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**Datasheet for the decision
of 16 July 2020**

Case Number: T 1214/20 - 3.4.01

Application Number: 14750518.4

Publication Number: 3169143

IPC: H05B33/08, G09G3/20, H03K7/00

Language of the proceedings: EN

Title of invention:
SYSTEM AND METHOD FOR CONTROLLING LED LIGHTING BY DISTRIBUTED
PWM

Applicant:
Lightbee, S.L.

Headword:
Re-establishment of rights

Relevant legal provisions:
EPC Art. 108, 122(1), 122(2)
EPC R. 136(1), 136(2)

Keyword:

Admissibility of appeal - appeal fee (not paid) - appeal deemed not to have been filed - notice of appeal - filed within time limit (no)
Re-establishment of rights - time limit for filing notice of appeal - (no) - all due care (no) - system for monitoring time limits - due care on the part of the professional representative - principle of proportionality

Decisions cited:

J 0019/05, T 0287/84, J 0014/16, T 0578/14, T 1022/14,
G 0001/18



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Case Number: T 1214/20 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 16 July 2020

Appellant: Lightbee, S.L.
(Applicant) Parque Científico Tecnológico de la ULPGC
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35017 Las Palmas De Gran Canaria (Las Palmas)
(ES)

Representative: Herrero & Asociados, S.L.
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 13 December
2019 refusing European patent application No.
14750518.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair P. Scriven
Members: T. Zinke
R. Winkelhofer

Summary of Facts and Submissions

- I. The decision of the Examining Division, refusing European patent application 14750518.4, was posted on 13 December 2019.
- II. On 30 April 2020, the applicant filed a notice of appeal against this decision, a (separate) statement of grounds of appeal, and paid the appeal fee.
- III. On 27 May 2020, the applicant requested "restoration of the right to appeal", i.e. re-establishment of rights into the time limits for the (notice of and statement of grounds of) appeal and for payment of the appeal fee, enclosing documentary evidence. No request for oral proceedings was made.
- IV. In the request for re-establishment of rights, the appellant brought forward the following:

The application had been pending since 2014, with the appellant being represented by Herrero & Asociados, S.L. ("H&A"). The persons in charge of this application (*F* and *P*) were both specially diligent, but there was an "internal misunderstanding" between them, which affected the correct handling of the application and resulted in no appeal being filed in due time.

F, on 27 November 2019 had informed *P* of the client's wishes to file a "divisional patent" and had "requested [*P*] to be informed about the deadline to file a Divisional Patent, i.e. within the two-month time limit to file an appeal, while the patent application is pending". *P*, due to an unpredictable and involuntary human

error, did not record the client's wish in H&A's system.

On 13 December 2019, the patent application was refused. The decision was received by *P*, who immediately passed it on to *F* by email, and asked whether any action was to be taken. Due to an unpredictable and involuntary human error, *F* "misplaced the internal email attaching the EPO's Decision of Refusal, and provided no action at all to [*P*]".

Based on the lack of instructions from *F*, *P* took no action, and, in particular, "did not provide the requested time limit by [*F*]".

F kept waiting "for the requested time limit to file the Division Patent and took no action at all regarding the possibility to Appeal". Thus, the deadline for filing an appeal was never recorded and instructions to file an appeal were never given.

On 27 March 2020, "the EPO, by means of a resolution, informed the applicant that the Patent was considered refused." It was only then that it became apparent that the time limit for filing an appeal had been missed and *F* immediately started to "assess the possibility of recovering the Patent".

H&A had provided high-quality legal service for more than 35 years from its offices in Spain, Portugal and Latin America. It had won a number of awards and been granted ISO 9001:2015 certification in December 2013 (since renewed and valid until December 2022). Its staff had extensive experience, was highly specialised, continuously trained, and included, eight European Patent Attorneys. *F* was a partially-qualified European

patent attorney with extensive experience and outstanding qualifications. *P* also had vast experience in the management of patents, including 16 years at H&A as a "patent and trademark administrative ". H&A operated a state-of-the-art ICT system for "surveillance, monitoring and control of the applications and processing of national patents/ EPO patents/ PCT patents that has proven effective for many years." It was relied upon to provide a double verification mechanism in addition to human control, in implementing a system of surveillance and double review of all instructions and incidents, and notably to supervise and control the expiration of deadlines. All communications between employees were made via email so that their contents could be recorded by the system. In the present case, an isolated human mistake and "a punctual lack of internal coordination" within a normally-reliable and satisfactory system resulted in a failure to file the appeal, in spite of H&A's established protocol having been properly developed and of the "outstanding care [we] took when handling this patent." The loss of the application would involve serious damage to the appellant, and this should also be taken into account, according to the principle of proportionality as established in the jurisprudence of the Boards of Appeal.

Reasons for the Decision

1. A party's right to file a notice of appeal can only be re-established under Article 122(1) EPC if the party was unable to observe the time limit in spite of having taken all due care required by the circumstances. The

request for re-establishment must be filed within two months of the removal of the cause of non-compliance (Rule 136(1) EPC), which is normally the date on which the person responsible for the application becomes aware of the omission (Case Law of the Boards of Appeal, 9th Edition, III.E.4.1.1 a)). Pursuant to Article 122(2) and Rule 136(2) EPC, the request for re-establishment must state - in a sufficiently substantiated fashion to make a conclusive case (Case Law III.E.4.4) - the grounds on which it is based, and it must set out the precise cause of non-compliance with the time limit concerned, and specify at what time and under which circumstances it occurred and was removed. A request which relies on general statements only and contains no specific facts does not satisfy the requirements for due substantiation (Case Law III.E.4.4, e.g. J 19/05, point 4).

2. In assessing whether all due care required by the circumstances was taken, the circumstances of each case must be considered as a whole (e.g. T 287/84 "Re-establishment", OJ EPO 1985, 333, point 2; J 14/16 "Re-establishment of rights", point 3.2). All due care is considered to have been exercised if non-compliance with a time limit results either from exceptional circumstances or from an isolated mistake within a normally-satisfactory monitoring system (Case Law III.E.5.2., 5.4.). In a large firm with numerous time limits to monitor, a normally-satisfactory monitoring system would have to comprise an effective system of cross-checks, independent of the person responsible for monitoring the time limits, and notably to prevent misunderstandings between a representative and an assistant (Case Law III.E.5.4.4 a)).

3. Based on the asserted facts, nothing casts doubt on the general reliability of any of *P* or *F*, who were responsible for taking the necessary steps to process the application, including the filing of any appeal. Even though not mentioned, the Board assumes, in the appellant's favour, that they worked under the supervision of a qualified European Patent Attorney.
4. There is also no reason to doubt that H&A have provided high-quality services to its clients over many years.
5. However, a series of misunderstandings and or errors occurred here. When informed by *F*, on 27 November 2019, of the client's wishes to file a divisional application *P*, due to an unspecified error, did not record this in the ICT system. That was the first error. When the Examining Division's decision of 13 December 2019 to refuse the application was notified to H&A, *P* passed it on to *F* by internal email and asked if any action was to be taken. *F* misplaced this email. That was the second error. Consequently, there was no feedback to *P* as to how to proceed. *P* did not make further enquiries, when no response came. That may have been a third error; or *P* may have been working within established conventions, interpreting the lack of response as indicating that no further action was needed. Either way, *P* took no action and did not make *F* aware of the time limits for filing a divisional application and for the appeal against the decision.
6. *P* and *F* are presented as being greatly experienced. The Board does not doubt it. But it would not matter if they were not, because they would require supervision by someone who was. The Board, therefore, can proceed on the basis that the application was in experienced hands. The serious consequences of not filing the

appeal on time would have been apparent. Despite this, *P* did not make further enquiry when no response came. Similarly, *F* did not make further enquiry about the pendency of the present application, which, from *F*'s point of view, at least, also went unanswered. If either had made further enquiries, it is likely that the mistake would have been caught.

7. Similarly, if the applicant's wish to file a divisional application had been recorded, that may have been enough. Nevertheless, there seems to have been no systematic check that this fact, which *F* knew was important and should be recorded, and which the system could record, had in fact been recorded.
8. At least three opportunities were missed, and for this reason alone, one cannot talk of an isolated mistake within a normally-satisfactory monitoring system.
9. H&A's ICT system, apparently, did not provide for independent cross-checks, reminders, or alerts and allowed an internal email to be misplaced without this being flagged up (cf. Case Law III.E.5.4.2).
10. Respecting the time limit for appeal is essential for a judicial review of a first-instance decision, and requires particular attention. This attention was not given here.
11. It has to be concluded that all due care required by the circumstances was not taken.
12. In referring to the principle of proportionality, the appellant overlooks recent jurisprudence, according to which time limits of the EPC seek to strike a balance between legal certainty and the proper administration

of justice on the one hand, and substantive justice on the other, and aim to avoid discrimination or arbitrary treatment of parties (T 578/14, point 8.4.) Article 122 and Rule 136 EPC, thus, leave no room for taking into account the possible loss resulting from the omission on an appellant's side, as this would deprive the time limits of any content and would make the provisions of Article 122 EPC uncertain and arbitrary (see Case Law III.E.8; and, for example, T 1022/14 "Re-establishment of rights/IHI", point 12).

13. No request for oral proceedings in the proceedings for re-establishment of rights was made. With this decision being based on the appellant's own assertions regarding the facts of the case, there was no reason to hold oral proceedings ex officio.
14. In accordance with Rule 126(2) EPC, the Examining Division's decision was notified on 23 December 2019, and the two-month time limit for the notice of appeal (Article 108 EPC) expired on 24 February 2020, a Monday and regular working day of the European Patent Office. From this, it follows that the notice of appeal, which was filed on 30 April 2020 with the payment of the appeal fee and the statement of grounds of appeal, was filed too late.
15. The request for re-establishment has to be refused.
16. The legal consequence of this finding, as has now been clarified by G 1/18 "Formation du recours", OJ EPO 2020, 26, is that the appeal is deemed not to have been filed.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated