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**Datasheet for the decision
of 28 June 2018**

Case Number: T 1823/16 - 3.5.01

Application Number: 09779319.4

Publication Number: 2353099

IPC: G06F13/10

Language of the proceedings: EN

Title of invention:

NETWORK ADAPTER, METHOD&COMPUTER PROGRAM PRODUCT

Applicant:

Sony Ericsson Mobile Communications AB

Headword:

Network Adapter/SONY ERICSSON

Relevant legal provisions:

EPC Art. 108, 112(1)(a), 122(1)

EPC R. 100(1), 136

Keyword:

Re-establishment of rights - all due care (no) - independent
cross-check (no)

Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

T 0413/91, T 0832/99, J 0005/80, J 0009/16, J 0007/16



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Case Number: T 1823/16 - 3.5.01

D E C I S I O N
of Technical Board of Appeal 3.5.01
of 28 June 2018

Appellant: Sony Ericsson Mobile Communications AB
(Applicant) Nya Vattentorget
221 88 Lund (SE)

Representative: AWA Sweden AB
P.O. Box 5117
200 71 Malmö (SE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 10 December
2015 refusing European patent application No.
09779319.4 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairwoman P. Schmitz
Members: M. Höhn
W. Chandler

Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division refusing European patent application No. 09779319.4 pursuant to Article 97(2) EPC. The decision was handed over to the postal service provider on 10 December 2015. Both the notice of appeal and the statement setting out the grounds of appeal were filed on 28 June 2016, together with a request for re-establishment of rights. The fee for re-establishment and the appeal fee were paid on the same day.
- II. In its communication dated 11 July 2017, the Board expressed its preliminary opinion that it had not been convincingly shown that all due care had been observed.
- III. In reply thereto, the appellant filed additional explanations and comments.
- IV. In the annex to the summons for oral proceedings dated 31 January 2018, the Board reiterated its provisional view.
- V. Oral proceedings were held on 28 June 2018. At the end, the Chairwoman announced the decision.
- VI. The appellant's arguments can be summarised as follows:

In the representatives' office the IP management software Inprotech was used to handle all aspects of clients and cases, such as names and due dates. Also, they no longer worked with paper files. Instead, all documents and correspondence belonging to a case were stored in an electronic file system called eFiles. When postal mail related to a client's case was received, it was scanned by the central post function to the eFiles

team inbox of the relevant client/case. The team inbox was checked by the responsible assistant. When a document was received which involved a time limit, the due date had to be entered in Inprotech. As a result, the due date appeared in the due date report of Inprotech and in the To Do list of the consultant. When these entries had been made, the assistant produced a Case Event Log Report which contained the date of the document and the due date. The Case Event Log Report was checked and attested/signed by the assistant who then created a Task in eFiles for the consultant responsible. The Task was created to draw the consultant's attention to the new document and the new deadline. This Task appeared in the consultant's Task list. The consultant opened the Task in eFiles, cross checked the Case Event Log Report against the document and signed if the Case Event Log Report was correct. A document containing due dates was never to be filed in eFiles before the due date had been entered in Inprotech.

VII. In the present case, the decision was received and scanned by the central post function on 16 December 2016 and sent to the responsible team inbox for the attention of Mrs S. who then entered the decision into eFiles but, by mistake, did not enter the appeal deadline into Inprotech. It was only on 2 May 2016 when they received a communication from the EPO dated 28 April 2016 regarding the refund of the 8th renewal fee that they became aware of this.

VIII. Mrs S. who was a well trained and experienced paralegal could not explain why she had not entered the deadline into Inprotech. This human error occurring for the first time, due to pressure and not negligence, had to be regarded as an isolated mistake within an otherwise

properly functioning administration.

- IX. The appellant requested re-establishment into the time limit for filing the notice of appeal and the statement of grounds of appeal and that the appeal be considered to be admissible. Subsidiarily, they requested that the following question of law be referred to the Enlarged Board of Appeal:

"At what point in time is a large firm required to implement cross-checks in order to comply with the all-due-care-requirement of Art. 122 EPC? Is it when verifying and monitoring time limits which have been entered into a docketing system, or is it at an earlier stage, i.e. even before a time limit has been entered? If so, how early?"

Reasons for the Decision

1. According to Article 108 EPC, the notice of appeal shall be filed within two months, and the statement setting out the grounds of appeal shall be filed within four months of notification of the decision. These time limits expired on 22 February 2016 and 20 April 2016, respectively (Rules 126(2), 131(2) and (4), 134(1) EPC). Since, both the notice of appeal and the statement setting out the grounds of appeal were only received on 28 June 2016 and thus outside the relevant time limits, the appeal is inadmissible (Rule 101(1) EPC), unless the request for re-establishment of rights can be allowed.

2. According to Rule 136(1) EPC, a request for re-establishment of rights must be filed within two months

of the removal of the cause of non-compliance. The cause of non-compliance was removed on 2 May 2016, when the appellant's representatives received a communication from the EPO regarding the refund of the 8th renewal fee. The request for re-establishment of rights was filed on 28 June 2016. The fee for re-establishment was was paid on the same day.

Only one re-establishment fee was paid, although the time limit for filing the notice and the time limit for filing the statement of grounds of appeal were missed. However, the non-observance of both time limits is intrinsically linked to the same hindrance. Both periods are triggered by the same event, *i.e.* the notification of the decision, and the hindrance to complying with them is based on one unitary factual basis *i.e.* that the time limits were not noted in the monitoring system. Re-establishment in respect of both periods has to be examined together and the result will inevitably be the same. In this situation, the Board considers one re-establishment fee to be sufficient (following the approach taken in T 832/99 of 17 September 2004 and J 17/16 of 28 June 2017). The omitted acts, *i.e.* filing the notice and the grounds of appeal and paying the appeal fee were completed at the same time.

Thus the request for re-establishment of rights is admissible.

3. According to Article 122(1) EPC, an applicant shall have his rights re-established if he has sufficiently demonstrated that in spite of all due care required by the circumstances having been taken, he was unable to observe the time limit. When an applicant is represented by a professional representative, a request

for re-establishment cannot be acceded to unless the representative himself can show that he has taken the due care required of an applicant (J 5/80, OJ EPO 1981, 343, Headnote 1). An isolated mistake by an assistant that happens in a normally satisfactory system is excusable. Where a large number of dates has to be monitored at any given time, it is normally expected that at least one effective cross-check is built into the system in order to be satisfactory. The cross-check must be independent of the person responsible for monitoring time limits. (cf. Case Law of the Boards of Appeal of the European Patent Office, 8th edition 2016, III.E.5.4 and 5.4.4).

4. In the present case, the non-observance of the time limits resulted from the fact that Mrs S. did not enter the due dates for filing the appeal into Inprotech, which was the system in place for monitoring time limits. Instead, Mrs S. filed the decision in eFiles where it remained unnoticed. This can be qualified as an isolated mistake by an assistant. The crucial question here therefore is whether the system as described can be considered to be adequate in view of the requirement of all due care under Article 122(1) EPC as applied by the Boards of Appeal.

5. It is uncontested that the representatives' firm is a large one where many dates have to be monitored so that a cross-check has to be foreseen. The point of dispute is, at what stage in the system must this cross-check must be built in. The representatives suggest that the cross-check, as required by the jurisprudence, did not have to apply to the recording of time limits, because this was not part of the monitoring process. Therefore, the cross-check foreseen by the consultant after he had been made aware of a new document and due date by the

Task created by the assistant was sufficient.

6. However, in the Board's view, a cross-check to be effective has to be introduced at an earlier stage, *i.e.* at the data entry phase, because if a mistake happens at that point the case will not be flagged at all. In decision J 9/16 of 21 November 2016, the Legal Board of Appeal said that "the majority of re-establishment cases concern situations where a recorded time limit was not followed up, or where the time limit was not recorded at all. It is not apparent to the Board that a different standard of all due care should apply to these two situations. Accordingly, it appears reasonable to also expect an independent cross-check when data is entered in a time limit monitoring system, and not only for the strict 'monitoring' of time limits already recorded." (point 11 of the reasons). The present Board agrees entirely with this view. The recording of a time limit is the very first step in monitoring it.
7. The cross-check provided for in the representatives' system could only take effect, once the assistant had performed her duties correctly and had entered the due dates in Inprotech and had created the Task. Otherwise, the representative would not become aware of a new document and deadline. The responsibility for this lay completely in the hands of the assistant without any counter check, so that if she made a mistake it would not be recognised by anybody. Clearly, the data entry at that stage is of utmost importance, because if not properly done, the case will completely disappear. Thus a cross-check at that stage is essential.
8. The representatives submitted in the oral proceedings that when introducing their electronic system, they

tried to mirror what was in place for paper files. In the paper world, when a document arrived, it was put in the paper file and when the consultant received the file, he checked whether the time limit was correctly noted. If the file had got lost at that point, or if the document had fallen out of the file, it would also not have been noticed. When moving to electronic tools no stricter standard of due care should be applied. The Board notes in this regard, that when examining whether a system is satisfactory, it is essential always to assess the system in place at the relevant time at the office in question. Each system has different advantages and drawbacks which have to be balanced and accordingly need different safeguards. What might be effective in the paper world might not be for the electronic world. In case of an electronic system, a cross-check would not be provided just because it could be easily performed, but because of the fact that if no data are entered the case becomes completely invisible. In the paper world at the same stage in the process, the physical file would have been retrieved and so it would have been visible at some point. Therefore, a cross-check at the data entry phase is essential, because every further action hinges thereupon. Since this was not the case, the Board cannot acknowledge that there was a satisfactory system in place and therefore all due care required by the circumstances has not been observed.

9. The appellant referred to decision T 413/91 of 25 June 1992 which, in his view, was in contradiction to decision J 9/16. He argued that, according to this decision, a mistake can only exist if a wrong date was inadvertently entered into a monitoring system and that only when such a fact made the party unable to observe the time limit would the circumstances of the case be

examined as to the second condition "in spite of due care". However, decision T 413/91 dealt with a completely different issue. It concerned the question of whether an opponent was prevented from observing a time limit although he was aware of it, but intentionally refrained from taking action because he believed that he could come to an agreement with the patent proprietor. Therefore, the statement made in decision T 413/91 was in a completely different context. In the present case, it is clear that the appellant was hindered and the reason was because the time limit was not noted.

10. *Referral to the Enlarged Board of Appeal*

According to Article 112(1)(a) EPC, the Board shall refer any question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law, or if a point of law of fundamental importance arises.

As set out above, the Board does not see that there is a divergence between decisions T 413/91 and J 9/16 and thus uniform application of the law does not require a referral.

The question which the appellant requests the Enlarged Board to answer is about all due care with regard to entering and monitoring time limits in large firms and how a cross-check is to be implemented. In considering whether all due care has been observed, the obligation to exercise due care must be considered in the light of the situation as it stood before the time limit expired. The steps the party took to comply with the time limit are to be assessed solely on the basis of the circumstances applying at that time (Case Law of

the Boards of Appeal of the European Patent Office, 8th edition 2016, III.E.5.2). Thus, what all due care requires is always dependent on the individual facts of a case and it is not just one system which a Board can prescribe. In decision J 9/16, the Legal Board made it clear that it is not for the EPO to dictate how docketing and time limit monitoring must be organised in any given office, or to suggest how any given system could be improved, in order to comply with the "all due care" requirement (point 15 of the reasons). This is very much a question of fact and not of the law. However, only points of law may be referred.

11. Since the request for re-establishment of rights is not allowable and both the notice of appeal, as well as the statement setting out the grounds of appeal were not filed in due time, the appeal is inadmissible (Rule 101(1) EPC).

Order

For these reasons it is decided that:

1. The request to refer the question of law to the Enlarged Board of Appeal is rejected.
2. The request for re-establishment of rights is rejected.
3. The appeal is rejected as inadmissible.

The Registrar:

The Chairwoman:



T. Buschek

P. Schmitz

Decision electronically authenticated