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Datasheet for the decision of 4 December 2020

Case Number:	T 1256/14 - 3.3.01
Application Number:	07870565.4
Publication Number:	2114425
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Language of the proceedings:	EN

Title of invention:
INTEGRATED PRODUCTION OF PHYTOCHEMICAL RICH PLANT PRODUCTS OR ISOLATES FROM GREEN VEGETATION

Applicants:
Savangikar, Chitra Vasant
Savangikar, Vasant, Anantrao

Headword:
Re-establishment of rights

Relevant legal provisions:
EPC Art. 122

Keyword:

Re-establishment of rights - due care in dealing with assistants

Decisions cited:

J 0005/80, J 0003/93, J 0016/93, J 0017/03, J 0001/07, J 0014/16, T 0667/92, T 1201/10

Catchword:

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Case Number: T 1256/14 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 4 December 2020

Appellant: (Patent Proprietor 1)	Savangikar, Chitra Vasant 74/F, Venus, Worli Sea Face Mumbai- 400 018, Maharashtra (IN)
Appellant: (Patent Proprietor 2)	Savangikar, Vasant, Anantrao 2 Rameshwar Apartment Near Mahila Bank Nashik 422 009 MAH (IN)
Representative:	Williams, Paul Edwin Lewis Silkin LLP 5 Chancery Lane Clifford's Inn London EC4A 1BL (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 16 December 2013 refusing European patent application No. 07870565.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	A. Lindner
Members:	L. Bühler
	J. Molina de Alba
	T. Sommerfeld
	P. de Heij

Summary of Facts and Submissions

I. The appeal lies from the decision of the examining division dated 16 December 2013 to refuse the applicants' request of 4 October 2011 for re-establishment of rights into the time limit for paying the renewal fee for the fourth year with additional fee for European patent application No 07870565.4.

II. The examining division enlarged by a legally qualified examiner refused the request for re-establishment essentially for the reason that the representative's system for monitoring the time limits for renewal fees was not satisfactory. According to the examining division, the monitoring system was deficient for the following reasons (see section II of the decision under appeal):

(i) The time limit in accordance with Rule 51(2) EPC of six months after the due date of the renewal fee was not monitored, and no reminder was sent towards the end of this period (points 10 to 14).

(ii) The system did not provide for an independent cross-check when discontinuing the monitoring for an application (point 15).

(iii) The separation between prosecution of applications and monitoring of renewal fees for applications within the organisation of the representative's office was shown to be unreliable (point 16).

III. The examining division's decision is based on the following evidence filed with the applicants' request of 4 October 2011 for re-establishment of rights and a letter dated 24 August 2012:

D1 witness statement by V. Savangikar

D2 witness statement by P. Williams (including Annexes 1 to 3)
D3 second witness statement by V. Savangikar
D4 witness statement by D. Morkeliunaite

IV. On 17 February 2014, the applicants (appellants) filed notice of appeal and paid the appeal fee. On 25 April 2014, the appellants filed their statement of grounds of appeal together with the following documents:
D5 email dated 29 July 2009 to V. Savangikar
D6 letter dated 4 November 2009 to S. Krishna

V. By letter dated 2 December 2014, the appellants filed a further (third) statement by V. Savangikar (D7).

VI. The board summoned to oral proceedings.

VII. By letter dated 26 November 2020, the appellants commented on the board's preliminary opinion accompanying the summons.

VIII. On 4 December 2020, oral proceedings were held via videoconference as requested by the appellants.

IX. The appellants' arguments relevant for the decision are as follows:

(a) The failure to pay the renewal fee for the fourth year for the application in question was due to a coincidence of three unrelated and isolated events:

(i) The first reminder for the renewal fee for the fourth year should have been printed and sent on 30 August 2010. However, this was a national holiday, and the person

responsible for reminder letters was not at the office. On her return, she forgot to run the renewal reminders letter report for the whole week.

(ii) The second reminder was sent on 1 November 2010 but was not received by the appellants.

(iii) On 23 December 2010, the application was erroneously recorded as abandoned. The record number for the application at issue (RB640) was in between the record numbers of three applications of a different applicant (RB618, RB638 and RB641-3). These applications had the same due dates and were transferred from the responsibility of the appellants' representative and therefore registered as abandoned. Due to a clerical error, the application at issue was also recorded as abandoned. Thus, a so called "abandoned letter" was not sent.

This coincidence of three completely unrelated events was highly unlikely. If only one of these events had not occurred, the renewal fee for the fourth year would have been paid. These events had nothing to do with the monitoring system. They had occurred outside of this system. In view of these exceptional circumstances, the request for re-establishment was allowable.

(b) Three situations had to be distinguished in which the monitoring for an application was discontinued and the application was recorded as abandoned in the monitoring system for renewal fees:

(i) A file was abandoned on instructions from the client (e.g. if the client no longer wanted to pursue an application). In this case, an abandoned letter was generated and sent to the client.

(ii) A file was also abandoned if no instructions to pay renewal fees were received in reply to the reminders sent before the due date. An abandoned letter was also generated and sent to the client in this case.

(iii) An application was abandoned if it was transferred to another professional representative or another payment service provider. In this case, no letter was generated.

In situations (i) and (ii), either explicit or implicit instructions by the client were present. In particular, it was agreed with the client, and the reminders made it clear, that renewal fees would not be paid in the absence of instructions. The abandoned letters sent to the client served as confirmation and a cross-check, respectively.

Situation (iii) was outside the regular renewal process and occurred very rarely. Only a single application was normally concerned. There was no automated process for this situation built into the monitoring system. The professional representative instructed a clerk to manually record the respective application as abandoned. This required making entries in two separate databases.

Therefore, it was not possible to accidentally record an application as abandoned and remove it from the monitoring.

(c) There was no cross-check built into the monitoring system for the transfer of an application to another representative or service provider. It was not technically feasible to implement a routine that would be able to identify an error in such a case. Furthermore, doublechecking the clerk's work would be unreasonable. Professional representatives should be able to rely on their experienced clerks and trust that they do what they have been asked to do properly. The required entries in two separate databases prevented errors. If the wrong application were abandoned, the error would be noticed. The wrong file would still be active. The resulting discrepancies would bring about an investigation into the causes. In addition and more importantly, the circumstances that led to the erroneous abandonment of the application at issue were unique. A transfer of three applications at the same time was exceptional and had never occurred before. Such a situation could not have been foreseen. The fact that the record number of the application at issue was in between the record numbers of the applications to be transferred and also had the same due date for the renewal fee was impossible to anticipate. Even if some kind of double-check on the clerk's work had been done, the error would have gone unnoticed. Retrospectively, it was clear what went wrong. But it was not reasonable to expect professional representatives or service providers to be prepared for every eventuality, let alone human errors there was no reason to suspect would happen.

X. The appellants requested that the decision under appeal be set aside and that the applicants be re-established into the time limit for paying the renewal fee for the fourth year with additional fee.

Reasons for the Decision

1. The appeal is admissible.

2. According to Article 122(1) EPC, an applicant may have its rights re-established if it has shown that in spite of all due care required by the circumstances having been taken, it was unable to observe a time limit vis-à-vis the European Patent Office. First, it is the applicant who has to observe all due care (J 3/93, point 2.1). If a professional representative is appointed, the duty of all due care applies both to the applicant and the professional representative (J 5/80, OJ EPO 1981, 343, point 4; J 17/03, point 5). In considering whether all due care has been observed, the circumstances of each case must be looked at as a whole. The obligation to exercise all due care must be considered in light of the situation as it stood before the time limit expired (see references in Case Law of the Boards of Appeal, 9th edition 2019, III.E.5.2).

3. For cases where non-compliance with a time limit involves some error in carrying out the party's intention to comply with the time limit, the case law has established the criterion 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 system (see references in Case

Law of the Boards of Appeal, 9th edition 2019, III.E. 5.3 and III.E.5.4).

4. Cause of non-compliance with the time limit

4.1 In this case, the system for monitoring the time limits for payment of renewal fees is based on two reminders sent four and two months before the due date of the renewal fee. If no instructions for payment are received before the due date, the application is considered abandoned. A letter (the "abandoned letter") is generated warning the client that the renewal fee has not been paid. The client is also informed that the renewal fee can still be paid on its instructions and that no further reminders will be sent. At the same time, the abandonment is recorded in the monitoring system.

4.2 The applicants argued that the failure to pay the renewal fee for the fourth year for the application at issue was due to a highly unlikely coincidence of three unrelated and isolated events (see point IX (a)). Non-compliance with the time limit therefore resulted from exceptional circumstances.

4.3 The coincidence of three mistakes in a single file is indeed exceptional (or unique, as the appellants put it). However, probability is not a criterion for re-establishment. In accordance with the case law, circumstances which cause a party to miss a time limit are exceptional only if they could not be reasonably foreseen by the party and are outside the party's or representative's control (see T 667/92, point 7 *in fine*; J 16/93, point 6.5 *in fine*; T 1201/10, point 13; J 14/16, point 6). The failure to send the first reminder and the loss of the second reminder cannot be

regarded as being outside the representative's control. Furthermore, these events were not the cause for missing the due date. Of course, had the reminders been sent and received, the appellants would have been aware of the due date and might have given instructions to pay the renewal fee. The failure to send the first reminder and the loss of the second reminder thus contributed to the non-payment of the renewal fee. Nevertheless, the abandoned letter is the only mechanism built into the representative's system to prevent a loss of rights if no instructions have been received by the due date. The erroneous abandonment of the application in the monitoring system prevented the abandoned letter from being generated and sent. This error is therefore the ultimate cause for non-compliance with the time limit in this case.

4.4 This finding is in line with the appellants' own submissions. They argued that the error occurred outside the renewal process for the application at issue when three applications of another applicant were transferred to a representative of another association. The appellants' representative was not in charge of these three applications. Instructions for their abandonment were given by a colleague. As a consequence of the erroneous abandonment of the application at issue, the cross-check process by way of the abandoned letter was bypassed (see, *inter alia*, D2, points 12 and 15 to 18).

4.5 For the above reasons, there is no need for the board to assess whether the representative met his obligation to exercise all due care in spite of the failure to send the first reminder and the loss of the second reminder. It is also not necessary to deal with the findings in the contested decision that the system for

monitoring time limits for payment of renewal fees was as such not satisfactory (see point II) as the non-compliance with the time limit was not the result of an error in monitoring it. The issue is rather whether the clerk's mistake in the process of a change of representation occurred in spite of all due care required by the circumstances having been taken.

5. Reasonable supervision

5.1 In accordance with the case law, a representative may entrust assistants with routine tasks. An assistant is not expected to meet the same standards of care expected of applicants or professional representatives. Moreover, an error by a negligent assistant is not attributed to the representative if the latter shows that they exercised the necessary due care in dealing with their assistant. In this respect, it is incumbent upon the representative to choose a suitable person, to ensure that this person is properly trained in the tasks to be performed, and to exercise reasonable supervision over their work (J 5/80, OJ EPO 1981, 343, headnotes II and III, points 6 and 7).

5.2 The entry of abandonment in the database for when the representation for an application has been transferred to an outside representative or service provider is an administrative task that may be delegated to a clerk. The representative could not identify the clerk who erroneously recorded the application as abandoned (see letter dated 3 September 2012, page 2, third paragraph). The exact circumstances of the erroneous abandonment can therefore not be established. However, the board accepts that both clerks in question were experienced persons properly instructed in the tasks to

be performed. The issue is therefore whether the representative exercised due supervision.

5.3 J 5/80 (headnote III, point 7) requires reasonable supervision. This means adequate supervision, that is as much as would be carried out under the circumstances by the average reasonably competent representative. Strict or constant supervision is not required and would be counter to the purpose of delegating administrative tasks.

5.4 In this case, in a usual situation of transfer of responsibility for an application to an outside representative, the clerk's task is simple. It requires recording a (single) application as abandoned in accordance with the instructions given by a professional representative. As the system requires two entries in separate databases, the most likely errors that could result in a loss of rights are taken care of. To expect further precautions or a double-check would amount to requiring close supervision of the clerk's work in such a situation. The fact that the application is removed from the monitoring of time limits for renewal fees might justify closer supervision. However, for a change of responsibility, discontinuing the monitoring is in line with the purpose of transferring the file to another representative. The removal from monitoring prevents actions that conflict with the change of responsibility. The entry of abandonment in the database is the final administrative step. The responsibility for giving the correct instructions remains with the representative. Therefore, it is at least arguable that a double-check on the clerk's work would exceed the appropriate level of supervision as required by decision J 5/80.

5.5 In any case, the board accepts that the situation in question could not be foreseen to ever happen. A change of representation to another association is not encountered on a daily basis in the representative's office. The transfer of several applications at the same time had never occurred before. In addition, the record number of the application in question (RB640) was in between the record numbers of the applications to be transferred (RB618, RB638 and RB641-3). This was not only unfortunate but also impossible to anticipate. It would be excessive to retrospectively expect a professional representative to have taken precautions for this eventuality. The board also accepts that the error would not necessarily have been discovered had a check on the clerk's work been implemented. The erroneous abandonment of an additional file would possibly have remained unnoticed. In hindsight, it is of course possible to conceive a safeguard that could have been built in to prevent the error. However, this would interpret the standard of "all due care" in an excessive manner.

5.6 For the above reasons, the board holds that the supervision was reasonable in the circumstances even without a double-check on the clerks. The request for re-establishment is allowable.

6. Additional considerations

6.1 Although not relevant for the present decision, the board considers it appropriate to respond, as a courtesy, to a line of argument put forward by the appellants (see namely D1, D3, D7 and the comments starting on page 2 of the letter dated 26 November 2020). In sum, they argued that it was

ultra vires to attribute a lack of all due care by a representative (or service provider) to an applicant who had itself shown all due care required by the circumstances.

6.2 The board would like to point out that the requirement of all due care by an appointed representative is established case law (see the landmark decision J 5/80, OJ EPO 1981, 343, headnote I and point 4). An applicant has to accept the actions of its representative, including the actions of the attorney's assistants and employees, on its behalf (J 5/80, headnote I and point 4; J 1/07, point 4.3). The current applicants' literal interpretation of Article 122 EPC takes into account neither the object and purpose of Article 122 EPC nor the supplementary means of interpretation, in particular the preparatory work, as set forth in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. The board thus fails to discern any good reason to depart from decision J 5/80 and the case law arising from it.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The appellants are re-established in their rights.

The Registrar: The Chairman:

M. Schalow A. Lindner

Decision electronically authenticated