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**Datasheet for the decision
of 4 February 2020**

Case Number: T 0600/18 - 3.2.01

Application Number: 10765486.5

Publication Number: 2490936

IPC: B64C13/46

Language of the proceedings: EN

Title of invention:

TACTILE CUEING APPARATUS

Patent Proprietor:

BAE Systems PLC

Opponent:

Airbus Helicopters Deutschland GmbH

Headword:

Storm Emma

Relevant legal provisions:

EPC Art. 122(1)

EPC R. 136(2)

Keyword:

Re-establishment of rights (no) - no conclusive case presented in request - due care on the part of the professional representative (no)

Decisions cited:

G 0001/18, R 0018/11, T 0525/91, T 1095/06, T 0387/11,
T 0592/11

Catchword:

No conclusive case has been submitted with the request for re-establishment of rights that explains why an attempt was (erroneously) made to pay the appeal fee using a form that was no longer accepted at the EPO.

Article 122 EPC and the relevant case law does not excuse mistakes by the representative himself or herself that are caused by the ignorance of the latest provisions even if the representative does not normally perform the duty of paying fees himself or herself.

As he or she is the one that is expected to instruct and supervise his or her staff, he or she must always keep informed of the latest developments on how to handle the payment of fees.

As he or she is expected to remember what he or she has learned even in stressful situations it cannot be acknowledged that the mistake has happened despite all due care having been taken.

The situation (stress caused by an upcoming snow storm) cannot be equated with one where a patent attorney was incapable of taking sound decisions due to sudden serious illness or a sudden and unexpected bereavement.



Beschwerdekammern

Boards of Appeal

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Case Number: T 0600/18 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 4 February 2020

Appellant: BAE Systems PLC
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London SW1Y 5AD (GB)

Representative: BAE SYSTEMS plc
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Respondent: Airbus Helicopters Deutschland GmbH
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Representative: GPI & Associés
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 December 2017 concerning maintenance of the
European Patent No. 2490936 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: C. Narcisi
P. Guntz

Summary of Facts and Submissions

- I. On 28 February 2018 the appellant (proprietor) filed a notice of appeal against the decision of the opposition division dated 22 December 2017 that European patent number 2 490 936 was not valid as granted but was to be maintained in amended form on the basis of the fifth auxiliary request filed during opposition proceedings.
- II. On the same day, the appellant tried to pay the appeal fee, but used an outdated debit order on paper (Form 1010), which, as stated in the Notice from the European Patent Office dated 27 September 2017 concerning revision of the Arrangements for deposit accounts and their annexes, supplementary publication 5 - OJ EPO 2017, was no longer acceptable for the valid payment of fees at the European Patent Office. Thus, the period for filing an appeal having lapsed on 1 March 2018 without the appeal fee having been paid, on 9 March 2018 the registrar of the board sent a notice of loss of rights.
- III. The appellant then paid the appeal fee online on 12 March 2018 and a fee for re-establishment of rights on 24 April 2018. On the same day it lodged a request for re-establishment of the right to file an appeal against the decision of the Opposition Division. This request is the subject of the present decision.
- IV. The appellant submitted that, due to security considerations and the fact that it operated in the aerospace and defence sector, the EPO's online filing software was not available on its general computers but only on the machines of three paralegals responsible for online filing. The patentee had found by experience that this system of filing documents and paying fees

worked consistently to maintain its portfolio of European patents.

An unforeseeable and isolated combination of factors led to the patentee being unable to pay the present appeal fee by its normal methods. Firstly, each of the three paralegals was absent on 28 February (respectively for reasons of pre-planned holiday, sickness and other unforeseeable personal reasons). This meant that none of the staff normally responsible for the payment of fees were present. In addition it became apparent through the day that the UK would be facing very severe weather conditions the following day (1 March, when the fee could still have been validly paid). As a result, a decision was made that the patentee's internal patent attorneys and paralegals should not attend work in the office on 1 March.

While the patentee's normal procedure constituted a well-functioning system, as evidenced by the filing of the notice of appeal in due time, in the present case, because of the combination of factors set out above and despite all due care having been taken, the fee for appeal was not validly paid.

- V. In its communication dated 28 May 2018 the Board informed the appellant of its preliminary opinion that a conclusive case had not been submitted to explain why an attempt was (erroneously) made on 28 February to pay the appeal fee using a form that was no longer accepted at the EPO. It appeared that the absence of the three relevant paralegals on that day and on 1 March 2018 had no relevance in respect of the omission to pay the appeal fee in due time.

VI. With its submission dated 27 July 2018, the appellant explained that on the afternoon of 28 February 2018, when the appeal was filed, weather conditions were deteriorating to such an extent that significant disruption to travel could be expected.

Since none of the regular paralegals was present and the normal way to pay the fees was thus unavailable, the patent attorney in charge of the case decided, under the pressure of the special situation, to use an alternative method of payment, by debit order form 1010.

In doing so, despite being well informed and having attended the EPO's seminar 'Guidelines2Day' where the changes to fee payments had been mentioned, he made an isolated error within a normally satisfactory system that was influenced by the fact that no-one who usually made fee payments was present and that he was under the pressure to let his staff leave early enough to get home safely.

VII. After the publication of the decision in case G 1/18 which seemed decisive for the present case, the Board issued summons to oral proceedings and informed the appellant, in the communication dated 29 August 2019, that Article 122 EPC and the relevant case law did not excuse mistakes by the representative himself or herself that were the result of ignorance of the latest provisions, even if the representative did not normally perform the duty of paying fees himself or herself. The question would have to be discussed during oral proceedings of whether the representative, when visiting the seminar 'Guidelines2Day', had applied all due care to keep informed, and whether his failure to comply with the information received there was due to

special circumstances that might distinguish the present case from all the previous case law of the Boards of Appeal in which the failure of the representative himself or herself to comply with the latest provisions was not seen as excusable.

VIII. Further to the summons to oral proceedings the appellant notified the Board that it would not attend. Oral proceedings were consequently cancelled by the Board and the decision was prepared in writing.

Reasons for the Decision

1. The request for re-establishment of the right to appeal the decision of the opposition division dated 22 December 2017 is inadmissible.
 - 1.1 The request has been submitted in writing within two months of the removal of the alleged cause of non-compliance on 2 March 2018 and both the missed appeal fee and the fee for re-establishment have been paid within this time limit.
 - 1.2 However, the request is not admissible for the following reasons.
 - 1.3 Rule 136(2) EPC, 1st sentence, states that the request "shall state the grounds on which it is based and shall set out the facts on which it relies".
 - 1.4 This has been interpreted by the case law of the Boards of Appeal as implying that a conclusive case setting out and substantiating the grounds and facts on which the request relies has to be made (see Case Law of the

Boards of Appeal, 9th edition, July 2019, III.E.4.4).

- 1.5 In the present case, however, no explanation has been given of why the Notice of Appeal filed on 28 February 2018 states "We pay herewith the fee for appeal" and why Form 1010 was submitted on paper, a method of paying that had no longer been acceptable at the European Patent Office since 1 December 2017. This hints at the assumption (later acknowledged) that, when signing the Notice of Appeal, the patent attorney considered that the appeal fee had already been validly paid using form 1010. Thus, the fact that none of the three paralegals able to submit online payments had been present on that day is of no relevance in deciding the case. The same applies to the fact that, due to severe weather conditions, neither the patent attorney nor any of the three relevant paralegals were present in the appellant's office on 1 March 2018.
- 1.6 Thus, the request for re-establishment does not contain a conclusive case setting out the grounds for the failure to pay the appeal fee in time. Rather, it gives an explanation of why the usual paralegals were not in a position to act. However, the present case is not one where no action has been taken at all, but rather one where the wrong action has been chosen. In this respect a conclusive case has not been submitted that explains why an attempt was (erroneously) made to pay the appeal fee using a form that was no longer accepted at the EPO.
- 1.7 Therefore, the situation on the day (illness of staff and upcoming storm) was merely the reason why the representative had to act himself. The failure to comply with the time limit was then caused by the representative's lack of awareness that there had been

a change in the handling of payments at the European Patent Office. The request for re-establishment fails to give any explanation of the reasons for this real source of non-compliance with the time limit.

2. However, even if such an explanation had been given, as has been done later (see the letter dated 27 July 2018) the request for re-establishment would not have been allowable.

2.1 It can be taken as read that wide parts of the UK faced extremely poor weather conditions on 1 March 2018 (<https://www.theguardian.com/uk-news/2018/mar/01/beast-from-east-storm-emma-uk-worst-weather-years>). However, on the afternoon of 28 February 2018 the situation was not so extreme that there was an immediate need to evacuate the office or the like. The patent attorney in charge of the case was still able to perform his duties, albeit under pressure to let his staff leave early enough to get home safely.

2.2 For the reasons set out above, the cause of non-compliance with the time limit was the decision of the patent attorney to chose a payment method that was outdated at that stage.

2.3 The case law regarding isolated mistakes within a normally satisfactory system refers to systems where the representative has entrusted tasks such as the monitoring of time limits to well trained staff who operate under his or her supervision. However, as set out for instance in decisions T 1095/06, T 592/11 and R 18/13, a mistake by the representative himself or herself is not normally excusable.

- 2.4 In the present case the representative was forced by the circumstances to act himself, instead of his well trained and supervised staff. However, a representative acting himself or herself is expected always to be informed of the relevant procedural provisions. In the present case, it seems that the failure to comply with the time limit to pay the appeal fee was caused by the mistaken belief of the representative that an outdated way to make payments was still acceptable, which was not in fact the case. Thus, at the time of leaving the office, the representative was under the impression that everything necessary to comply with the time limit had been performed. As a consequence, the correct payment was only performed when the representative's firm was made aware of the mistake.
- 2.5 This mistake has been made under the stress of the situation, which might have slightly exceeded other stressful situations an attorney often has to face in the workplace. However the situation as submitted by the appellant cannot be equated with one where a patent attorney was incapable of taking sound decisions due to sudden serious illness or a sudden and unexpected bereavement, as in cases T 525/91 or T 387/11.
- 2.6 Article 122 EPC and the relevant case law do not excuse mistakes by the representative himself or herself that are the result of ignorance of the latest provisions, even if the representative does not normally perform the duty of paying fees himself or herself. As he or she is the person who is expected to instruct and supervise his or her staff, he or she must always keep informed of the latest developments on how to handle the payment of fees. As he or she is expected to remember what he or she has learned even in stressful

situations, it cannot be accepted that the mistake has been made despite all due care having been taken.

- 2.7 Therefore, even if the appellant had presented its full and conclusive case within its initial request re-establishment could not have been granted.
3. Since the appeal fee has not been paid in due time, according to the reasons set out in decision G 1/18 the appeal is to be treated as not having been filed.
4. As a consequence, the appeal fee has been paid without any legal basis and is to be reimbursed.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused as inadmissible.
2. The appeal is deemed not to have been filed.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated