filed within two months of removal of the cause of non-compliance, and at the latest within one year after expiry of the unobserved time limit. The omitted act must also be completed within the above period (cf. Rule 136(2), second sentence, EPC).
- 4.1.3 In view of the above conclusion that the former representative's state of health prevented him from fulfilling his professional duties properly as from the end of 2013, the cause of non-compliance with the missed time limit was not removed with the receipt of the noting of loss of rights dated 12 February 2014. Thus, the filing of the request for re-establishment on 18 April 2014 as well as the completion of the omitted act on 26 June 2014, i.e. the payment of the third renewal fee and the additional fee, were both performed within the time limit pursuant to Rule 136(1), first sentence, EPC, because the one-year time limit had not yet expired. Also the fee for re-establishment was paid in due time.
- 4.2 As regards the question whether the former representative and/or the applicant has taken all due care as required under Article 122(1) EPC, reference is made to the findings under points 3.2 to 3.9 above. Since the former representative's state of health prevented him from prosecuting the present application properly, at least as from the end of 2013, and from taking the necessary procedural steps in due time, and in view of the fact that the applicant had - at that point in time - no reason to suspect that the former

representative could not be relied on, the requirements of Article 122(1) EPC are met in the same way as for the request for re-establishment of rights in respect of the appeal periods.

- 4.3 Consequently, *restitutio in integrum* is granted in respect of payment of the third renewal fee and the additional fee.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The appellant is re-established in its rights.

The Registrar:

The Chairwoman:



C. Eickhoff

P. Schmitz

Decision electronically authenticated