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**Datasheet for the interlocutory decision
of 28 February 2018**

Case Number: T 1201/10 - 3.5.01

Application Number: 02747302.4

Publication Number: 1402441

IPC: G06F17/60

Language of the proceedings: EN

Title of invention:

SYSTEM AND METHOD FOR PERSONALISED INTERACTIVE AUTOMATED
ELECTRONIC MARKETING

Applicant:

Rochet, Jean-Luc
S.A. POLYGONE INTERNATIONAL

Headword:

Re-establishment / POLYGONE INTERNATIONAL

Relevant legal provisions:

EPC Art. 122, 128(4)
EPC R. 51(2), 51(4)(a), 136(1), 136(2), 144
Decision of the President of the European Patent Office dated
12 July 2007 concerning documents excluded from file
inspection

Keyword:

Re-establishment of rights (yes) - time limit for paying
renewal fee - unrepresented applicant - due care on the part
of the applicant - exceptional circumstances
Exclusion of documents from file inspection (yes)

Decisions cited:

J 0005/94, J 0023/14, J 0007/15 and J 0008/15, J 0007/16,
T 0287/84 (OJ 1985, 333), T 473/91 (OJ 1993, 630), T 0936/90
of 22 July 1993, T 0555/08, T 1381/11 and T 0649/13



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Case Number: T 1201/10 - 3.5.01

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.5.01
of 28 February 2018

Appellant: Rochet, Jean-Luc
(Applicant 1) Rue des Tilleuls, 77
1435 Hévillers (BE)

Appellant: S.A. POLYGONE INTERNATIONAL
(Applicant 2) Chaussée de Louvain 47
1410 Waterloo (BE)

Representative: Madgwick, Paul Roland
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 16 December
2009 refusing European patent application No.
02747302.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman W. Chandler
Members: N. Glaser
Y. Podbielski

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Examining Division posted on 16 December 2009 to refuse application No. 02747302.4 for lack of inventive step. The notice of appeal was filed on 15 February 2010 and the appeal fee was paid on the same day. The statement setting out the grounds of appeal was filed on 26 April 2010.

- II. The appellant was informed by notice dated 5 July 2013 that the renewal fee for the 12th year of the application had fallen due on 31 May 2013 and had not been paid by the due date. The appellant was further informed that, if the renewal fee and the additional fee were not paid by the last day of the 6th calendar month following the due date, the application would be deemed withdrawn.

- III. On 9 December 2013 the appellant paid the renewal fee and the additional fee. In a telephone conversation on 15th January 2014 the appellant's representative was informed that the payment of the renewal fee for the 12th year and the additional fee was received too late as the last day to pay these fees had been 2 December 2013.

- IV. On 3 February 2014 the appellant filed a request for re-establishment of rights into the period for paying the renewal fee for the 12th year of the application. The appellant paid the fee for re-establishment of rights on 28 January 2014 and again on 4 February 2014. An amount equalling one of the payments was subsequently reimbursed. The appellant requested oral proceedings in case the request for re-establishment of

rights could not be granted as a result of the written procedure. The present decision concerns this request.

- V. The appellant also filed with his submissions of 3 February 2014 a request for interruption of the proceedings due to action taken against the appellant's property. The Legal Division informed the appellant by communication dated 13 August 2015 that the request for interruption of the proceedings could not be granted. The appellant was informed that he could request an appealable decision within two months of notification of this communication. No such request was filed.
- VI. The request for re-establishment of rights dated 3 February 2014 was accompanied by a request to exclude it from the public file as it contained facts of commercial significance. A further letter from the appellant dated 30 June 2014 concerned with the request for interruption of the proceedings also contained a request that the letter and the annexes thereto be excluded from the public file as they contained personal and commercial information about the appellant and his company. The Legal Division informed the appellant by letter dated 4 July 2014 that his requests for exclusion from file inspection made in the letters dated 3 February 2014 and 30 June 2014 were granted.
- VII. On 7 March 2017 the appellant filed a request for re-establishment of rights into the period for paying the renewal fee for the 15th year of the application. That request was accompanied by a request for exclusion from the public part of the file as the request for re-establishment of rights contained statements concerning the appellant's financial affairs. The Board informed the appellant by communication dated 30 May 2017 that

his request for exclusion from file inspection made in his letter dated 7 March 2017 was granted.

- VIII. In a communication dated 6 July 2017 the Board set out its preliminary view that the appellant's request for re-establishment of rights dated 3 February 2014 was admissible, but unlikely to be allowable. The Board has decided to exclude the communication from file inspection for the same reasons as those given in points 14-19 below.
- IX. Oral proceedings took place on 28 February 2018. In the course of the oral proceedings the appellant submitted two further documents and asked that these also be excluded from the public file as they concerned the appellant's financial affairs. Two days in advance of the oral proceedings, the appellant sent a letter containing references to his financial affairs together with annexes intended as further evidence. The Board interprets the appellant's request from exclusion of file inspection made in the context of the oral proceedings as also applying to the letter dated 26 February 2018 and its annexes.
- X. The appellant's arguments, and evidence in support thereof, are summarised below. They have been redacted for the same reasons as those given in points 14-19 below.

...

Reasons for the Decision

Board's competence to decide

1. The requests for re-establishment of rights were filed while the appeal proceedings were pending and with regard to time limits that had expired in the course of these proceedings. Any loss of rights resulting from the failure to pay the renewal fees thus also occurred in the course of the appeal proceedings. Given that with the commencement of the appeal proceedings, the competence to decide on the case has moved from the department of first instance to the Boards of Appeal (T 473/91, OJ 1993, 630, Reasons 1.2), the Board is competent to decide on the requests for re-establishment of rights (T 555/08, Reasons 2; see also T 936/90 of 22.7.1993, Reasons 1; T 1381/11 and T 649/13, Reasons 3).

Requests on which the Board needs to decide

2. The request for re-establishment of rights filed with letter dated 7 March 2017 is moot as the renewal fee for the 15th year of the application has not fallen due. It only becomes due on the date of notification of the decision re-establishing the appellant into the period for paying the renewal fee for the 12th year (Rule 51(4)(a) EPC). Thus, the only request for re-establishment of rights on which the Board decides is that filed on 3 February 2014 (hereinafter "the request for restitution").

Admissibility of the request for restitution

3. For the request for restitution to be admissible it must have been filed within two months of the removal of the cause of non-compliance, the omitted act must have been completed and the fee for restitution must have been paid within this time period, and the request must state the grounds on which it is based and set out the facts on which it relies (Rule 136(1) and (2) EPC).
4. A patent application is deemed withdrawn only upon expiry of the six-month grace period for paying the renewal fee with additional fee under Rule 51(2) EPC (J 23/14, Reasons 2.3-2.5, referring to established case law; see also J 7/15 and J 8/15, Reasons 3 and J 7/16, Reasons 4.1.3). Thus, the relevant time-limit with which the appellant failed to comply was that for the payment of the renewal fee, plus the additional fee, for the 12th year of the application. The last day on which these payments could have been made was 2 December 2013.
5. The Board accepts the appellant's account of events and regards 9 December 2013 as the date of the removal of the cause of non-compliance. The appellant's request for restitution was received on 3 February 2014 and thus within 2 months of the removal of the cause of non-compliance, with the payment of the fee for restitution having already been made. Rule 136(1) EPC is thus complied with.
6. The request contains the grounds on which it is based as well as the facts on which it relies. The payment of the renewal fee, with the additional fee, for the 12th year of the application was made on 9 December 2013. Rule 136(2) EPC is thus also complied with.

7. In view of the above, the request for restitution is admissible.

Allowability of the request

8. Under Article 122(1) EPC, an applicant for a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office, which has the direct consequence of causing a loss of rights, shall, upon request, have his rights re-established.
9. When considering whether all due care has been exercised, the Board has to look at the circumstances of the case as a whole (T 287/84, OJ 1985, 333), and consider it in the light of the situation as it stood before the time limit expired (Case Law of the Boards of Appeal, 8th edition, III.E.5.2, with reference to several decisions).
10. At the relevant time in question, which is the period prior to 2 December 2013, the appellant was not represented, as the firm representing the appellant had withdrawn from representation in March 2013. With this withdrawal, the sub-authorisation of 15 June 2010 for the person who eventually became the new representative of the appellant also ceased. The appellant was thus not represented until the new representative was appointed. The information that the new representative had been instructed to take over representation was sent to the EPO by letter dated 19 December 2013.
11. When assessing what standard of care can be expected, the same standard of care is not expected from an

unrepresented applicant as from a professional representative. The standard expected from an unrepresented applicant is lower so as to take into account that the applicant cannot be expected to have the same level of knowledge of the procedure before the EPO. However, an individual applicant must also exercise due care. He must take all necessary steps to ensure that he can do whatever is required during the grant procedure to prevent any loss of rights (J 5/94, Reasons 3.1; see also further decisions referred to in this respect in Case Law of the Boards of Appeal, 8th edition, III.E.5.5.1 b)).

12. In cases such as the present one, where the non-compliance with a time limit involves an error in carrying out the intention to comply with the time limit, the boards have repeatedly held that due care is considered to have been taken if non-compliance with the time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (see Case Law of the Boards of Appeal, 8th edition, III.E.5.2, with reference to several decisions). The latter is not relevant for the case in question. In the present case, the Board must assess whether there were exceptional circumstances which caused the appellant to miss the relevant time limit.

13. The appellant's version of events is credible and supported by several pieces of evidence. The Board thus regards the appellant's version of events as convincing. The Board is also convinced that there were exceptional circumstances prior to 2 December 2013, which had not ever happened beforehand and which could not reasonably have been foreseen by the appellant. These circumstances, which were predominantly outside

the appellant's control, directly resulted in the appellant being unable to observe the time limit for payment of the renewal fee, together with the additional fee, for the 12th year of the application. Thus, despite having taken all due care in the circumstances, the appellant missed the time limit. In view of this, the appellant's request for restitution is allowed.

Exclusion of documents from file inspection

14. Rule 144 EPC identifies parts of the file which are excluded from file inspection under Article 128(4) EPC. These include documents excluded from inspection by the President of the EPO on the ground that such inspection would not serve the purpose of informing the public about the European patent application or the European patent.
15. Pursuant to Article 1(2)(a) of the Decision of the President of the European Patent Office dated 12 July 2007 concerning documents excluded from file inspection (OJ EPO 2007, Special edition No.3, J.3., p.125) documents are excluded from file inspection at the reasoned request of a party or his representative, if their inspection would be prejudicial to the legitimate personal or economic interests of natural or legal persons.
16. In the present case, requests for exclusion from file inspection concern the appellant's request for re-establishment of rights dated 7 March 2017, the appellant's letter dated 26 February 2018 together with the annexes thereto and the documents presented to the Board in the course of the oral proceedings on 28 February 2018.

17. None of the documents for which the appellant seeks exclusion from file inspection is relevant for the assessment of the patent application as such. They thus do not serve the purpose of informing the public about the patent application.

18. The appellant's request for re-establishment of rights dated 7 March 2017 contains information concerning the appellant's financial affairs. The appellant has a legitimate personal interest that this information is not made public. In addition, this request for re-establishment is moot (see point 2 above) and thus also not relevant for this decision.

19. The letter dated 26 February 2018 as well as the first document presented during the oral proceedings before the Board (the latter is referred to hereinafter as "the document presented to the Board at the oral proceedings") comprise in large parts information concerning the appellant's financial affairs. The annexes to the letter provide evidence thereof and the Board considers the letter and its annexes as intertwined such that their exclusion from file inspection is considered together. In view of the information concerning the appellant's financial affairs in these documents, the Board is of the view that the appellant has a legitimate interest that both the document presented to the Board at the oral proceedings and the letter dated 26 February 2018 together with its annexes are to be excluded from file inspection. As regards the second document presented during the oral proceedings, the Board notes that this was merely a better copy of the first annex to the letter dated 26 February 2018.

Order

For these reasons it is decided that:

1. The appellant is re-established in his rights.
2. The following documents are excluded from file inspection:
 - the appellant's request for re-establishment of rights dated 7 March 2017
 - the document presented to the Board at the oral proceedings
 - the appellant's letter dated 26 February 2018 together with the annexes thereto.

The Registrar:

The Chairman:



T. Buschek

W. Chandler

Decision electronically authenticated