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**Datasheet for the decision
of 17 September 2020**

Case Number: T 1322/18 - 3.2.02

Application Number: 10835717.9

Publication Number: 2510970

IPC: A61M21/02, A61G7/05, A61M21/00,
A61N5/06

Language of the proceedings: EN

Title of invention:
SLEEP INDUCTION DEVICE

Applicant:
Mignon Belle Co., Ltd.

Headword:
Re-establishment of rights/Mignon Belle

Relevant legal provisions:
EPC Art. 108, 122

Keyword:
Re-establishment of rights - time limit for filing notice of
appeal - all due care (no)
Appeal deemed not to have been filed

Decisions cited:
G 0001/18, T 0003/90, T 0281/87

Catchword:



Beschwerdekammern
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Case Number: T 1322/18 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 17 September 2020

Appellant:
(Applicant) Mignon Belle Co., Ltd.
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Representative:
Dossmann, Gérard
Casalonga & Partners
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 22 December 2017 refusing European patent application No. 10835717.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: L. Bühler
M. Stern

Summary of Facts and Submissions

- I. The present decision concerns the applicant's request for re-establishment into the time-limit for filing an appeal against the decision of the examining division refusing European patent application No. 10835717.9.
- II. Pursuant to Rule 126(2) EPC, the notification of the decision posted on 22 December 2017 was deemed to have been delivered to the applicant's representative on 1 January 2018. Accordingly, the two-month time limit for filing an appeal and paying the appeal fee according to Article 108 EPC ended on 1 March 2018. No appeal was received within that period.
- III. The request for re-establishment, which complies with the relevant formal requirements, and the omitted appeal were filed on 2 May 2018.
- IV. In support of the request for re-establishment, the applicant submitted essentially the following:
 - The applicant, Mignon Belle Co., Ltd., is a one-person company controlled and operated by Mr M. Ogasawara who is also the inventor. Accordingly, any decision with respect to the prosecution of the present European patent application is taken by Mr Ogasawara.
 - The applicant engaged Mr. Ogura (hereinafter: Japanese representative) as representative in patent matters. Casalonga & Partners, Munich, were appointed as European professional representatives for the prosecution of the present application.

- On 13 February 2018, the European representatives sent the decision dated 22 December 2017 refusing European patent application No. 10835717.9 to the Japanese representative seeking instructions on whether an appeal should be filed. The European representatives informed the Japanese representative that the final date for filing an appeal and for payment of the appeal fee was 1 March 2018 and that the deadline for filing detailed grounds for appeal was 1 May 2018.

- The decision and a translation into Japanese was sent to Mr Ogasawara by his Japanese representative and received on 19 February 2018. The Japanese representative contacted Mr Ogasawara on 22 February 2018 and they arranged for a meeting on 26 February 2018 to discuss the matter. However, Mr Ogasawara cancelled the meeting at short notice and informed the Japanese representative of a business trip from 27 February 2018 until 1 March 2018. Being caught off guard by this unexpected turn of events and due to a misconception of Rule 126(2) EPC, the Japanese representative miscalculated the time-limit for filing the notice of appeal against the decision dated 22 December 2017. From his experience he believed that the 10 days of the fictitious notification according to Rule 126(2) EPC did not determine the beginning of the time-limit (*dies a quo*) but functioned as grace period that was added to the two month time-limit for filing an appeal in order to determine the end date (*dies ad quem*). Therefore, the Japanese representative (and consequently also Mr Ogasawara) believed that the notice of appeal still could be filed on Monday 5 March 2018 and that they could take a decision

when Mr Ogasawara had returned from his business travel.

- On Saturday, 3 March 2018, the Japanese representative instructed the European representative to file an appeal.
- By email dated 5 March 2018, the European representative informed the Japanese representative that the time-limit for filing an appeal had been missed and that a request for re-establishment was the only remedy available.

V. The board summoned to oral proceedings to be held on 10 September 2020 and informed the applicant of its preliminary opinion.

VI. By letter dated 7 September 2020, the applicant informed the board that they would not attend oral proceedings and that they requested a decision on the state of the file. Oral proceedings were cancelled.

VII. The applicant requested in writing re-establishment of rights pursuant to Article 122 EPC into the time-limit to file an appeal against the decision of the examining division posted on 22 December 2017 to refuse European patent application No. 10835717.9.

Reasons for the Decision

1. The request for re-establishment of rights is admissible.
2. By letter dated dated 7 September 2020, the applicant informed the board of their non-attendance at the oral

proceedings scheduled for 10 September 2020. According to generally established practice, the board considers that such statement amounts to a withdrawal of the request for oral proceedings (see T 3/90, OJ EPO 1992, 737, point 1, and the case-law following this decision), all the more so since the applicant asked for a decision on the state of the file.

3. The allowability of the request hinges on the requirement that all due care required by the circumstances has been taken to comply with the time-limit for filing an appeal.

4. The board acknowledges that the Japanese representative was faced with Mr Ogasawara's sudden decision to cancel the meeting scheduled for 26 February 2018 and to go on a business trip on the next day (see point IV). This unexpected turn of events might have put pressure on the Japanese representative to accommodate Mr Ogasawara with the required time for his decision on a possible appeal. However, the Japanese representative had been informed in clear terms by the European representatives (see Annexes 1 and 4 to the request for re-establishment) that the deadline for filing the appeal was 1 March 2018. He had been asked to provide instructions as to whether an appeal should be filed by 28 February 2018 at the latest. The board fails to see any good reason why the Japanese representative flagrantly disregarded these unequivocal directions and calculated the time-limit on his own. Even worse, the Japanese representative overstepped the bounds of his competence and calculated the time-limit based on personal observations rather than on sound knowledge of the law. This is not in keeping with the requirement of all due care required by the circumstances.

5. The applicant cited decision T 281/87 in support of their request. The facts underlying this decision are not comparable to the present case. An oversight made when signing a letter that has been prepared by an assistant in order to comply with a time-limit without giving the contents of the letter a second thought, as in T 281/87, cannot be compared to miscalculating the end of a time-limit when ascertaining the time available for complying with this time-limit.

6. In view of the above reasons, the request for re-establishment is refused. As a consequence, the appeal is deemed not to have been filed (G 1/18, OJ EPO 2020, 26, answer 1(b)).

Order

For these reasons it is decided that:

1. The request for re-establishment is refused.

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

3. Reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated