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Boards of Appeal
Registries

Chambres de recours
Greffes

Aktenzeichen

File Number

Numéro du dossier

J 41 192 - 311

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decision dated 27/10/93. This decision has already been distributed previously as category "C"
 Anmeldung Nr. / Patent Nr.:

Copy of the _____
 Application No. / Patent No.:

 Demande n° / Brevet n°:

(soweit nicht aus der Anlage ersichtlich)

(if not apparent from enclosure)

(si le n° n'apparaît pas sur l'annexe)

P.S.: Bei der ersten Verteilung je 8ten die Seiten 2, 4, 6, 8

A	X	B		C	
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File No.: J 0041/92 - 3.1.1
Application No.: 89 500 037.0
Publication No.: 0 334 789
Classification: Lead bullet with plane base and base spoke
Title of invention: F42B 11/04

DECISION
of 27 October 1993

Applicant: Marron Blanco, Jose Maria

Headword: Restitutio/MARRON BLANCO

EPC: Art. 122(1), 122(2), 122(3)

Keyword: "Restitutio, deficiencies in application" - "removal of cause of non-compliance" - "principle of good faith" - "obligation to warn applicant of any impending loss of rights" - "all due care, professional representative"

Headnote

In order to comply with the requirement under Article 122 EPC to take all due care required by the circumstances, a professional representative who runs a one person office must normally be expected to make appropriate arrangements so that, in the case of absence through illness, the observance of time limits can be ensured with the help of other persons (cf. point 4.4 of the Reasons).

Case Number: J 0041/92 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 27 October 1993

Appellant: Marron Blanco, Jose Maria
Paseo del Rey No 4
E-28008 Madrid (ES)

Representative: De las Heras Hurtado, Margarita
General Pardinias No 45
E-28001 Madrid (ES)

Decision under appeal: Decision of the Formalities Section of the
European Patent Office dated 19 June 1992
refusing a request for re-establishment into
the time limit pursuant to Article 86(2) EPC in
respect of the third year for the European
patent application No. 89 500 037.0

Composition of the Board:

Chairman: F. Schulte
Members: R. Schachenmann
G. Dornier

Summary of Facts and Submissions

- I. European patent application No. 89 500 037.0 was filed on 20 March 1989. The renewal fee for the third year was due on 2 April 1991 and the additional six month period laid down in Article 86(2) EPC ended on 2 October 1991. On 8 October 1991 the amount of the fee was actually paid into a bank account held by the EPO. The Formalities Section of the EPO, therefore, issued a notification pursuant to Rule 69(1) EPC, dated 6 November 1991, informing the Applicant that, pursuant to Article 86(3) EPC, the European patent application was deemed to be withdrawn.
- II. The authorized representative, by letter of 2 January 1992, acknowledged receipt of this notification and confirmed that the application was "to be kept in force". She stated that a serious illness had forced her to interrupt professional work for more than three months. After her recovery, all necessary steps were taken to keep the application in force. The representative asked the EPO to let her know "whether any fine or additional fee ought to be paid".
- III. The Formalities Section, by a communication of 10 February 1992, informed the representative that her letter of 2 January 1992 could be considered as a request for re-establishment of rights under Article 122 EPC but that no fee for re-establishment had been paid, yet. It also expressed its doubts whether, with regard to the payment of the renewal fee, all due care required by the circumstances had been taken.
- IV. On 31 March 1992 the fee for re-establishment of rights was paid. In her answer of 8 April 1992 the representative stated that the late payment of the

renewal fee for the third year was caused by the fact that, before the due date of 2 April 1991, it had not been possible for her to contact the Applicant/Appellant, who, at that time, was on a trip overseas. Later, i.e. "from the end of June to the beginning of October 1991", illness had prevented her from doing any professional work and, especially, from arranging for the payment of the renewal fee in time.

- V. The Formalities Section, in its decision of 19 June 1992, rejected the application for re-establishment of rights on the grounds that the fee for re-establishment had not been paid within two months from the removal of the cause of non-compliance with the time limit. The Formalities Section, therefore, considered it to be "redundant" whether, in respect of the payment of the renewal fee, all due care had been taken.
- VI. On 18 August 1992 an appeal was filed against the decision of the Formalities Section. It was requested that the decision be "changed" and that the Appellant's rights be re-established. In support of this request it was argued that the notification pursuant to Rule 69(1) EPC of 6 November 1991 had not removed the cause of non-compliance with the time limit. Albeit, at that time, one of the causes of non-compliance (the representative's illness) had been removed, a second cause (the frequent absences of the Applicant) continued until the representative, on 28 March 1992, succeeded in contacting the Appellant. The fee for re-establishment of rights, therefore, had been paid in time. No new facts or arguments were presented in order to substantiate the Appellant's case that the failure to comply with the time limit for the payment of the renewal fee had occurred in spite of all due care having been taken.

VII. On 15 March 1993 the Legal Board of Appeal issued a communication pursuant to Article 110(2) EPC stating that, according to the principles set out in the decision T 14/89 (OJ 1990, 432), the application for re-establishment of rights was admissible. The Board, however, expressed its doubts whether the application was sufficiently substantiated. The Appellant was invited to submit additional information with regard to the representative's illness and the measures taken to comply with time limits falling within this period.

VIII. The representative, in her answer of 15 May 1993, stated that she was a professional in practice alone and had no other person working for her. Nobody was, therefore, available to take care of patent matters during her illness. Though there was a time monitoring system at her office, nobody was there to handle it. The unexpected appearance of the serious illness had prevented her from taking any special measure in advance in order to ensure the compliance with the time limits falling within the period of illness.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and therefore is admissible.
2. The first issue to be decided concerns the admissibility of the application for re-establishment of rights.

Pursuant to Article 122(2) EPC, an application for re-establishment of rights must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. It shall not be deemed to be filed until after the fee for re-establishment of rights has been paid (Article 122(3) EPC).

- 2.1 The Legal Board of Appeal agrees with the first instance that the letter of the authorized representative, dated 2 January 1992, was clearly recognisable as an application for re-establishment of rights, even if it was not explicitly identified as such.
- 2.2 The first instance, however, considered this application to be inadmissible on the ground that the fee for re-establishment was not paid within the two month period provided for in Article 122(2) EPC. The two month period under Article 122(2) EPC is calculated from the moment the cause of non-compliance with the time limit is removed, i.e. normally, from the date on which the person responsible for the application becomes aware of the fact that a time limit has not been observed (cf. e.g. decision J 27/90 of the Legal Board of Appeal, OJ 1993, 422). This date, in the present case, is the date on which the authorised representative received the communication pursuant to Rule 69(1) EPC, i.e. 16 November 1991 at the latest. Since the representative is considered to be entitled to undertake procedural steps in the interest of the applicant, the alleged absence of the Appellant, at that time, is not important. Incidentally, there was no need for any instructions to be given by the Appellant, since the renewal fees had already been paid. The two month period of Article 122(2) EPC, therefore, ended on Monday, 17 January 1992.
- 2.3 The application for re-establishment was received at the EPO on 3 January 1992, i.e. 14 days before the end of the two month period under Article 122(2) EPC. The application, however, gave no indication that the representative intended to pay the fee for re-establishment. Instead, the representative asked the EPO to let her know "whether any fine or additional fee ought to be paid". This made it quite clear to the

Receiving Section that the professional representative was not aware that a fee for re-establishment had to be paid. Taking into account that there were still 14 days until the end of the two month period, the deficiency could have easily been corrected, if the EPO, in accordance with the representative's request, had issued a warning.

2.4 In the Board's view, the users of the EPC cannot, by merely asking the EPO to warn them of any deficiency that might arise in the course of the proceedings, shift their own responsibility for complying with the provisions of the Convention to the EPO. If, however, a deficiency is readily identifiable by the EPO and can easily be corrected within the time limit, the principle of good faith requires the EPO to issue a warning (following the decisions T 14/89, OJ EPO 1990, 432, and J 13/90, published in the special edition of the Official Journal 1993, page 59). The Legal Board of Appeal, therefore, accepts that the representative, in the circumstances of the present case, could legitimately have expected that, in response to her express request, the EPO would have warned her of the outstanding fee for re-establishment.

2.5 If a warning can be expected but is not issued to the applicant within the time limit to be observed, the EPO must set a period in which the applicant can correct the deficiency and perform the procedural acts in time (cf. decision J 13/90). This is no longer necessary in the present case since, after having been informed of the outstanding fee for re-establishment of rights by the communication of 10 February 1992, the Appellant paid the fee within the time limit set by this communication for filing observations.

- 2.6 For the above reasons, the request for re-establishment is, contrary to the contested decision, considered to be admissible.
3. As a result, the Legal Board of Appeal could remit the case to the department of first instance for examination of the request for re-establishment on the merits. The Board, however, in exercising its discretionary power under Article 111(1) EPC, has decided not to do so for the following reasons. The first instance, in its decision of 19 June 1992, confined itself to a brief discussion of the issue whether, pursuant to Article 122(1) EPC, all due care required by the circumstances had been taken (cf. page 5 of the decision of 19 June 1992). It, nevertheless, emerges from the communication of 10 February 1992, that the Appellant was given sufficient opportunity to comment on this issue. Moreover, it follows from the file that the first instance duly considered the Appellant's arguments but came to the conclusion that they were not sufficiently substantiated. The Board is, therefore, satisfied that the Appellant was given the opportunity to argue his case before two instances.
4. Hence, the Legal Board of Appeal, hereafter, considers the issue whether all the due care required by the circumstances had been taken to comply with the time limit for the payment of the renewal fee for the third year (Article 122(1) EPC).
- 4.1 According to the representative's statements, the non-observance of the time limit was due to the combination of two events: the frequent absences of the Appellant and the severe illness of the professional representative between June and October 1991.

4.2 With regard to the absences of the Appellant, no detailed information or proof was submitted. The Appellant, obviously, had to do a lot of business-related travelling. His trips were an ordinary part of his occupation. The frequent absences did not, therefore, occur surprisingly. In these circumstances, a diligent and careful applicant may be expected to make arrangements so that prolonged interruptions in communication with the authorised representative can be avoided. Alternatively, the applicant would have to instruct the representative to take, until further notice, every procedural step necessary in order to maintain his patent application. No evidence was submitted showing that any of these measures was taken by the Appellant.

4.3 Even if such measures had been taken, the failure to comply with the time limit would hardly have been avoided since the representative, due to her illness, did not even try to contact the Appellant within the critical three months before 2 October 1991. Hence, it appears to be unimportant whether or not the Appellant could have been contacted at that time.

4.4 In the Board's view, the illness of the professional representative is, therefore, the actual cause for the non-observance of the time limit of 2 October 1991. The professional representative was forced to interrupt her professional activities from June until the beginning of October 1991. On inquiry by the Board she stated that, because she was a professional in practice alone, nobody had been available to handle the time monitoring system or to comply with the time limits during her illness. Therefore, the issue arises, whether, in view of the representative's illness, all due care had been taken to avoid a loss of rights during the critical period. According to the jurisprudence of the Boards of Appeal,

it must normally be expected that, in a large firm, where a considerable number of deadlines have to be monitored, at least an effective system of staff substitution in the case of illness and for absences in general is in operation (decision T 324/90; OJ 1993, 33). The Board concedes that, in the case of a professional working alone and having a much smaller number of time limits to comply with, less strict standards, in this respect, may be applied. However, a careful and diligent professional representative must, in any case, be expected to take into account that he or she might fall ill and be prevented, for some time, from taking care of time limits. Therefore, if a professional representative runs a one person office, appropriate provisions should be made so that, in the case of an absence through illness, the observance of time limits can be ensured with the help of other persons. If there is no substitute or assistant at the representative's office, cooperation with colleagues or with a professional association could e.g. be sought for this purpose.

In the present case, it is admitted that no precautions were taken to ensure the observance of time limits during the representative's illness. The time monitoring system was left to itself for about three months. Even though the professional representative was only handling a few European patent applications she had to reckon with the possibility of time limits falling within this period.

- 4.5 From the foregoing, the Legal Board of Appeal must conclude that, in the circumstances of the present case, all due care was taken neither by the Appellant nor by his professional representative. The request for re-establishment of rights is, therefore, refused.

Order

For these reasons, it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:

M. Beer

R. Schulte



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decision dated 27/10/93. This decision has already been distributed previously as category "C"

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Demande n° / Brevet n°:

(soweit nicht aus der Anlage ersichtlich)

(if not apparent from enclosure)

(si le n° n'apparaît pas sur l'annexe)

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File No.: J 0041/92 - 3.1.1
Application No.: 89 500 037.0
Publication No.: 0 334 789
Classification: Lead bullet with plane base and base spoke
Title of invention: F42B 11/04

DECISION
of 27 October 1993

Applicant: Marron Blanco, Jose Maria

Headword: Restitutio/MARRON BLANCO

EPC: Art. 122(1), 122(2), 122(3)

Keyword: "Restitutio, deficiencies in application" - "removal of cause of non-compliance" - "principle of good faith" - "obligation to warn applicant of any impending loss of rights" - "all due care, professional representative"

Headnote

In order to comply with the requirement under Article 122 EPC to take all due care required by the circumstances, a professional representative who runs a one person office must normally be expected to make appropriate arrangements to that, in the case of absence through illness, the observance of time limits can be ensured with the help of other persons (cf. point 4.4 of the Reasons).

Case Number: J 0041/92 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 27 October 1993

Appellant: Marron Blanco, Jose Maria
Paseo del Rey No 4
E-28008 Madrid (ES)

Representative: De las Heras Hurtado, Margarita
General Pardinias No 45
E-28001 Madrid (ES)

Decision under appeal: **Decision of the Formalities Section of the European Patent Office dated 19 June 1992 refusing a request for re-establishment into the time limit pursuant to Article 86(2) EPC in respect of the third year for the European patent application No. 89 500 037.0**

Composition of the Board:

Chairman: R. Schulte
Members: B. Schachenmann
G. Davies

Summary of Facts and Submissions

- I. European patent application No. 89 500 037.0 was filed on 20 March 1989. The renewal fee for the third year was due on 2 April 1991 and the additional six month period laid down in Article 86(2) EPC ended on 2 October 1991. On 8 October 1991 the amount of the fee was actually paid into a bank account held by the EPO. The Formalities Section of the EPO, therefore, issued a notification pursuant to Rule 69(1) EPC, dated 6 November 1991, informing the Applicant that, pursuant to Article 86(3) EPC, the European patent application was deemed to be withdrawn.
- II. The authorized representative, by letter of 2 January 1992, acknowledged receipt of this notification and confirmed that the application was "to be kept in force". She stated that a serious illness had forced her to interrupt professional work for more than three months. After her recovery, all necessary steps were taken to keep the application in force. The representative asked the EPO to let her know "whether any fine or additional fee ought to be paid".
- III. The Formalities Section, by a communication of 10 February 1992, informed the representative that her letter of 2 January 1992 could be considered as a request for re-establishment of rights under Article 122 EPC but that no fee for re-establishment had been paid, yet. It also expressed its doubts whether, with regard to the payment of the renewal fee, all due care required by the circumstances had been taken.
- IV. On 31 March 1992 the fee for re-establishment of rights was paid. In her answer of 8 April 1992 the representative stated that the late payment of the

- VII. On 15 March 1993 the Legal Board of Appeal issued a communication pursuant to Article 110(2) EPC stating that, according to the principles set out in the decision T 14/89 (OJ 1990, 432), the application for re-establishment of rights was admissible. The Board, however, expressed its doubts whether the application was sufficiently substantiated. The Appellant was invited to submit additional information with regard to the representative's illness and the measures taken to comply with time limits falling within this period.
- VIII. The representative, in her answer of 15 May 1993, stated that she was a professional in practice alone and had no other person working for her. Nobody was, therefore, available to take care of patent matters during her illness. Though there was a time monitoring system at her office, nobody was there to handle it. The unexpected appearance of the serious illness had prevented her from taking any special measure in advance in order to ensure the compliance with the time limits falling within the period of illness.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and therefore is admissible.
2. The first issue to be decided concerns the admissibility of the application for re-establishment of rights.

Pursuant to Article 122(2) EPC, an application for re-establishment of rights must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. It shall not be deemed to be filed until after the fee for re-establishment of rights has been paid (Article 122(3) EPC).

Receiving Section that the professional representative was not aware that a fee for re-establishment had to be paid. Taking into account that there were still 14 days until the end of the two month period, the deficiency could have easily been corrected, if the EPO, in accordance with the representative's request, had issued a warning.

2.4 In the Board's view, the users of the EPC cannot, by merely asking the EPO to warn them of any deficiency that might arise in the course of the proceedings, shift their own responsibility for complying with the provisions of the Convention to the EPO. If, however, a deficiency is readily identifiable by the EPO and can easily be corrected within the time limit, the principle of good faith requires the EPO to issue a warning (following the decisions T 14/89, OJ EPO 1990, 432, and J 13/90, published in the special edition of the Official Journal 1993, page 59). The Legal Board of Appeal, therefore, accepts that the representative, in the circumstances of the present case, could legitimately have expected that, in response to her express request, the EPO would have warned her of the outstanding fee for re-establishment.

2.5 If a warning can be expected but is not issued to the applicant within the time limit to be observed, the EPO must set a period in which the applicant can correct the deficiency and perform the procedural acts in time (cf. decision J 13/90). This is no longer necessary in the present case since, after having been informed of the outstanding fee for re-establishment of rights by the communication of 10 February 1992, the Appellant paid the fee within the time limit set by this communication for filing observations.

4.2 With regard to the absences of the Appellant, no detailed information or proof was submitted. The Appellant, obviously, had to do a lot of business-related travelling. His trips were an ordinary part of his occupation. The frequent absences did not, therefore, occur surprisingly. In these circumstances, a diligent and careful applicant may be expected to make arrangements so that prolonged interruptions in communication with the authorised representative can be avoided. Alternatively, the applicant would have to instruct the representative to take, until further notice, every procedural step necessary in order to maintain his patent application. No evidence was submitted showing that any of these measures was taken by the Appellant.

4.3 Even if such measures had been taken, the failure to comply with the time limit would hardly have been avoided since the representative, due to her illness, did not even try to contact the Appellant within the critical three months before 2 October 1991. Hence, it appears to be unimportant whether or not the Appellant could have been contacted at that time.

4.4 In the Board's view, the illness of the professional representative is, therefore, the actual cause for the non-observance of the time limit of 2 October 1991. The professional representative was forced to interrupt her professional activities from June until the beginning of October 1991. On inquiry by the Board she stated that, because she was a professional in practice alone, nobody had been available to handle the time monitoring system or to comply with the time limits during her illness. Therefore, the issue arises, whether, in view of the representative's illness, all due care had been taken to avoid a loss of rights during the critical period. According to the jurisprudence of the Boards of Appeal,

Order

For these reasons, it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:

M. Beer

R. Schulte

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File No.: J 0041/92 - 3.1.1
Application No.: 89 500 037.0
Publication No.: 0 334 789
Classification: Lead bullet with plane base and base spoke
Title of invention: F42B 11/04

D E C I S I O N
of 27 October 1993

Applicant: Marron Blanco, Jose Maria

Headword: Restitutio/Marron Blanco

EPC: Art. 122(1), 122(2), 122(3)

Keyword: "Restitutio, deficiencies in application" - "removal of cause of non-compliance" - "principle of good faith" - "obligation to warn applicant of any impending loss of rights" - "all due care, professional representative."

Headnote
Catchwords



Case Number: J 0041/92 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 27 October 1993

Appellant: Marron Blanco, Jose Maria
Paseo del Rey No 4
E-28008 Madrid (ES)

Representative: De las Heras Hurtado, Margarita
General Pardinias No 45
E-28001 Madrid (ES)

Decision under appeal: Decision of the Formalities Section of the
European Patent Office dated 19 June 1992
refusing a request for re-establishment into
the time limit pursuant to Article 86(2) EPC in
respect of the third year for the European
patent application No. 89 500 037.0

Composition of the Board:

Chairman: R. Schulte
Members: B. Schachenmann
G. Davies

Summary of Facts and Submissions

- I. European patent application No. 89 500 037.0 was filed on 20 March 1989. The renewal fee for the third year was due on 2 April 1991 and the additional six month period laid down in Article 86(2) EPC ended on 2 October 1991. On 8 October 1991 the amount of the fee was actually paid into a bank account held by the EPO. The Formalities Section of the EPO, therefore, issued a notification pursuant to Rule 69(1) EPC, dated 6 November 1991, informing the Applicant that, pursuant to Article 86(3) EPC, the European patent application was deemed to be withdrawn.

- II. The authorized representative, by letter of 2 January 1992, acknowledged receipt of this notification and confirmed that the application was "to be kept in force". She stated that a serious illness had forced her to interrupt professional work for more than three months. After her recovery, all necessary steps were taken to keep the application in force. The representative asked the EPO to let her know "whether any fine or additional fee ought to be paid".

- III. The Formalities Section, by a communication of 10 February 1992, informed the representative that her letter of 2 January 1992 could be considered as a request for re-establishment of rights under Article 122 EPC but that no fee for re-establishment had been paid, yet. It also expressed its doubts whether, with regard to the payment of the renewal fee, all due care required by the circumstances had been taken.

- IV. On 31 March 1992 the fee for re-establishment of rights was paid. In her answer of 8 April 1992 the representative stated that the late payment of the

renewal fee for the third year was caused by the fact that, before the due date of 2 April 1991, it had not been possible for her to contact the Applicant/Appellant, who, at that time, was on a trip overseas. Later, i.e. "from the end of June to the beginning of October 1991", illness had prevented her from doing any professional work and, especially, from arranging for the payment of the renewal fee in time.

V. The Formalities Section, in its decision of 19 June 1992, rejected the application for re-establishment of rights on the grounds that the fee for re-establishment had not been paid within two months from the removal of the cause of non-compliance with the time limit. The Formalities Section, therefore, considered it to be "redundant" whether, in respect of the payment of the renewal fee, all due care had been taken.

VI. On 18 August 1992 an appeal was filed against the decision of the Formalities Section. It was requested that the decision be "changed" and that the Appellant's rights be re-established. In support of this request it was argued that the notification pursuant to Rule 69(1) EPC of 6 November 1991 had not removed the cause of non-compliance with the time limit. Albeit, at that time, one of the causes of non-compliance (the representative's illness) had been removed, a second cause (the frequent absences of the Applicant) continued until the representative, on 28 March 1992, succeeded in contacting the Appellant. The fee for re-establishment of rights, therefore, had been paid in time. No new facts or arguments were presented in order to substantiate the Appellant's case that the failure to comply with the time limit for the payment of the renewal fee had occurred in spite of all due care having been taken.

VII. On 15 March 1993 the Legal Board of Appeal issued a communication pursuant to Article 110(2) EPC stating that, according to the principles set out in the decision T 14/89 (OJ 1990, 432), the application for re-establishment of rights was admissible. The Board, however, expressed its doubts whether the application was sufficiently substantiated. The Appellant was invited to submit additional information with regard to the representative's illness and the measures taken to comply with time limits falling within this period.

VIII. The representative, in her answer of 15 May 1993, stated that she was a professional in practice alone and had no other person working for her. Nobody was, therefore, available to take care of patent matters during her illness. Though there was a time monitoring system at her office, nobody was there to handle it. The unexpected appearance of the serious illness had prevented her from taking any special measure in advance in order to ensure the compliance with the time limits falling within the period of illness.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and therefore is admissible.
2. The first issue to be decided concerns the admissibility of the application for re-establishment of rights.

Pursuant to Article 122(2) EPC, an application for re-establishment of rights must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. It shall not be deemed to be filed until after the fee for re-establishment of rights has been paid (Article 122(3) EPC).

- 2.1 The Legal Board of Appeal agrees with the first instance that the letter of the authorized representative, dated 2 January 1992, was clearly recognisable as an application for re-establishment of rights, even if it was not explicitly identified as such.
- 2.2 The first instance, however, considered this application to be inadmissible on the ground that the fee for re-establishment was not paid within the two month period provided for in Article 122(2) EPC. The two month period under Article 122(2) EPC is calculated from the moment the cause of non-compliance with the time limit is removed, i.e. normally, from the date on which the person responsible for the application becomes aware of the fact that a time limit has not been observed (cf. e.g. decision J 27/90 of the Legal Board of Appeal, OJ 1993, 422). This date, in the present case, is the date on which the authorised representative received the communication pursuant to Rule 69(1) EPC, i.e. 16 November 1991 at the latest. Since the representative is considered to be entitled to undertake procedural steps in the interest of the applicant, the alleged absence of the Appellant, at that time, is not important. Incidentally, there was no need for any instructions to be given by the Appellant, since the renewal fees had already been paid. The two month period of Article 122(2) EPC, therefore, ended on Monday, 17 January 1992.
- 2.3 The application for re-establishment was received at the EPO on 3 January 1992, i.e. 14 days before the end of the two month period under Article 122(2) EPC. The application, however, gave no indication that the representative intended to pay the fee for re-establishment. Instead, the representative asked the EPO to let her know "whether any fine or additional fee ought to be paid". This made it quite clear to the

Receiving Section that the professional representative was not aware that a fee for re-establishment had to be paid. Taking into account that there were still 14 days until the end of the two month period, the deficiency could have easily been corrected, if the EPO, in accordance with the representative's request, had issued a warning.

2.4 In the Board's view, the users of the EPC cannot, by merely asking the EPO to warn them of any deficiency that might arise in the course of the proceedings, shift their own responsibility for complying with the provisions of the Convention to the EPO. If, however, a deficiency is readily identifiable by the EPO and can easily be corrected within the time limit, the principle of good faith requires the EPO to issue a warning (following the decisions T 14/89, OJ EPO 1990, 432, and J 13/90, published in the special edition of the Official Journal 1993, page 59). The Legal Board of Appeal, therefore, accepts that the representative, in the circumstances of the present case, could legitimately have expected that, in response to her express request, the EPO would have warned her of the outstanding fee for re-establishment.

2.5 If a warning can be expected but is not issued to the applicant within the time limit to be observed, the EPO must set a period in which the applicant can correct the deficiency and perform the procedural acts in time (cf. decision J 13/90). This is no longer necessary in the present case since, after having been informed of the outstanding fee for re-establishment of rights by the communication of 10 February 1992, the Appellant paid the fee within the time limit set by this communication for filing observations.

- 2.6 For the above reasons, the request for re-establishment is, contrary to the contested decision, considered to be admissible.
3. As a result, the Legal Board of Appeal could remit the case to the department of first instance for examination of the request for re-establishment on the merits. The Board, however, in exercising its discretionary power under Article 111(1) EPC, has decided not to do so for the following reasons. The first instance, in its decision of 19 June 1992, confined itself to a brief discussion of the issue whether, pursuant to Article 122(1) EPC, all due care required by the circumstances had been taken (cf. page 5 of the decision of 19 June 1992). It, nevertheless, emerges from the communication of 10 February 1992, that the Appellant was given sufficient opportunity to comment on this issue. Moreover, it follows from the file that the first instance duly considered the Appellant's arguments but came to the conclusion that they were not sufficiently substantiated. The Board is, therefore, satisfied that the Appellant was given the opportunity to argue his case before two instances.
4. Hence, the Legal Board of Appeal, hereafter, considers the issue whether all the due care required by the circumstances had been taken to comply with the time limit for the payment of the renewal fee for the third year (Article 122(1) EPC).
- 4.1 According to the representative's statements, the non-observance of the time limit was due to the combination of two events: the frequent absences of the Appellant and the severe illness of the professional representative between June and October 1991.

- 4.2 With regard to the absences of the Appellant, no detailed information or proof was submitted. The Appellant, obviously, had to do a lot of business-related travelling. His trips were an ordinary part of his occupation. The frequent absences did not, therefore, occur surprisingly. In these circumstances, a diligent and careful applicant may be expected to make arrangements so that prolonged interruptions in communication with the authorised representative can be avoided. Alternatively, the applicant would have to instruct the representative to take, until further notice, every procedural step necessary in order to maintain his patent application. No evidence was submitted showing that any of these measures was taken by the Appellant.
- 4.3 Even if such measures had been taken, the failure to comply with the time limit would hardly have been avoided since the representative, due to her illness, did not even try to contact the Appellant within the critical three months before 2 October 1991. Hence, it appears to be unimportant whether or not the Appellant could have been contacted at that time.
- 4.4 In the Board's view, the illness of the professional representative is, therefore, the actual cause for the non-observance of the time limit of 2 October 1991. The professional representative was forced to interrupt her professional activities from June until the beginning of October 1991. On inquiry by the Board she stated that, because she was a professional in practice alone, nobody had been available to handle the time monitoring system or to comply with the time limits during her illness. Therefore, the issue arises, whether, in view of the representative's illness, all due care had been taken to avoid a loss of rights during the critical period. According to the jurisprudence of the Boards of Appeal,

it must normally be expected that, in a large firm, where a considerable number of deadlines have to be monitored, at least an effective system of staff substitution in the case of illness and for absences in general is in operation (decision T 324/90; OJ 1993, 33). The Board concedes that, in the case of a professional working alone and having a much smaller number of time limits to comply with, less strict standards, in this respect, may be applied. However, a careful and diligent professional representative must, in any case, be expected to take into account that he or she might fall ill and be prevented, for some time, from taking care of time limits. Therefore, if a professional representative runs a one person office, appropriate provisions should be made so that, in the case of an absence through illness, the observance of time limits can be ensured with the help of other persons. If there is no substitute or assistant at the representative's office, cooperation with colleagues or with a professional association could e.g. be sought for this purpose.

In the present case, it is admitted that no precautions were taken to ensure the observance of time limits during the representative's illness. The time monitoring system was left to itself for about three months. Even though the professional representative was only handling a few European patent applications she had to reckon with the possibility of time limits falling within this period.

- 4.5 From the foregoing, the Legal Board of Appeal must conclude that, in the circumstances of the present case, all due care was taken neither by the Appellant nor by his professional representative. The request for re-establishment of rights is, therefore, refused.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



R. Schulte

B. Schachenmann 15.10.93

ArDames 22.10.93