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**D E C I S I O N**  
**of 13 December 2005**

**Case Number:** T 0172/04 - 3.2.06

**Application Number:** 97200550.8

**Publication Number:** 0794275

**IPC:** D03D 11/02

**Language of the proceedings:** EN

**Title of invention:**

A fabric for the confection of roller blinds

**Patentee:**

l'Estor, S.L.

**Opponents:**

HUNTER DOUGLAS Industries B.V.

AB Ludvig Svensson

**Headword:**

Enhancement of roller blinds/L'ESTOR S.L.

**Relevant legal provisions:**

EPC Art. 108, 121, 122(2)

EPC R. 84(a)

**Keyword:**

"Rule 84(a) EPC: document not received - Article 121 EPC: not allowable - Article 122 EPC: not admissible"

**Decisions cited:**

J 0007/82, T 0191/82

**Catchword:**

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Case Number: T 0172/04 - 3.2.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.06  
of 13 December 2005

**Appellant:** l'Estor S.L.  
(Proprietor of the patent) Avda, Barberá 328-332  
E-08203 Sabadell (Barcelona) (ES)

**Representative:** Ungria Lopez, Javier  
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**Respondent 01:** HUNTER DOUGLAS Industries B.V.  
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NL-3008 AB Rotterdam (NL)

**Representative:** Schapira, Ronald Allen  
Hunter Douglas Industries B.V.  
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NL-3071 EL Rotterdam (NL)

**Respondent 02:** AB Ludvig Svensson  
(Opponent 02) S-511 82 Kinna (SE)

**Representative:** Hammond, Andrew David  
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S-417 56 Göteborg (SE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 17 November 2003  
revoking European patent No. 0794275 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** J. Van Moer  
G. De Crignis

## Summary of Facts and Submissions

- I. The present appeal is from a decision of the opposition division dated 17 November 2003 revoking European patent No. 0 794 275.
- II. The opposition division was of the opinion that the grounds of opposition under Article 100(b) and (c) EPC prejudiced the maintenance of the patent.
- III. Notice of appeal was lodged on 27 January 2004 and the appeal fee paid the same day.
- IV. In a communication dated 13 May 2004 the Board informed the parties that the statement of grounds of appeal had not been filed and set a two month time period to file observations.
- V. With letter of 26 July 2004 the appellant (patent proprietor) submitted the following arguments and requests.
  - The grounds of appeal had been despatched within time on 27 February 2004 and Rule 84a EPC was applicable.
  - As a precaution, reestablishment of rights was requested under Article 122 EPC. This request was allowable since all due care had been taken within an otherwise satisfactory control system.

The appellant further contended that its submissions had been filed in time since the communication of the Board dated 13 May 2004 was to be considered as

notified ten days afterwards i.e. on 24 May 2004, 23 May 2004 being a Sunday so that the two months time periods expired on 26 July 2004, 24 July 2004 being a Saturday.

VI. The respondent 02 (opponent 02) replied with letter of 8 October 2004.

He submitted that Rule 84a was not applicable as there was no indication that the grounds of appeal had reached the European Patent Office within the 3 months from expiry of the time limit.

Further a correct application of Rule 78(2) EPC and Rule 85(1) EPC - assuming Rule 78(2) EPC was applicable contrary to decision T 428/98 - gave the due date of 23 July 2004 for the *restitutio in integrum* time limit.

In any case, *restitutio in integrum* was not allowable as the routines outlined by the appellant did not include any control that the documents actually reached the EPO although such means were readily available.

VII. In a communication dated 14 February 2005 the Board drew the attention to the advice of delivery of the letter of the Board dated 13 May 2004 and to decision J 7/82, OJ EPO 1982, 391 with respect to the starting date of the Article 122(2) EPC time limit.

VIII. In response, the respondent 02 completed his argumentation with letter of 25 April 2005 as follows:

- The appellant not having contested that the letter of 13 May 2004 had been notified there was no reason for the Board to investigate delivery.
- The advice of delivery of this letter was irrelevant as the handwritten date of receipt was illegible.

IX. The appellant completed his argument with letter of 25 April 2005 as follows:

- He admitted the Board's communication dated 13 May 2004 was received at his firm on 17 or 18 May 2005 although only brought to his attention one or two weeks later and he referred to decision T 191/82 which held that the representative himself had to be made aware of the facts.
- Auxiliary to his request on the basis of Rule 84(a) EPC, he filed a request for further processing under Article 121 EPC with respect to the time limit set by the Board in its communication of 13 May 2004, this time limit not being a term set in the EPC.
- In addition auxiliary he filed a request for *restitutio in integrum* into the same time limit set by the Board in its communication of 13 May 2004, the reason being that the representative had become aware of the receipt of the Board's communication of 13 May 2004 at the earliest on the date corresponding to the legal fiction under Rule 78(2) EPC.

X. As annex to the summons to oral proceedings the Board issued a communication in view of Article 113(1) EPC underlining the following considerations.

- The letter of the Board dated 13 May 2004 was to be considered to have been received at the latest on 18 May 2004 by an authorised member of the appellant's staff.
- Decision T 191/82 was irrelevant as no registered post was involved in the reasons for the decision.
- As a consequence the request for *restitutio in integrum* into the time limit of Article 108 EPC was late.
- Article 121 EPC could not be applied as it did not apply to procedure after grant.
- The request for *restitutio in integrum* into the time limit of two months set by the Board in the communication of 13 May 2004 was also late as apparently the appellant was putting forward the same arguments as for the first *restitutio in integrum* request and therefore the date of the removal of the cause of non-compliance was once again 18 May 2004.

XI. Oral proceedings took place on 13 December 2005.

The appellant and respondent 02 were present and presented the same arguments as in writing.

The appellant requested that the decision under appeal be set aside as regards the grounds of opposition under Article 100(b) and (c) EPC. It further requested that the grounds of appeal be deemed to be filed in due time. Auxiliarily it requested *restitutio in integrum* under Article 122 EPC or further processing in accordance to Article 121 EPC.

The respondent 02 requested that the appeal be dismissed.

The respondent 01 made no substantive submissions in writing and, as announced by letter of 15 September 2005, was not present at the oral proceedings.

## **Reasons for the Decision**

1. *The appellant's request on the basis of Rule 84(a) EPC*

According to its wording, Rule 84(a) EPC only applies if a document is received late at the European Patent Office.

In the present case, the statement of grounds of appeal allegedly despatched was never received at the European Patent Office.

In its attempt to prove the earlier despatch of the statement of grounds of appeal the appellant relied on two documents as evidence.

The first one is an affidavit by one of its employees but this affidavit only states that said employee had

placed the envelope in the tray of post to be despatched. As what happened afterwards is not defined, this evidence is insufficient.

The second one is a document from the Spanish postal services indicating that on 27 February 2004 the firm of the representative of the appellant sent to the European Patent Office a number of not further specifically identified mail items.

Nothing in that document qualifies as evidence that the statement of grounds was part of it.

Therefore this evidence is also insufficient.

Thus Rule 84(a) EPC cannot be applied in the present case.

2. The appellant's auxiliary request to allow *restitutio in integrum* into the time limit of two months set by the Board in its communication of 13 May 2004 to file observations has no object as neither the respondents nor the Board have objected to the compliance of the appellant's main request with said time limit and the non-compliance with a time limit is the first legal condition for the application of Article 122 EPC. In any case - according to the appellant's own statement - this request was made under the condition that the Board considered the main request not filed within time which condition was not fulfilled.

Therefore this request is not admissible.

3. *The appellant's request on the basis of Article 121 EPC*



Article 121 EPC, according to its wording, only applies to European patent applications and not to European patents.

The present case relates to a granted European patent and not to an application and as one of the conditions set out in Article 121 EPC fails, the Article cannot be applied.

4. *The appellant's request for restitutio in integrum into the time limit set by Article 108 EPC*

To decide on the admissibility of this request one of the conditions to be considered is the date of the removal of the cause of non-compliance as required by Article 122(2) EPC.

In his letter dated 25 April 2005 the appellant has admitted that the Board's communication of 13 May 2004 was received at the firm of the representative by an authorised staff member at the latest on 18 May 2004.

Applying the usual legal principles as set out in decision J 7/82; OJ EPO 1982, 391 the Board comes to the conclusion that the time limit to be considered here expired on 19 July 2004, 18 July being a Sunday.

The Board is indeed of the opinion that the date of removal of the cause of non-compliance is 18 May 2004 as Article 122(1) EPC is concerned with the factual circumstances of the removal.

The notification system by registered letter under Rule 78(c) of the EPC implies that such a notification is delivered at the addressee and in the present case the appellant has never disputed that the correct addressee was the firm of its representative and has admitted that the notification concerned was received by an employee authorised to receive post on behalf of the appellant.

The circumstance that the representative himself only had knowledge of the notification several days or weeks later is not evidenced and, furthermore, even if it was the case, would be irrelevant as in the present case the only legal condition to consider i.e. delivery at the addressee is established.

Decision T 191/82 cannot help the appellant's case as that decision deals with different facts especially the fact that the loss of rights was discovered by an employee irrespective of any registered notification delivered to a recipient acting on behalf of the party.

The logical legal consequences of the above are that the date of removal of the cause of non-compliance is 18 May 2004 and that the request for *restitutio in integrum* filed on 26 July 2004 is out of time, the time limit having expired 19 July 2004.

Consequently the appeal is not admissible as the statement of grounds for the appeal was not timely filed within time in accordance with Article 108 EPC.

**Order**

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

1. The grounds of appeal are deemed not to have been filed in due time.
2. The requests for *restitutio in integrum* are inadmissible.
3. The request for further proceeding is inadmissible.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau