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**Datasheet for the decision  
of 13 December 2022**

**Case Number:** T 0258/19 - 3.3.08

**Application Number:** 13722668.4

**Publication Number:** 2827762

**IPC:** A61B5/00, G01N21/35, G01N33/483

**Language of the proceedings:** EN

**Title of invention:**

Skin cancer biomarker detection by infrared spectroscopy

**Applicants:**

MC Professional Ltd.  
IR Clinical Cancer Diagnostics Ltd.  
Eikje, Natalja

**Headword:**

Skin cancer biomarker/MC PROFESSIONAL

**Relevant legal provisions:**

EPC Art. 108  
EPC R. 116, 126(2), 137(3)  
RPBA 2020 Art. 13(2)

**Keyword:**

Admissibility of appeal - notice of appeal - filed within time limit (yes)

Amendments of application after summons - discretion of examining division

Amendment after summons in appeal - exceptional circumstances (no)

**Decisions cited:**

G 0007/93



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Case Number: T 0258/19 - 3.3.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 13 December 2022**

**Appellant:** MC Professional Ltd.  
(Applicant 1) Voistluse 23-35  
Tallinn 10132 (EE)

**Appellant:** IR Clinical Cancer Diagnostics Ltd.  
(Applicant 2) Hasleveien 26  
Leil. 702  
0571 Oslo (NO)

**Appellant:** Eikje, Natalja  
(Applicant 3) Hasleveien 26-702  
0571 Oslo (NO)

**Decision under appeal:** **Decision of the Examining Division of the European Patent Office posted on 16 May 2018 and 1 August 2018 refusing European patent application No. 13722668.4 pursuant to Article 97(2) EPC**

**Composition of the Board:**

**Chairwoman** T. Sommerfeld  
**Members:** A. Schmitt  
P. de Heij

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the examining division of 20 April 2018 refusing European patent application No. 13722668.4, which had been filed as an international application published as WO 2013/139348. The decision was signed on 24 April 2018, posted on 16 May 2018 and re-posted on 1 August 2018.
  
- II. The decision of the examining division is based on a single set of claims which was filed in electronic form on 20 April 2018. The examining division decided not to admit this claim request into the proceedings pursuant to Rules 116(2) and 137(3) EPC. The examining division held that the claim request was late-filed and did not appear to be allowable. The application was refused under Article 97(2) EPC on the grounds of the absence of an agreed text on which the examination could be based.
  
- III. The decision and the reasons were dispatched to the applicants on 16 May 2018 but were returned to the European Patent Office (EPO) with an indication that the documents had not been claimed. However, the EPO also received an acknowledgement of receipt dated 13 July 2018. The decision of 20 April 2018 and the reasons were dispatched once more on 1 August 2018.
  
- IV. With an email dated 8 August 2018, the applicants filed a complaint stating that the decision posted on 16 May 2018 had not been received and was not accessible online. In response, the EPO informed the applicants on 4 September 2018 that the decision to refuse the present patent application had been dispatched on 1 August 2018 and could be appealed

within a time limit of two months, starting from 11 August 2018.

- V. The notice of appeal of the applicants (appellants) was filed on 11 October 2018, referring to the decision that was originally dispatched on 16 May 2018, and the appeal fee was paid on 5 October 2018. With the statement of grounds of appeal, the appellants requested that the decision of the examining division dated 1 August 2018 be set aside and submitted new sets of claims as the main request and auxiliary requests I and II.
- VI. The board summoned the appellants to oral proceedings and issued a communication pursuant to Article 15(1) RPBA. The board stated that it understood the appeal to concern the decision which had first been posted on 16 May 2018. It was noted that the EPO had received an acknowledgement of receipt dated 13 July 2018 and that it appeared that the appeal had not been filed within two months of notification of the decision. Although there was hardly any reasoning in the grounds of appeal as to why the decision of the examining division was incorrect, the board preliminarily considered the appeal sufficiently substantiated by the reference in the notice of appeal to health problems as the justification for the late filing of the claim request in the first instance. However, the board preliminarily saw no reason to deviate from the conclusions of the examining division.
- VII. On the day of the oral proceedings before the board, i.e. 13 December 2022, the appellants sent new claim requests by email.

VIII. The appellants' arguments in support of the appeal as understood by the board from the written and oral submissions and where relevant to the present decision are as follows.

*Admissibility of the appeal*

The appellants had not received the decision in July 2018. They had only learned about the decision when their representative was contacted by the EPO that summer while being on the beach. The acknowledgement of receipt could have been signed by mistake.

*Admittance of new claim requests at first instance*

The decision of the examining division not to admit the claim request sent to it on 20 April 2018 ignored the fact that the representative of the appellants had been admitted to the emergency unit of a hospital in Tallinn on 29 March 2018. For this reason, and also due to the representative having to care for an unwell family member, the representative had been physically unable to prepare all of the documents requested in time.

The whole application process had been disturbing and strange. Documents that had been sent to the appellants had not been received. The former professional representative of the appellants had advised that the application be abandoned but had at the same time urged the appellants to pay the renewal fees.

The board should make an exception for the appellants because they had been wrongly advised.

*Admittance of new claim requests in the appeal proceedings*

Admitting the claim requests filed on the day of the oral proceedings was justified. There had been a miscommunication concerning the receipt of the documents that were sent to the appellants by the EPO that could have been avoided if the EPO had contacted the representative by telephone. In addition, there had been an unnecessary delay in the handling of the application.

- IX. The appellants requested that the decision under appeal be set aside and that a patent be granted based on the claim requests of set 1 or, alternatively, set 2, set 5, set 3 or set 4, all of which were submitted by email on 13 December 2022.

**Reasons for the Decision**

*Admissibility of the appeal*

1. As stipulated by Article 108 EPC, notice of appeal must be filed within two months of notification of the decision. The appealed decision was notified by registered letter with advice of delivery on 16 May 2018. Rule 126(2) EPC stipulates that in case of such notification, the letter shall be deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider, unless it has failed to reach the addressee or has reached it at a later date. In the event of any dispute, it is incumbent on the EPO to establish whether the letter reached its destination.

2. In the present case, the letter containing the decision was returned to the EPO by the Tallinn post office on 1 June 2018 as "*Non réclamé*". However, an acknowledgement of receipt dated 13 July 2018 that had apparently been signed by the representative of the appellants is also present on file. The appellants have alleged that signing and returning the acknowledgement of receipt was a misunderstanding, which the board understands to mean that in spite of the acknowledgement the decision had not in fact been received. In view of the return of the document by the Tallinn post office, this allegation does not seem improbable. Moreover, the burden of proof for establishing whether the document was received is on the EPO. This implies that in the case of doubt about whether or not the decision was received, like in the present case, the appellant must be given the benefit of that doubt.
3. Therefore, it has to be assumed that the decision was not received by the appellants until 11 August 2018, ten days after the second dispatch of the decision on 1 August 2018. The notice of appeal was received by the EPO on 11 October 2018, i.e. within the time limit according to Article 108 EPC. The appeal also meets the other requirements for admissibility as set out in Articles 106 to 108 and Rule 99 EPC. The appeal is therefore held admissible.

*Admittance of new claim requests at first instance*

4. The claim set submitted on the day of the oral proceedings before the examining division was filed after the deadline for written submissions in preparation for the oral proceedings that had been set in accordance with Rule 116 EPC. Exercising its



discretion under Rule 137(3), the examining division decided not to admit this claim request into the proceedings because it was late-filed and did not appear to be allowable.

5. When reviewing this decision of the examining division, the guiding principle should be that it is not the function of the board to review all the facts and circumstances of the case, as if it were the examining division, in order to decide whether or not it would have exercised its discretion in the same way as the department of first instance. A board should only overrule the way in which the first-instance department exercised its discretion if the board comes to the conclusion either that the first-instance department did not exercise its discretion in accordance with the right principles or that it exercised its discretion in an unreasonable way, and thus exceeded the proper limits of its discretion (see decision G 7/93, section 2.6).
6. The appellant has not argued that the examining division did not exercise its discretion in accordance with the right principles and the board cannot find any errors in the principles the examining division applied.
7. In addition, it cannot be regarded unreasonable to deny the admittance of a claim request submitted at such a late stage of the proceedings. The health problems of the representative of the appellants and those of a dependent family member that allegedly prevented the appellants from preparing their documents in response to communications from the examining division in a timely manner cannot - as unfortunate as these health problems are - justify this very late filing. The board

notes that the appellant had been informed that the final date for written submissions or amendments was 20 March 2018 and that the appellant had not requested an extension of this period or the postponement of the oral proceedings.

8. The circumstances put forward at the oral proceedings before the board concerning the receipt of the first dispatch of the impugned decision and the advice of the former professional representative of the appellants have no bearing on the exercise of the examining division's discretion. They cannot shed new light on the assessment of the allowability of the appeal.
9. The appellants have requested the board to make an exception. However, the board has no power to make exceptions from applicability of the rules that govern admittance of late-filed claim requests if no legal basis for such an exception exists. That is the case here.

*Admittance of new claim requests in the appeal proceedings*

10. The claim requests were filed after notification of the summons to oral proceedings. Their filing therefore represents an amendment to the appellants' appeal case. Article 13(2) RPBA requires that such an amendment must, in principle, not be taken into account, unless in case of exceptional circumstances which have been justified with cogent reasons by the party concerned.
11. The alleged miscommunication concerning the receipt of the documents that were sent to the appellants by the EPO and the alleged unnecessary delay in the handling of the application referred to by the appellants cannot be regarded exceptional circumstances justifying the

late filing of the claim requests. Therefore, the board has decided not to admit the new claim requests into the appeal proceedings.

*Conclusion*

12. As no admissible claim set has been filed, the decision of the examining division has to be confirmed.

**Order**

**For these reasons it is decided that:**

**The appeal is dismissed.**

The Registrar:

The Chairwoman:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated