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**Datasheet for the decision
of 2 September 2019**

Case Number: T 2569/16 - 3.2.08

Application Number: 07107270.6

Publication Number: 1988244

IPC: E05F15/12

Language of the proceedings: EN

Title of invention:

Drive device for operating a vehicle door

Patent Proprietor:

U-Shin Deutschland Zugangssysteme GmbH

Opponent:

Brose Fahrzeugteile GmbH & Co. KG, Hallstadt

Headword:

Relevant legal provisions:

EPC Art. 122(1), 122(2), 128(4), 108

EPC R. 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 - (no)
Inspection of files - Exclusion of documents from file
inspection (yes)

Decisions cited:

G 0001/18

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 2569/16 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 2 September 2019

Appellant: U-Shin Deutschland Zugangssysteme GmbH
(Patent Proprietor) Waldstrasse 2
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Representative: Gaillarde, Frédéric F. Ch.
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Respondent: Brose Fahrzeugteile GmbH & Co. KG, Hallstadt
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Representative: Gottschald, Jan
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 June 2016
revoking European patent No. 1988244 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairwoman P. Acton
Members: Y. Podbielski
M. Foulger

Summary of Facts and Submissions

- I. The appeal of the patent proprietor (hereinafter "the appellant") is directed against the decision of the opposition division to revoke the patent.
- II. The decision of the opposition division was posted on 27 June 2016. The notice of appeal was received by the EPO on 25 October 2016 and the appeal fee was paid on the same date, and thus after expiry, on 7 September 2016, of the two month period foreseen in Article 108 EPC.
- III. In addition, the EPO received, on 25 October 2016, a reasoned request for re-establishment of rights, a statement setting out the grounds of appeal, and a request for exclusion from file inspection of a document. The fee for re-establishment of rights was paid on the same date.
- IV. With letter dated 2 January 2017 the appellant filed a redacted version of the document for which it requested exclusion from file inspection.
- V. In its communication dated 11 April 2019 the Board expressed its preliminary opinion that the request for re-establishment of rights could not be granted. It also informed the parties of its preliminary view that the request for exclusion from file inspection of the unredacted version of the document in question could be granted.

VI. The arguments of the appellant can be summarised as follows:

- (a) The failure to observe the time limit for filing the notice of appeal and paying the appeal fee was due to an isolated mistake within a normally well functioning system. The intellectual property manager ("IP manager"), who was the sole person in the IP department trained in intellectual property, had left the company on 6 April 2016. The person replacing her, Mr M., only started work there on 30 August 2016. The letter from the EPO which notified the appellant of the EPO's decision to revoke the patent arrived during the time when the position was unoccupied. However, the post addressed to the IP department, including the letter from the EPO, was left unopened until Mr M. arrived on 30 August 2016.

- (b) The reason for this mistake was that the Director of the R&D division, Mr C., under whose administrative supervision the IP department operated, believed that all matters of IP were dealt with by a law firm during the period where the post of IP manager was unoccupied, and that the letters from the EPO received by the IP department were simply duplicates of letters also sent to the law firm. He had no knowledge of IP matters himself and exercised all due care in seeking a replacement for the IP manager as soon as possible. In addition, there was a well-functioning system of delivering the post addressed to the IP department directly to the IP manager who then instructed his assistant.

- (c) On or, more likely, after 30 August 2016 Mr M. opened the letter from the EPO and discovered its contents. He did, however, not have sufficient time to file the notice of appeal within the relevant time period, which expired on 7 September 2016, as he first needed to acquaint himself with the file and seek instructions. In addition he was coping with a large number of letters which had accumulated over months.
- (d) As regards the request for exclusion from file inspection, the appellant argued that the document in question contained information which might be prejudicial to the legitimate interests of a person.

VII. The arguments of the respondent can be summarised as follows:

- (a) The appellant was part of a large group of companies and it could be expected that a system existed whereby time limits were met even in the absence of the person responsible for the IP department. This could, for example, take the form of a written set of instructions covering the interim period. There was even sufficient time to introduce such a system, had it been lacking, given the fact that the IP manager had indicated her departure already in December 2015 and left only in April 2016. No such system was, however, in place during the relevant time period when the IP manager position was vacant.
- (b) In addition, there would have been sufficient time for the appellant to meet the time limit had the new IP manager taken all due care. He discovered on

his arrival that the patent had been revoked and had seven days to file a notice of appeal and pay the appeal fee. As filing the notice and paying the appeal fee did not require much preparation (in contrast to filing the grounds of appeal) this could and should have been done within the available time frame.

- (c) The respondent had no comments concerning the appellant's request for exclusion of a document from file inspection.

Requests of the parties

VIII. The appellant requests re-establishment of rights with regard to the time period for filing the notice of appeal and paying the appeal fee. The appellant furthermore requests that the unredacted version of the statement of Mr C. dated 14 October 2016 and received by the EPO on 28 October 2016 be excluded from file inspection.

IX. The respondent requests that the request for re-establishment of rights not be granted.

Reasons for the Decision

1. Formal requirements of the request for re-establishment of rights

1.1 A request for re-establishment of rights must fulfill the following formal requirements set out in Rule 136(1) and (2) EPC:

- (a) the request has to be filed in writing and the prescribed fee be paid within two months of the removal of the cause of non-compliance,
- (b) the request has to be substantiated. i.e. it must state the grounds on which it is based and set out the facts on which it relies,
- (c) the omitted act has to be completed within the period for filing the request.

1.2 In cases such as the present one which involves an error in the carrying out of the party's intention to comply with a time limit, the removal of the cause of non-compliance occurs on the date on which the person responsible for the application becomes aware of the fact that the time limit has not been observed (Case Law of the Boards of Appeal, 9th edition III.E. 4.1.1.a)). In the present case, this was on 30 August 2016 at the earliest.

1.3 The request for re-establishment was received by the EPO on 25 October 2016 and thus within the two-month time limit for filing the request. The fee for re-establishment was paid on the same day and the omitted acts (filing of the notice of appeal and payment of the appeal fee) were also completed on that day. The request is substantiated and the requirements of Rule 136(1) and (2) EPC are thus fulfilled.

2. Substantive requirements of the request for re-establishment of rights

2.1 Pursuant to Article 122(1) EPC the appellant must show that he was unable to observe the time limit despite of all due care required by the circumstances. The "all

due care" requirement refers to the due care that would be taken by the average reasonably competent patentee or representative. The case law of the EPO has recognised that all due care is considered to have been taken if the non-compliance with the time limit results from an isolated mistake within a normally satisfactory system for monitoring time limits or for processing mail (Case Law of the Boards of Appeal, 9th edition III.E.5.2 and 5.4). The appellant relies on that case law.

2.2 The appellant argues that the system in place was that when the IP manager was absent a specific law firm would act. This had always happened when the outgoing IP manager had been absent, e.g. due to holidays. Mr C. had been told by the outgoing IP manager prior to her departure that the law firm would undertake the work on all the ongoing files. Thus, Mr C. had good reasons to believe this to be the case. He mistakenly assumed that the letters received by the IP department were simply duplicates, sent for information, and that the law firm dealt with the originals.

2.3 The appellant is and was at the relevant time a company which formed part of a group of companies operating in several countries, including France, Italy, Germany and Spain. The intellectual property work of all the companies within the group was centralised. The relevant department, which is located in France, thus dealt with the intellectual property portfolio of all members of that group. The Board is of the view that it can be expected in these circumstances that there is a satisfactory system in place in the IP department which ensures that time limits are not missed when the IP manager is absent or the IP manager position is vacant. This applies even more where, as in the present case,

the company was warned by the outgoing IP manager of her impending departure from the company some four months prior to her actual departure.

- 2.4 The Board notes that it may well be that, had the letters addressed to the IP department been forwarded to the law firm, a satisfactory system could have been developed. However, this was not done and there was in fact no system of any description in place to deal with the IP matters during the more than five months which elapsed between the departure of the old and the arrival of the new IP manager. What the appellant tries to excuse is not an isolated mistake within a satisfactory system, but rather the lack of any system - resulting from the mistaken belief that one was in place during the relevant period. AS there was no satisfactory system in place during the relevant period, there is no need to address the issue of whether the mistake of not opening the letters received from the EPO amounted to an isolated mistake.
- 2.5 The appellant's argument that Mr C. took all due care by acting swiftly to replace of the outgoing IP manager is not related to the issue of what system existed during the period when the position of IP manager was vacant. The argument that the mail delivery system within the company worked well also adds nothing in this regard.
- 2.6 In addition, the Board notes that the appellant could have filed the notice of appeal and paid the appeal fee before the expiry of the two month time limit specified in Article 108 EPC. The appellant had argued in its reasoning of the request for re-establishment of rights that Mr M. had become aware of the revocation decision on 30 August 2016. During the oral proceedings the

appellant argued that it may well have been later than that as Mr M. had to cope with a considerable number of letters. However, no evidence has been provided to support this and the Board thus has to work on the assumption that Mr M. became aware of the decision on 30 August 2016. This was more than one week, including six working days, before the expiry of the time limit for filing the notice of appeal and paying the appeal fee on 7 September 2016. Given that filing a notice of appeal and payment of an appeal fee do not require ample preparation, and that a precautionary appeal can be filed and soon after be withdrawn with the reimbursement of the entire appeal fee (Rule 103(1)(b) EPC), the Board considers that there was sufficient time available for the notice of appeal to be filed and the appeal fee to be paid.

2.7 In view of the above the Board is of the view that the request for re-establishment of rights cannot be granted. As a consequence, the appeal is deemed not to have been filed and the appeal fee is to be reimbursed (G 1/18).

3. Exclusion from file inspection

3.1 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.

3.2 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 its representative, if
their inspection would be prejudicial to the legitimate
personal or economic interests of natural or legal
persons.

- 3.3 The Board notes that the statement of Mr C. dated
14 October 2016, which was received by the EPO on
28 October 2016, was filed in support of the
appellant's request for re-establishment of rights and
does not inform the public about the European patent.
It contains a statement which may be prejudicial to the
legitimate interests of a person if the document were
to be made public. That statement is blanked out in the
redacted version of the document. The Board is of the
view that a redaction of the document is justified and
therefore decides to exclude the unredacted version of
the document from file inspection.

Order

For these reasons it is decided that:

1. The following document is excluded from file inspection: the unredacted version of the statement of Mr C. dated 14 October 2016, which was received by the EPO on 28 October 2016.
2. The request for re-establishment of rights is refused.
3. The appeal is deemed not to have been filed.
4. The appeal fee is reimbursed.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated