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**Datasheet for the decision
of 5 May 2014**

Case Number: T 0707/13 - 3.2.03

Application Number: 05020754.7

Publication Number: 1640512

IPC: E02F9/20, E02F9/22

Language of the proceedings: EN

Title of invention:
Loader control system.

Patent Proprietor:
Agco SA

Opponent:
Deere & Company

Headword:

Relevant legal provisions:

EPC Art. 122(1)
EPC R. 101(2), 99(1)(a)

Keyword:

Admissibility of appeal - notice of appeal - name and address
of appellant
Re-establishment of rights - all due care (no)

Decisions cited:

T 0938/94, T 0774/05

Catchword:



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Boards of Appeal
Chambres de recours**

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Case Number: T 0707/13 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 5 May 2014

Appellant:
(Patent Proprietor)

Agco SA
Avenue Blaise Pascal
60026 Beauvais (FR)

Representative:

AGCO Intellectual Property Department
AGCO Limited
Abbey Park Stoneleigh
Kenilworth, Warwickshire CV8 2TQ (GB)

Respondent:
(Opponent)

Deere & Company
One John Deere Place
Moline, IL 61265-8098 (US)

Representative:

Dehnhardt, Florian Christopher
John Deere GmbH & Co. KG
Global Intellectual Property Services
John-Deere-Straße 70
68163 Mannheim (DE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 January 2013 concerning maintenance of the
European Patent No. 1640512 in amended form.**

Composition of the Board:

Chairman: G. Ashley
Members: V. Bouyssy
K. Garnett

Summary of Facts and Submissions

I. By its decision posted to the parties on 9 January 2013, the Opposition Division rejected the main request of the proprietor (AGCO SA) to reject the opposition but held that the patent could be maintained in amended form according to the proprietor's sole auxiliary request.

II. A notice of appeal was filed by the proprietor (hereafter: the appellant) on 19 March 2013. The letter-heading on the notice of appeal was as follows:

"AGCO, Your Agricultural Company",

together with the following words:

"AGCO Limited

Registered Office: Abbey Park Stoneleigh, Kenilworth,
England CV8 2TQ",

followed by contact details. The Notice itself was headed:

"Re:

European Patent EP 1,640,512 B1

Application No: 05 020 754.7

Proprietor and Appellant: AGCO SA

Proprietor's Ref: 7657EP"

The notice was signed by an authorised representative, Mr David Marden.

III. The proprietor of the patent, as stated in the decision appealed from and as confirmed in the European Patent Register was, as stated above, AGCO SA, whose address according to the Register was:

Avenue Blaise Pascal
60026 Beauvais
France

The proprietor's representative according to the register was:

AGCO Intellectual Property Department
AGCO Limited,
Abbey Park Stoneleigh
Kenilworth,
Warwickshire CV8 2TQ
GB

The address of the appellant itself was not revealed in the notice of appeal. The only address given was that of AGCO Limited. The same applies to the statement of the grounds of appeal which was filed on 17 May 2013.

IV. On 18 July 2013 the Board's Registrar sent the appellant a communication under Rule 101(2) EPC, drawing attention to the deficiency in the notice of appeal, namely that the address of the appellant was not stated (Rule 99(1)(a) EPC). The appellant was invited to remedy the deficiency within two months of notification of the communication, and it was stated that otherwise it could be expected that the appeal would be rejected as inadmissible. An acknowledgement of this communication, dated 23 July 2013, was received by the Office on 24 July 2013. Otherwise, there was no response.

V. On 3 December 2013 the Board sent a communication to the parties stating inter alia as follows:

(i) Having regard to (a) the fact that the notice of appeal did not appear to contain the appellant's address and (b) the appellant's apparent failure to remedy this defect within two months of notification of

the communication dated 18 July 2013, it appeared that the appeal must be rejected as inadmissible (Article 108 EPC, first sentence, in conjunction with Rule 101(2) EPC).

(ii) If the appellant disputed these conclusions, it was invited to file observations on the issue and also to state whether it requested oral proceedings to be appointed at which it could be heard, both such actions to be performed within two months of notification of the communication.

VI. On 24 December 2013 and in response to the Board's communication, the appellant filed submissions together with a request for re-establishment of the right provided under Rule 101(2) EPC, in respect of which the appropriate fee was paid on the same day.

VII. On 14 February 2014 the Board sent a further communication to the parties, stating inter alia as follows:

(i) Even assuming that the request for re-establishment had been filed within two months of the removal of the cause of non-compliance with the period specified in the communication of the Office dated 18 July 2013, it did not appear that the evidence filed, such as it was, established that the appellant had been unable to observe the time limit despite all due care required by the circumstances.

(ii) Oral proceedings would be held on 16 May 2014, at which the discussion would be limited to the issues of admissibility of the appeal and, if necessary, the appellant's request for re-establishment. If either of the parties did not wish to have, or did not intend to

attend such oral proceedings they were requested to notify the Board.

(iii) Any further written submissions on which either of the parties intended to rely should be filed at least one month before the date set for oral proceedings.

VIII. On 28 February 2014 the appellant filed a sworn statement of Mr Andrew White and Ms Lyne Murray confirming what had been said in the submissions filed on 24 December 2013 in support of the request for re-establishment of right. It was also stated that the appellant did not plan to attend the oral proceedings scheduled for 16 May 2014.

IX. On 3 March 2014 the opponent (hereafter: the respondent) filed a letter stating that it would also not be attending the oral proceedings scheduled for 16 May 2104.

X. On 28 April 2014 the Board cancelled the date scheduled for oral proceedings.

XI. The submissions of the appellant can be summarised as follows:

(i) Admissibility of appeal

Although not expressly reprinted in the Notice of Appeal, the appellant's address was readily available to all parties from simple inspection of the register. In T 938/94 both the name and the address of the appellant had been omitted. The Board there had stated that the purpose of the rule reflected a standard requirement which allows (enables) the Board to check that the party concerned is entitled to initiate the procedure and that the party can be easily identified.

(ii) Re-establishment

The non-observance of the time limit for providing the missing address was due to an isolated procedural mistake in an otherwise properly functioning administration. The mistake was due to (a) a failure to enter the associated deadline in the diary system and (b) filing the communication of 18 July 2013 in the case file without delivering the case file to the responsible IP attorney. The triggering factor was the rare occurrence of receiving a communication requiring the return of a signed acknowledgement of receipt.

In support of these general submissions the appellant relied on the following facts:

(a) The appellant is one of many companies within the AGCO group. All European-based companies in the AGCO group are supported and represented by the IP Department of AGCO Ltd, based in the UK.

(b) The time consuming effort involved in, and the financial cost of filing a notice of appeal and a statement of the grounds of appeal demonstrates the appellant's intent to continue with the appeal in the critical period.

(c) When the Board's communication of 23 July 2013 was received by the appellant, the assigned representative (Mr Marden) was away on vacation. The IP Administrator charged with handling the post, entering the deadlines in the diary management system and for filing communications for the AGCO Groups (Ms Murray) had over 12 years experience in that role and possessed the UK Chartered Institute of Patent Attorneys Certificate in Patent Administration.

(d) On 23 July 2013 Ms Murray had processed the Acknowledgement of Receipt Form (Form 2936) which had accompanied the Board's

communication, which involved delivering the communication to another representative, Mr Andrew White. Mr White signed the acknowledgement form, which Ms Murray then returned to the EPO the same day.

(e) Normal internal procedure involved the IP Administrator (in this case Ms Murray) recording the deadline for replying to the communication in the diary management system before marrying the communication to the case file and passing it to the responsible IP Attorney. To meet the requirements of AGCO Ltd's IP Department's Internal Diary Management Policy, the responsible IP attorney validates at least one of the diary entires made by the IP Administrator.

(f) In the present case both the original communication and the signed acknowledgement were placed in the case file.

(g) Mistakenly the deadline was not recorded in the diary management system nor was the case file delivered to the IP Attorney. The combination of these rare procedural omissions resulted in the non-observance of the time limit.

(h) AGCO IP Department had appropriate policies and procedures in place to handle official communications with all due care so as to reduce the risk of not observing critical time limits. The omission in this case was a rare example, in an otherwise successful system, of internal procedure not being followed.

XII. The respondent has not filed any submissions on this issue.

Reasons for the Decision

Admissibility of the appeal

1. Rule 99(1) (a) EPC states that the notice of appeal shall contain the name and the address of the appellant as provided in Rule 41, paragraph 2(c) EPC. Rule 101(2) EPC provides that if the Board of Appeal notes that the appeal does not comply with Rule 99(1) (a) EPC, it shall communicate this to the appellant and shall invite it to remedy the deficiencies noted within a period to be specified. If the deficiencies are not remedied in due time, the Board of Appeal shall reject the appeal as inadmissible.

2. In the present case the appellant does not dispute that the notice of appeal did not contain the address of the appellant, nor that this deficiency was communicated to the appellant by the Board, nor that the deficiency was not remedied within the period specified in the Board's communication and thus not within due time.

3. The appellant argues that the appellant's address was readily available to all parties from simple inspection of the register. This is true but not the point. The appellant refers to the statement in T 938/94 that the purpose of Rule 99(1) (a) EPC is to enable the Board to check that the party concerned is entitled to initiate the procedure and that this party can be easily identified. However, the relevant passage in T 938/94 states in full (point 3 of the Reasons):

"The requirements of Rule [99(1) (a)] EPC merely reflect a standard requirement when initiating a legal procedure, such as an appeal, that the name and address of the party initiating the procedure be given, so that it can be checked that the party is entitled to initiate the procedure, should, for example, the

procedure result in an order for costs being made against it. Initiation of such procedure is also a suitable time for those acting on behalf of the party to check that it is identified by its correct current name and address. While usually the name and address of the party will not have changed, there can be no presumption or implication that this is so. Hence the requirements of Rule [99(1)(a)] EPC."

The statement explains why the notice should appeal should specify not only the name but also the address of the appellant. The appellant also observes that in T 938/94 both the name and the address of the appellant had been omitted. This is true but irrelevant. It does not mean that the reference to the address of the appellant in Rule 99(1)(a) EPC can just be ignored.

4. It is also true that no one could reasonably have been misled or caused any harm by the omission. However Rule 99(1)(a) EPC is clear and the Board cannot simply disregard the requirement that the notice of appeal shall state the address of the appellant, nor ignore the obligation imposed on the Board of Appeal by Rule 101(2) EPC to reject the appeal as inadmissible in the present circumstances. As the Board in T 938/94 noted (point 2 of the Reasons):

"In these circumstances the Board has no choice but to reject the appeal as inadmissible as laid down in Rule [Rule 99(1)(a) EPC]: to do anything else would not be applying the European Patent Convention."

T 774/05, point 4.2 of the Reasons, final two sentences, is to the same effect.

5. Further, by itself, the failure to state the address of the appellant in the notice of appeal does not have any drastic

consequences. It is only after the Board has noted the omission, and then communicated this to the appellant, and then only when the appellant has failed to remedy the defect within due time that the drastic consequence of the appeal being inadmissible follows. The same point was made in T 938/94, the Board then adding (point 3 of the Reasons):

"Giving the name and address of a party is not an onerous burden. Even if an appellant fails to do so in the Notice of Appeal, he has the further period required to be set by Rule [101(2) EPC] in which to do so. Someone incapable both of meeting the clearly laid down requirements of Rule [99(1)(a)] EPC and of remedying this defect within the set time limit when invited to do so, cannot expect to have a further doctrine invented to excuse his failures."

6. Unless, therefore, the appellant succeeds in its request to have the right provided under Rule 101(2) EPC re-established, the appeal must be dismissed as inadmissible.

Re-establishment of the right provided under Rule 101(2) EPC.

7. Article 122(1) EPC provides that a proprietor of 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 shall have his rights re-established upon request if the non-observance of this time limit has the direct consequence of causing the loss of any right or means of redress.

8. The request for re-establishment is admissible (Rules 136(1) and (2) EPC).

9. While it is correct that the requirements of Article 122(1) EPC may be satisfied if the omission is an isolated mistake within a normally satisfactory monitoring system (See Case Law of the Boards of Appeal, 7th edition, page 556), the Board considers that such a principle does not assist the appellant in the present case, for the following reasons:

(a) As the appellant itself acknowledges, a communication from a Board of Appeal under Rule 101(2) EPC is not an everyday occurrence. Rather it is something which can be expected to alert a representative that appropriate action of some kind needs to be taken. It is in the nature of a wake-up call.

(b) It might be expected that Mr White, who was apparently responsible for the file while Mr Marden was on holiday, would have read the communication from the Board of 18 July 2013 when Ms Murray brought it to him on 23 July 2013. It consists of only one page. Whether or not he did so is not stated. All that can be gathered from the evidence is that he signed the acknowledgement form accompanying it. If he did read it, it could be expected that he would direct some sort of action to be taken, for example to supply the missing address (hardly an onerous task), ask when Mr Marden was expected to return and/or direct the file to be put on Mr Marden's desk if he was due to return before the expiry of the time limit specified in the Board's communication. Whether he did any of these things is not said.

(c) Instead the appellant refers to two omissions which are said to have been made by Ms Murray. No explanation is however provided as to how it was that she came to make the omissions in question. It is merely said that mistakenly neither was the deadline recorded in the diary management system nor was the case file delivered to the responsible IP Attorney (presumably Mr Marden). If, as the appellant submits, it was the combination of these rare procedural omissions that resulted in

the non-observance of the time limit, it is not explained how this doubly unfortunate state of affairs came about. There is therefore no evidence which substantiates the submission that all due care was taken by her.

10. The appellant submits that it is clear that it did not wish to give up the appeal (see point XI(ii)(b), above). This is not in doubt but not the point.

11. Overall therefore, there is no sufficient evidence to substantiate the submission that all due care was taken. The request for re-establishment is refused.

Order

For these reasons it is decided that:

1. The request for re-establishment of the right provided under Rule 101(2) EPC is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



C. Vodz

G. Ashley

Decision electronically authenticated