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Datasheet for the decision of 21 September 2017

Case Number: T 2406/16 - 3.3.05

Application Number: 08741914.9

Publication Number: 2134472

IPC: B01L3/00, F16K99/00

Language of the proceedings: EN

Title of invention:
DEVICE FOR HANDLING LIQUID SAMPLES

Applicant:
Amic AB

Headword:
No access to account information

Relevant legal provisions:
EPC Art. 122(1), 122(2), 108 sentence 2, 112a(4) sentence 3
EPC R. 136

Keyword:
Re-establishment of rights - (no) - isolated mistake within a satisfactory system for monitoring time limits (no) - due care in dealing with assistants (no)
Appeal fee not paid - appeal deemed not to have been filed

Decisions cited:
R 0004/15, T 0836/09, T 1355/09, T 2017/12, T 1553/13, T 1325/15, G 0001/14

Catchword:
It now seems to be settled case law of the Boards of Appeal that an appeal where the appeal fee is paid after the two-month time limit of Article 108, first sentence, has expired is deemed not to have been filed (see grounds 4 to 4.2).

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Case Number: T 2406/16 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 21 September 2017

Appellant: (Applicant)	Amic AB Uppsala Science Park 751 83 Uppsala (SE)
Representative:	Bergenstråhle Group AB P.O. Box 17704 118 93 Stockholm (SE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 5 July 2016 refusing European patent application No. 08741914.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	E. Bendl
Members:	G. Glod
	P. Guntz

Summary of Facts and Submissions

I. On 5 July 2016 the Examining Division decided to refuse European patent application No. 08 741 915.9 for lack of clarity (Article 84 EPC) and lack of novelty (Article 54(2) EPC).

II. With a letter dated 1 September 2016 the Appellant appealed this decision and declared that he had paid the prescribed fee.

III. After having received the statement of grounds of appeal dated 31 October 2016, the Registrar of the Board of Appeal informed the appellant in a loss of rights notice according to Article 112(1) EPC that the appeal fee had not been paid and that the appeal was thus deemed not to have been filed pursuant to Article 108, second sentence, EPC.

IV. On 16 November 2016 the Appellant filed a request for re-establishment of rights and paid both the missing appeal fee and the fee for re-establishment.

It claimed that the omission to pay the appeal fee had occurred despite all due care required by the circumstances having been taken and essentially argued as follows:

Under normal circumstances the attorney responsible drafted the document to be filed and the assistant entered it into the electronic online filing system (eOLF). Fees were paid from the company's account held with the EPO by giving an order in eOLF. It was the assistant's task to check with the accounts department whether there were sufficient funds in the deposit account. When the case was ready for filing, the

attorney checked the case in eOLF and either signed the document in eOLF or instructed the assistant to submit the document in eOLF. Only the assistant was able to remove the due date in eOLF and he or she was instructed to do so only after the document had been filed and the fee (if any) had been paid.

In the case at hand, the assistant responsible for the administration of the case was on vacation and had been replaced by another assistant, Ms EN, who had been working at the firm since 2002 and had never made any mistake that led to any loss of rights. The same applied to the professional representative, Mr FC, who had been working at the firm since 2005.

On his instruction, Ms EN had prepared the notice of appeal in eOLF. She had also contacted the chief financial officer (CFO) of the company, Ms JS, to ensure that sufficient funds were available in the deposit account, but did not get an immediate reply from her. Under these circumstances, Mr FC decided to file the letter on 1 September 2016 and to let Ms EN pay the fee later when the CFO had returned with an answer regarding the funds in the deposit account.

However, after the letter had been filed, Ms EN erroneously removed the due date from the system. This should only have happened after the payment was made.

The CFO never got back to Ms EN regarding the amount of funds in the EPO account and, during those first days of September when a number of people were still on vacation and many due dates had to be dealt with, the payment was forgotten by all persons involved. Since the due date had been removed from eOLF, the system did

not issue a reminder "within the due date 5 September 2016" [sic].

Thus, according to the appellant, the mistake of removing the due date before the payment had been made should be considered to be an isolated mistake in an otherwise satisfactory system.

V. In the communications pursuant to Article 15(1) RPBA of 14 December 2016 and 11 May 2017, the board gave its preliminary opinion that despite the claim that a once-off error had occurred in a system that otherwise worked well, it seemed that a deliberate decision not to follow the common routine of simultaneously filing the notice of appeal and the fee-payment order in eOLF was followed by an error (removing the due date in the docketing system) and three omissions (by Ms EN to inquire and pay; by Ms JS to come back with the required information; by Mr FC to perform a final check on the case). The Board would have to consider in particular the question of whether the representative, when deviating from the normal routine of payment, should have ensured that he would perform a final check on the file before the expiry of the time limit for paying the appeal fee. It also needed to be established when exactly Ms JS was contacted and how it was normally ensured that the funds in the deposit account were sufficient.

VI. With regard to the said communications of the Board, the Appellant submitted with letters of 10 February 2017 and 8 September 2017 inter alia the following further facts and arguments:

Whereas the act of filing a Notice of Appeal required the signature of the representative, the payment of the

appeal fee did not. The instruction by Mr FC to Ms EN was to pay the appeal fee as soon as Ms JS had returned with an answer regarding the account *or* upon expiry of time limit at the latest. This information should have been entered into the docketing system.

Thus, although Mr FC had deviated from the normal routine of payment, he had every reason to expect that the term would be left open. Since the term had been inadvertently closed by Ms EN, Mr FC had no possibility to see in the docketing system whether any outstanding actions needed to be dealt with. No additional physical paper file was available. The final check, therefore, depended on there being correct entries in the docketing system.

The query to the CFO, Ms JS, had been communicated verbally on the afternoon of 1 September 2016. Ms JS was not in a position to check the balance of the account at that time, but agreed to get back to Ms EN before the due date of 5 September 2016. Normally the accounts department reviewed the balance of the deposit account no more than once or twice per week, because their employees had numerous other tasks to perform, most of which were not related to specific patent cases; they did not normally perform additional checks on demand. The account statement showed sufficient funds on 1 September 2016, so Ms JS had no reason to believe that the payment of the appeal fee could not be or could not have been carried out. It was neither her task nor within her competence to handle terms in the docketing system or to check whether the appeal fee in the present case had been paid. It was, instead, up to Ms EN, who is an experienced patent administrator, to get back to Ms JS in this particular case.

Hence, the alleged deviation from the common routine was, according to the appellant, limited to the delegation of the task of paying the appeal fee to a chosen, properly instructed and experienced employee, which could not be considered to be out of the ordinary. Consequently, Mr FC had every reason to assume that the appeal fee had been paid when the term was closed in the docketing system and therefore did not perform a cross-check.

VII. Oral proceedings were held on 21 September 2017 in the absence of the Appellant, having been duly summoned by letter dated 7 April 2017 and having made known by letter dated 8 September 2017 its intention not to attend.

Reasons for the Decision

1. The decision under appeal was posted on 5 July 2016 and was deemed to have been delivered on 15 July 2016 (Rule 126(2) EPC). The time limit for filing the notice of appeal and for paying the appeal fee, therefore, expired on 15 September 2016 (Article 108, first and second sentence). A notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid (Article 108, second sentence). Thus, the appeal fee not having been paid until 16 November 2016, the notice of appeal of 1 September 2016 was not filed within the prescribed time limit. The non-compliance with the time limit, notwithstanding any later payment, has according to the case law of the Boards of Appeal the effect that the appeal is to be considered as not having been filed (see *infra*, Reasons 4). Re-establishment of rights is available in this situation

(Article 122(1) EPC).

2. According to the appellant's submissions, the failure to observe the time limit for filing the statement of grounds of appeal came to light after submitting the statement of grounds of appeal when the appellant received a communication dated 2 November 2016 from the Registrar of the Board of Appeal indicating that the fee was missing. The cause of non-compliance with the time limit under Article 108, first and second sentence, EPC can therefore be considered to have been removed on that day. The two-month time limit for filing the request for re-establishment of rights in writing (Article 122(2) and Rule 136(1) EPC) was therefore observed by filing the request for re-establishment of rights on 16 November 2016. On the same day, the omitted act, i.e. the payment of the appeal fee, was performed and the fee for re-establishment was paid. Furthermore, the request for re-establishment of rights states the grounds and facts on which it is based.

Hence, the request for re-establishment of rights is admissible.

3. The appellant has, however, not shown that all due care required by the circumstances was taken to comply with the time limit for filing the appeal fee (Article 122(1) EPC).

3.1 In the case at hand, the appellant submits that the failure to comply with the missed time limit resulted from the decision to send the notice of appeal before payment of the appeal fee and the erroneous simultaneous removal of the time limit from the docketing system by an assistant, which went unnoticed

by the representative.

3.2 In the case of non-observance of a time limit due to an error, the boards of appeal have established the criterion that due care is considered to have been taken if non-compliance with the time limit resulted either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law of the Boards of Appeal (hereinafter "CLBA"), 8th ed., III.E.5.2., penultimate paragraph). It is the appellant's contention that the present case amounts to such an isolated mistake.

3.3 The party requesting re-establishment of rights bears the burden of making the case and proving that the requirements are met (CLBA *supra*, III.E.5.2., last paragraph). Thus, in the present case the appellant bears the burden of proof to show the existence of a normally satisfactory monitoring system.

3.4 The Board observes that eOLF in combination with a docketing system for monitoring the relevant time limits, when used as intended by an experienced and well trained assistant such as Ms EN under the supervision of a carefully acting representative such as Mr FC, could under most circumstances provide a satisfactory monitoring system to deal with time limits such as the one for filing a notice of appeal. However, the system described is imperfect insofar as it does not guarantee sufficient supervision under all circumstances, in particular not in cases where the usual order of processing steps is intentionally or accidentally changed or interrupted, as will be described below.

3.5 In the present case, the monitoring system was overridden before the error occurred (see 3.5.1) and the way information was exchanged between the patent department and the accounts department (see 3.5.2) made the system error-prone to begin with.

3.5.1 The normal routine of having everything necessary to file an appeal prepared by the assistant and having the representative perform a cross-check when electronically signing the notice of appeal was not followed in the case at hand. Instead the representative signed a notice of appeal containing the (then) inaccurate statement "the decision *is* hereby appealed *and the prescribed fee paid*" (italics added by the board) and left it to the assistant to pay the fee later once the CFO had informed her that there were sufficient funds in the deposit account. Whereas the normal routine made sure that the representative, who is the only one allowed to sign submissions, would certainly perform the cross-check, the deviation therefrom meant that the assistant could single-handedly make the payment and remove the time limit from the docketing system (see appellant's letter of 8 September 2017, page 2, third paragraph), so a cross-check was missing. This, however, allowed the assistant's error to remain unnoticed by the representative, who did no longer need to be involved with the matter.

3.5.2 According to the appellant's submissions, it is the patent department's task to pay fees from the company's account with the EPO by giving an order in eOLF. Yet patent attorneys and their assistants apparently do not have access to the account balance. Thus, they cannot check themselves whether there are sufficient funds to make the payment, and need to get information from the

accounts department before they can issue a payment order. However, according to the Appellant's submissions, it appears to be rather difficult to get this information. It is not sufficient to contact a colleague from the accounts department because the account balance is reviewed only once or twice a week (cf. letter of 10 February 2017, paragraph bridging pages 2 and 3). Thus, even when there are sufficient funds in the account, as was the case on 1 September 2016, it might well happen, as in the present case, that members of the accounts department are not in a position to give the green light for payments because the account balance has not been checked recently enough. Since they do not normally perform checks on demand (cf. letter of 8 September 2017, paragraph bridging pages 1 and 2), the only way to get the information needed is apparently to contact the accounts department repeatedly until the point in time where the account's balance has just been checked and the department is, thus, able to provide the required information. It is evident that such a system is unreliable and prone to error.

3.5.3 Thus, changing the normal routine of checking whether the appeal fee has been paid when the notice of appeal is being sent and leaving it, instead, to the assistant to pay the appeal fee as soon as she received information from the accounts department regarding the required funds, meant intentionally deviating from a potentially satisfactory system to a system that was subject to uncertainties. These became apparent after Ms EN had erroneously removed the due date in the docketing system. Ms JS forgot to get back to Ms EN and Ms EN forgot to make further attempts to get the required information from the accounts department.

Moreover, the need to deviate from the common routine only arose as a consequence of the defective information system. In a system where patent assistants have immediate access to the account balance, be it electronically or by some other reliable way of getting the latest information from the accounts department, Mr FC would not have had to deviate from the normal routine and entrust Ms EN with paying the appeal fee later, or, if he had nevertheless done so, it would not have been a problem for Ms EN to perform this task any time after having been entrusted with it.

3.5.4 Therefore, the case at hand cannot be compared with the case underlying decision T 1355/09 where an order in writing to pay the appeal fee was not carried out. In that case it was the task of the accounting department of the Appellant's parent company to effect all payments ordered by the Appellant, a small patent exploitation agency that employed only four persons. The Board found that the Appellant had no influence over the further execution of its orders, which were sent by internal post to the relevant department of its parent company and had been reliably carried out over the last years. The Board found that the risk of errors in this context was relatively low and came to the conclusion that no additional control mechanism had to be in place as had been found previously in decision T 836/09 regarding the checking of outgoing mail.

In the case at hand, on the contrary, it was the task of the patent department, i.e. the representative and his assistant, to effect the payment. Thus, the patent department had not yet done everything within its competence to file the appeal in time. Taking into account the difficulties of getting prompt information regarding the sufficiency of funds in the account (cf.

sections 3.5.2. and 3.5.3 above), one can also not describe the procedure for paying fees as being low risk. Thus, the reasoning in decision T 1355/09 (reasons 1.4 - 1.7) does not apply here.

3.6 Thus, looking at the way the case was handled, the Board does not deem the monitoring system used by the Appellant to have been normally satisfactory.

3.7 Furthermore, the ultimate responsibility in observing time limits lies with the representative (see CLBA, III. E.5.5.2 e)). In the present case, he signed the letter of 1 September that contained a wrong statement regarding the payment of the appeal fee. He should have made sure that such payment had really been made. When transferring complete responsibility for this payment to his assistant – contrary to the routine procedure – he should have ensured that he performed the final cross-check himself. By jeopardising the possibility of a final cross-check, the principle of "due care" was violated.

3.8 To conclude, the omission in paying the appeal fee and the deletion from the docketing system of the time limit for paying such a fee was due to an apparently unsatisfactory monitoring system and lack of due care from the representative.

3.9 For these reasons, the request for re-establishment of rights is to be refused.

4. Although the appeal fee was paid together with the request for re-establishment on 16 November 2016 and the wording of Article 108, second sentence, would suggest that the appeal was deemed to have been filed on that day (see decisions T 2017/12 of

24 February 2014 (OJ EPO 2014, A76) and T 1553/13 of 20 February 2014 (OJ EPO 2014, A84), referring the question to the Enlarged Board), it now seems to be settled case law of the Boards of Appeal that an appeal where the appeal fee is paid after the two-month time limit of Article 108, first sentence, has expired is deemed not to have been filed.

4.1 Although neither referral led to an answer of the Enlarged Board (G 1/14), decision T 1325/15 set out why the interpretation of Article 108, second sentence, EPC as applied by the majority of earlier decisions should be maintained (reasons 34 to 37), this allegedly being in line with other EPC provisions where no distinction is made between late filing and non-filing (Reasons 40 to 41). No distinction appears to be drawn between cases where the appeal is filed in time and the appeal fee is not paid until after expiry of the time limit and cases where the fee is paid in time and the notice of appeal is filed late (Reasons 42).

4.2 Whereas case T 2017/12 was closed without a decision, the Board in case T 1553/13 issued a final decision dated 23 November 2016 going back on its earlier opinion of 20 February 2014, on the grounds that the Enlarged Board in decision R 4/15 had found that a request under Article 112a(4), third sentence was deemed not to have been filed where the respective fee had been paid after the time limit had elapsed. The Board concluded that, both provisions having essentially the same wording, Article 108, second sentence and Article 112a(4), third sentence, EPC should be interpreted in the same way.

4.3 Under these circumstances, this Board follows the decisions referred to in sections 4.1 and 4.2 above.

5. As a consequence the appeal is deemed not to have been filed, so the appeal fee has been unduly paid and is to be reimbursed.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.

2. The appeal is deemed to not have been filed.

3. The appeal fee is reimbursed.

The Registrar: The Chairman:

C. Vodz E. Bendl

Decision electronically authenticated