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D E C I S I O N
of 22 April 2004

Case Number: T 0772/03 - 3.5.3

Application Number: 93117371.0

Publication Number: 0597318

IPC: H01Q 19/17

Language of the proceedings: EN

Title of invention:
Multibeam antenna for receiving satellite

Applicant:
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.

Headword:
Multibeam antenna/MATSUSHITA

Relevant legal provisions:
EPC R. 71(1), 67

Keyword:
"Less than 2 months notice of summons to oral proceedings without agreement of the party"
"Substantial procedural violation (yes)"
"Remittal to the first instance (yes)"
"Refund of appeal fee (yes)"

Decisions cited:
T 0111/95

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0772/03 - 3.5.3

D E C I S I O N
of the Technical Board of Appeal 3.5.3
of 22 April 2004

Appellant: MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
1006, Oaza-Kadoma
Kadoma-shi
Osaka 571-8501 (JP)

Representative: Kügele, Bernhard
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CH-1220 Les Avanchets - Geneva (CH)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 18 February 2003 refusing European application No. 93117371.0 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: A. S. Clelland
Members: M.-B. Tardo-Dino
A. J. Madenach

Summary of Facts and Submissions

I. European patent application No. 93 117 371.0 was filed on 27 October 1993 and published under No. EP-A2-0 597 318.

II. The Examining Division issued a first decision on 14 January 2000 refusing the application on the ground that the subject-matter of claims 1 and 2 lacked an inventive step.

III. The applicant appealed this decision with letter dated 22 February 2000, and filed amended sets of claims of main and auxiliary requests .

IV. On 11 July 2000 the Examining Division making use of its power under Article 109 EPC rectified the decision dated 14 January 2000 and refunded the appeal fee.

V. In a communication dated 19 February 2001 the Examining Division informed the applicant that the decision of 14 January 2000 had been rectified because of an error in designation of the documents D1 and D2, resulting in the documents being interchanged. The Examining Division further indicated that it considered that the claims of the main request lacked an inventive step and that the claims of the auxiliary request infringed Article 123(2)EPC.

VI. With letter dated 15 June 2001 the applicant cancelled the previous main request and maintained its auxiliary request with some amendments to claim 1 as the new main request. In the event that the Examining Division

intended to refuse the application oral proceedings were requested.

VII. With a notice dated 8 October 2002 the applicant was summoned to the oral proceedings scheduled on 3 December 2002.

VIII. By a telephone call on 2 December 2002 mentioned in the file the applicant "was informed that the oral proceedings on 4 December 2000(sic) will take place in the PschorrHöfe building..."

IX. The minutes of the oral proceedings indicate that these proceedings took place on 3 December 2002, and that the applicant did not appear despite having been duly summoned.

X. The decision was given to refuse the application, the written decision stating that it was for lack of inventive step.

XI. With letter dated 16 April 2003 the applicant filed a notice of appeal against this decision and requested that the decision be set aside. A substantial procedural violation was alleged based on the non observance of Rule 71(1) EPC which provides that at least two months' notice must be given before the oral proceedings unless the parties agree to a shorter period. It was further requested that in view of the circumstances and especially that the Examining Division had already made and corrected one procedural violation the case should be remitted to a different Examining Division. A refund of appeal fees was requested.

The appellant's representative insisted that he never agreed to a shorter period than the prescribed two months and contested the assertion set out in the minutes of the oral proceeding according to which the applicant's representative had "confirmed repeatedly by phone that they would come".

Reasons for the Decision

1. The appeal is admissible.

2. It is apparent that the summons dated 8 October 2002 to oral proceedings on 3 December 2002 does not comply with the minimum time limit of two months required by Rule 71(1) EPC. In accordance with this Rule at least two months' notice of the summons must be given unless the parties agree to a shorter period.

3. In the present case there is no evidence on the file that the appellant's representative agreed to a shorter period of notice. The Board notes that the minutes of the oral proceedings state that the applicant "had been duly summoned" and that the representative had "confirmed repeatedly by phone that [he] would come", but the appellant contests this and states that the date was fixed without his agreement and that he never agreed to the shorter period of notice. He also states that he never confirmed that he would attend the oral proceedings. He draws attention to the minute of a telephone call to his secretary the day before the date of the hearing in which the first examiner stated that the hearing would take place in the PschorrHöfe

building; the secretary is quoted as having "subsequently confirmed that the person attending had received this information".

4. Dealing first with the minute of the telephone call, the Board notes that this is rendered confusing by the fact that it gives the wrong date for the hearing - 4 December instead of 3 December - and indeed even gives the wrong year, 2000 instead of 2002. Nor does it state that the representative would be attending, but rather that he had received the information on the location. The Board accordingly attaches no significance to the contents of this minute.

5. Nor do the minutes of the oral proceedings prove that the representative agreed to a shorter period of notice. The statement that the representative had "confirmed repeatedly by phone that [he] would come" is not supported by any documentary evidence, or as noted above by the phone call the day before the hearing.

6. Moreover, the file contains no evidence that the representative and the examining division ever discussed a shorter period of notice, or that the representative assented to a shorter period, either explicitly at the time of appointing the hearing or implicitly by attending the hearing.

7. The Board observes that, as held in decision T 111/95 (not published), the onus of proving that agreement on a shorter period for notice was reached lies with the Examining Division as the party making the claim. On the facts of the present case it has failed to do so. This failure constitutes a substantial procedural

violation justifying both a remittal to the first instance and a refund of the appeal fee.

8. Finally, the Board notes that this is the second appeal on the present case. In the first appeal, the decision was rectified by interlocutory revision and the appeal fee refunded. The Board accordingly suggests that it would be appropriate to change the composition of the examining division.

9. Since the appeal is allowable and a substantial procedural violation has occurred, the Board deems it equitable to order reimbursement of the appeal fees in accordance with the Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The matter is remitted to the first instance with the order to resume proceedings at the stage reached prior to the summons of 8 October 2002.

3. The appeal fee is refunded.

The Registrar: The Chairman:

D. Magliano A. S. Clelland