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**Datasheet for the decision
of 27 August 2019**

Case Number: T 2609/18 - 3.4.03

Application Number: 11820815.6

Publication Number: 2652757

IPC: H01G9/20, H01L27/30

Language of the proceedings: EN

Title of invention:

ELECTRIC AND MECHANICAL INTERCONNECTION SYSTEM OF
PHOTOELECTROCHEMICAL CELLS MODULES

Applicant:

Permasteelisa S.p.A. a socio unico

Headword:

Relevant legal provisions:

EPC Art. 108 sentence 1, 122(1)
EPC R. 136(1), 136(2)

Keyword:

Admissibility of appeal - notice of appeal - filed within time limit (no) - appeal deemed not to have been filed
Re-establishment of rights - filed within two months of the removal of the cause of non-compliance (no) - request duly substantiated (no)

Decisions cited:

G 0001/18

Catchword:



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Case Number: T 2609/18 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 27 August 2019

Appellant: Permasteelisa S.p.A. a socio unico
(Applicant) Viale E. Mattei 21/23
31029 Vittorio Veneto (TV) (IT)

Representative: Santi, Filippo
Barzanò & Zanardo Roma S.p.A.
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 21 June 2018
refusing European patent application No.
11820815.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Eliasson
Members: G. Decker
M. Papastefanou

Summary of Facts and Submissions

- I. The appeal of the applicant (hereinafter "the appellant") lies against the decision of the examining division posted on 21 June 2018 refusing European patent application No. 11 820 815.6. According to the acknowledgement of receipt, the appellant received the written decision on 2 July 2018.
- II. The appellant paid the appeal fee on 20 August 2018. The EPO received no notice of appeal at that time.
- III. With a letter dated 22 October 2018, received by the EPO that same day, the appellant filed the statement setting out the grounds of appeal.
- IV. According to a memo from EPO formalities officer Ms Karin Rinder dated 24 October 2018, a consultation by telephone with the appellant's representative Mr Barzacco (in the absence of Mr Filippo Santi) revealed that he could not provide evidence that a notice of appeal had been duly submitted.
- V. With a letter dated 4 January 2019, the appellant filed a request for re-establishment of rights in relation to the non-observance of the time limit for filing the notice of appeal. At the same time, it paid the prescribed fee for re-establishment of rights and filed a notice of appeal. The appellant submitted that, *"after a revision of the documents comprised in the European patent register"*, it *"became aware today"* that a notice of appeal had not been filed together with the payment of the appeal fee on 20 August 2018. The cause of non-compliance with the period was a *"clerical error made in good faith"*. The appellant provided no further

grounds or facts on which it based its request for re-establishment.

- VI. In a communication the board informed the appellant of its provisional opinion that the request for re-establishment of rights was inadmissible. The appellant did not respond to this communication.
- VII. By letter dated 2 August 2019, the appellant withdrew its request for oral proceedings.

Reasons for the Decision

- 1. According to Article 108, first sentence, EPC, notice of appeal must be filed at the EPO within two months of notification of the decision. The appeal fee must be paid within the same time limit, Article 108, second sentence, EPC.
- 2. The appellant received the decision of the examining division on 2 July 2018. Consequently, under Rules 126(2), 131(2) and (4) EPC the above two-month time limit started on 3 July 2018 and expired on 2 September 2018. Within this period, the appellant paid only the appeal fee but did not file notice of appeal.
- 3. It is established case law that, if no written notice of appeal has been filed within the time limit but only the appeal fee has been paid in time, the mere payment does not constitute a valid means of lodging an appeal (see Case Law of the Boards of Appeal of the European Patent Office, 8th edition 2016, section IV.E.2.5.4, and further references cited there).

4. Thus, the question of whether the appeal has been validly lodged hinges on whether the request for re-establishment of rights in respect of the time limit for filing the notice of appeal is admissible and allowable.

5. Admissibility of the request for re-establishment of rights - Article 122, Rule 136 EPC

- 5.1 *Time limits for filing a request for re-establishment*

- 5.1.1 Rule 136(1), first sentence, EPC stipulates that, for a request for re-establishment of rights under Article 122 EPC to be admissible, the request must be filed in writing within two months of the removal of the cause of non-compliance with the period. Said removal normally occurs on the date on which the person responsible for the application (the patent applicant or their professional representative) is made aware of the fact that a time limit has not been observed (see Case Law of the Boards of Appeal, 8th edition 2016, section III.E.4.1.1 a), and further references cited there). Furthermore, under Rule 136(2), second sentence, EPC the omitted act must be completed within the relevant period for filing the request.

- 5.1.2 In the present case, the appellant - contrary to its submission with the letter dated 4 January 2019 - learned already during the telephone call with the formalities officer on 24 October 2018 that a notice of appeal had not been sent to the EPO. It follows that under Rules 131(2) and (4), 134(1), first sentence, EPC the two-month time limit started on 25 October 2018 and expired after the Christmas holidays on 2 January 2019.

5.1.3 Since the appellant filed the request for re-establishment together with the notice of appeal only on 4 January 2019, the request was filed and the omitted act was made good only after expiry of the relevant time limits set out in Rule 136(1), first sentence, and Rule 136(2), second sentence, EPC. Consequently, the request for re-establishment is inadmissible.

5.2 *Substantiation of the request for re-establishment*

5.2.1 Under Rule 136(2), first sentence, EPC the request for re-establishment has to state the grounds on which it is based, and set out the facts on which it relies. It is a condition for the admissibility of a request for re-establishment of rights that a duly substantiated statement of grounds be submitted within the time limit for filing the request. The request for re-establishment of rights must:

- set forth the precise cause of non-compliance with the time limit concerned (i.e. a fact or obstacle preventing the required action within the time limit);
- specify at what time and under which circumstances the cause occurred and was removed; and
- present the core facts making it possible to consider whether all the due care required by the circumstances had been taken to comply with the time limit concerned.

A request for re-establishment of rights which relies on general statements only and contains no specific facts does not satisfy the requirement for a duly

substantiated request under Rule 136(2), first sentence, EPC (see Case Law of the Boards of Appeal, 8th edition 2016, section III.E.4.4, and further references cited there).

- 5.2.2 In this case, the appellant merely submitted that the failure to file notice of appeal was "*due to a clerical error made in good faith*". It presented no facts whatsoever on the question whether the conduct of the appellant's representative complied with the requirement to exercise all due care under the circumstances. Hence, the request does not satisfy the requirement for a duly substantiated request under Rule 136(2), first sentence, EPC and is inadmissible for this reason as well.

6. Reimbursement of the appeal fee

Following the opinion G 1/18 of the Enlarged Board of Appeal, Headnote 1 c), an appeal is deemed not to have been filed where:

- the appeal fee was paid within the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal; and
- notice of appeal was filed after expiry of that two-month time limit.

Consequently, the appeal fee is to be reimbursed. This is to be ordered *ex officio* (see G 1/18, Headnote 2).

Order

For these reasons it is decided that:

1. The request for re-establishment of rights in respect of the time limit for filing notice of appeal is rejected as inadmissible.
2. The appeal is deemed not to have been filed.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated