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**Datasheet for the decision
of 26 May 2021**

Case Number: T 1547/20 - 3.5.07

Application Number: 15192268.9

Publication Number: 3163467

IPC: G06F17/30

Language of the proceedings: EN

Title of invention:

Method and tool for the automatic reformulation of search
keyword strings in document search systems

Applicant:

BIGFLO s.r.l.

Relevant legal provisions:

EPC Art. 108, 122(1), 122(2)

EPC R. 101(1), 134(2), 134(4), 136(1), 136(2)

Keyword:

Admissibility of appeal - (no) - statement of grounds - filed
within time limit (no)

Re-establishment of rights - time limit for filing statement
of grounds - all due care (no)

Decisions cited:

J 0001/20



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Case Number: T 1547/20 - 3.5.07

D E C I S I O N
of Technical Board of Appeal 3.5.07
of 26 May 2021

Appellant: BIGFLO s.r.l.
(Applicant) Via Galvani 2E
24044 Dalmine (BG) (IT)

Representative: Karaghiosoff, Giorgio Alessandro
c/o Praxi Intellectual Property S.p.A. - Savona
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 13 November
2019 refusing European patent application
No. 15192268.9 pursuant to Article 97(2) EPC**

Composition of the Board:

Chairman J. Geschwind
Members: P. San-Bento Furtado
C. Barel-Faucheux

Summary of Facts and Submissions

- I. European patent application No. 15192268.9 was refused by the decision of 13 November 2019, received by the appellant on 21 November 2019.
- II. The applicant (appellant) filed a notice of appeal against that decision with the letter dated 13 January 2020, received by the EPO on 16 January 2020. The appeal fee was paid at the same time.
- III. On 13 July 2020, the registry of the boards sent a communication informing the appellant that it appeared that the written statement of grounds of appeal had not been filed and that, as a consequence, the appeal seemed to be inadmissible under Article 108, third sentence and Rule 101(1) EPC. Since no acknowledgement of receipt had been received, on 10 September 2020 the registry of the boards sent a further communication asking the appellant to acknowledge the receipt of the communication of 13 July 2020.
- IV. On 23 September 2020 the appellant filed a statement setting out the grounds of appeal and a request for re-establishment of rights with respect to the term for filing the grounds of appeal. The fee for re-establishment of rights was paid on the same day.
- V. In a communication sent after a summons to oral proceedings, the board expressed mainly the preliminary opinion that the request for re-establishment of rights was not allowable under Article 122(1) and (2) EPC, even taking account of the period extensions provided under Rule 134(2) and (4) EPC due to the disruptions

caused by the COVID-19 pandemic, and thus that the appeal seemed to be inadmissible. The appellant was invited to provide evidence to support its assertions and to complete the information with regard to the facts and circumstances of the delay and of the procedure followed for dealing with cases, including the double system allegedly in place.

- VI. The appellant did not reply to the board's communication. Six days before the date scheduled for the oral proceedings, the appellant informed the registry per email that it would attend the oral proceedings.
- VII. Oral proceedings were held as scheduled by video conference. At the end of the oral proceedings, the Chair announced the board's decision.
- VIII. The appellant's final requests were that the request for re-establishment of rights under Article 122 EPC and Rule 136 EPC with respect to the term for filing the grounds of appeal be granted; and that the appeal be considered admissible.
- IX. The appellant's arguments, where relevant to this decision, are addressed in detail below.

Reasons for the Decision

- 1. The notice of appeal is deemed to have been filed on the day on which the appeal fee was paid, i.e. 16 January 2020, and therefore within two months of notification of the decision of 13 November 2019, as required by Article 108, first and second sentences, EPC when taking into account the date of deemed notification of Rule 126(2) EPC.

2. Article 108, third sentence, EPC stipulates that the statement setting out the grounds of appeal shall be filed within four months of notification of the decision. Under normal circumstances, the period for filing the statement setting out the grounds of appeal in the case at hand would have expired on the 23 March 2020, i.e. four months after the presumed day of notification under Rule 126(2) EPC, which is the tenth day following handover to the postal service provider. However, this period was extended due to the COVID-19 pandemic and associated disruptions acknowledged by the EPO. For the reasons given below, the appellant has nonetheless not observed the time limit.

3. *Extension of periods - Rule 134(2), (4) and (5) EPC*

3.1 With the "Notice from the European Patent Office dated 15 March 2020 concerning the disruptions due to the COVID-19 outbreak", OJ EPO 2020, A29, the EPO announced that, as the state in which the EPO was located, the Federal Republic of Germany, like many other contracting states, was experiencing restrictions on the movement and circulation of persons, as well as on certain services, exchanges and public life in general, which could be qualified as a general dislocation within the meaning of Rule 134(2) EPC, periods expiring on or after the date of the Notice were extended for all parties and their representatives to 17 April 2020. The dislocation under Rule 134(2) EPC was further extended in similar notices dated 1 May 2020 (OJ EPO 2020, A60) and 27 May 2020 (OJ EPO 2020, A74).

3.2 Due to the COVID-19 pandemic and associated disruptions, all periods expiring on or after 15 March 2020 were thus extended to 2 June 2020 under Rule 134(2) and (4) EPC. After that date, Rule 134(5)

EPC could be invoked in cases of failure to observe time limits due to exceptional occurrences (see the above cited notice dated 27 May 2020). As required by Rule 134(4) EPC, the date of commencement and the end of the dislocation under Rule 134(2) EPC were published by the EPO in the notices cited above.

3.3 The deadline of 23 March 2020 for filing the statement of grounds of appeal in the current case in accordance with Article 108 EPC and Rule 126(2) EPC is eight days after the date of commencement of the general dislocation announced in the notices cited above and within the thus established period of dislocation under Rule 134(2) and (4) EPC. The deadline was therefore extended to 2 June 2020.

3.4 However, the statement of grounds of appeal was filed on 23 September 2020, i.e. more than **three months after** the end of the extension under Rule 134(2) and (4) EPC, and, to the board's best knowledge, long after the last disruptions caused by the pandemic in Europe.

The board further notes that the appellant did not invoke any exceptional circumstances under Rule 134(5) EPC with its grounds for re-establishment of rights and did not provide evidence that the delivery or transmission of mail was dislocated due to the pandemic, as required by Rule 134(5) EPC, even after receiving the board's communication in which a link to the notice of 27 May 2020 was provided and period extensions under Rule 134(2), (4) and (5) EPC were mentioned.

3.5 It follows that, even taking into account the extension of periods under Rule 134(2) and (4) EPC, the appellant was unable to observe the time limit for filing the

statement of grounds of appeal required by Article 108 EPC.

4. *Admissibility of the request for re-establishment*

- 4.1 The time limits for filing a request for re-establishment under Article 122(1) EPC are set out in Rule 136(1) EPC. In respect of the period for filing an appeal, a request for re-establishment of rights shall be filed in writing within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit. The request shall not be deemed to have been filed until the prescribed fee has been paid.

The removal of the cause of non-compliance is to be established on a purely factual basis and occurs on the date on which the person responsible for the application is made aware of the fact that a time limit has not been observed. Considering that removal took place earlier than on the actual date of receipt of the loss-of-rights communication can only be based on actual knowledge, rather than on a presumption of knowledge (see Case Law of the Boards of Appeal, 9th edition, July 2019, III.E.4.1.1 a), and J 1/20, reasons 3.7 to 3.8).

- 4.2 In the case at hand, the filing of the request for re-establishment and payment of the prescribed fee occurred on the same day. It is clear that the request for re-establishment of September 2020 was filed within one year of expiry of the unobserved time limit of June 2020 for filing the statement of grounds of appeal.

The removal of the cause of non-compliance is the date the representative was made aware by the registry's communication sent out on 13 July 2020 that the statement of grounds of appeal had not been filed (see point III. above). On 23 September, the board received the request for re-establishment of rights (point IV.). Under these circumstances, the question of whether the request was filed within the time limit of two months translates into the question of whether the appellant received the communication of 13 July on or after 23 July. The appellant submitted that it had filed the request for re-establishment within the time limit stipulated by Rule 136(1) EPC, but no evidence was provided with regard to the date of receipt of the communication of 13 July. In particular, the board did not receive an acknowledgement of receipt of the communication nor a response to the registry's communication of 10 September 2020 requesting the acknowledgement (see point III. above). In the absence of proof that the actual date of receipt of the communication was within nine days after it was sent out, i.e. before 23 July, the board is satisfied that the request for re-establishment was submitted in time.

4.3 In addition, the request for re-establishment of rights satisfies the requirements of Rule 136(2) EPC. In particular, the request states the grounds on which it is based and sets out the facts on which it relies. As the statement of grounds of appeal was submitted with the request for re-establishment (see point IV. above), the omitted act has been completed within the relevant period for filing the request for re-establishment.

4.4 Therefore, the board is satisfied that the request for re-establishment is admissible under Rule 136(1) and (2) EPC.

5. *Written submissions by the appellant*

5.1 In support of its request, with its grounds for re-establishment of rights, the appellant argued that it was unable to observe the time limit in spite of all due care in view of a combination of unfortunate exceptional circumstances, especially:

- the replacement in the representative's firm of an experienced paralegal employee who entered maternity leave at the end of 2019 with a colleague ("new paralegal" in the following) who was experienced with the national procedures but not the European granting procedure (see the request for re-establishment of rights, page 2, first paragraph), and
- the COVID-19 lockdown in Italy, which started on 11 March 2020 and forced the representative's firm to make substantial changes to be able to work remotely, including moving the computers for carrying out the Italian, European and International applications to the homes of the responsible paralegal personnel (page 1, second and third paragraphs of the section on facts; page 2, sixth to eighth paragraph).

5.2 With regard to the monitoring system in place, the appellant stated that the server-client "Foundation CPA system" and the virtual private network (VPN) had already been in use before the lockdown in the representative's firm with its headquarters in Genova and Savona. At that time, the client computers being used by the staff already had VPN access to the file and email systems. The Foundation CPA management software monitored each term and automatically ensured the transmission of alerts to the persons in charge of the different tasks falling due. For each term, the CPA

system alerted the responsible paralegal employee one month to 15 days in advance of the due date depending on the duration of the term, the alert being repeated until the respective activity was closed (page 1, last two paragraphs).

- 5.3 According to the appellant, the new paralegal had been trained from October 2019 by the leaving paralegal and the representative. Since the representative rarely dealt with appeal cases and COVID-19 was at the time not a credible threat in the West, the main features relevant for the term management had not been extensively explained to the new paralegal (page 2, first two paragraphs).

The appellant submitted that there was a double check system in place consisting of the CPA system and the internal workflow management database with records dedicated to the individual tasks but that the new paralegal employee had closed both tasks of filing the written statement and filing the notice of appeal in both systems. The closure had been communicated to the current representative by the paralegal employee as the "closure of the filing of the appeal". So both systems no longer had a record and an alert set for the written statement. The double check system in place had worked very well, even during the COVID-19 lockdown, for all other cases open at the EPO (page 2, eighth paragraph; page 3, fifth to eleventh lines).

The representative argued that all due care required by the circumstances had been taken but that the omission of the procedural step had unavoidably occurred by mistake. The appellant and the representative had become aware of the omission by the communication dated 13 July 2020 (page 3).

6. *Submissions by the appellant at the oral proceedings*

6.1 At the oral proceedings, the appellant described the drastic effects of the pandemic in Bergamo, Genova, Liguria, Savona and in Italy in general, which had caused regional and national lockdowns. The representative submitted that during the COVID-19 crisis, it had been difficult to talk to the appellant, and that the postal services had been severely affected. The appellant was a spin-off of a university in a region which had been severely affected by the COVID-19 crisis. The representative had to contact the university administration to deal with the issues of this patent application, but this was impossible due to a lockdown of the administrative services at the university.

The appellant submitted that the board should take these circumstances into account when determining whether all due care had been observed.

6.2 At the oral proceedings, the appellant also mentioned the problems which arose when the main paralegal had to go on maternity leave and had maternity-related health problems and thus could not train the new paralegal and provide the required support starting from November 2019.

6.3 Regarding the system in place, the appellant submitted that there had been a mistake which caused the emails to be sent to the paralegal on leave. Due to the incorrect forwarding of emails by the monitoring software used, some reminders had been sent to the wrong email addresses. The representative stated that he was a professor of intellectual property and had extensive experience in this field but that he had many time limits to keep track of in addition to those for

this case. The representative contended that all due care had been exercised.

7. *Due care required by the circumstances*

- 7.1 In the case law of the boards, the requirement of due care expressed in Article 122(1) EPC is usually interpreted in a strict manner.

Re-establishment of rights is only allowed if the party has been diligent and careful and the time limit was missed due to unforeseeable factors. The conduct of the appellant and/or representative has to be indicative of all due care required by the circumstances. In particular, all due care is considered to have been taken if the non-compliance results from exceptional circumstances or from an isolated mistake in a normally satisfactory monitoring system (see Case Law of the Boards of Appeal, 9th edition 2019, III.E.5.2).

- 7.2 In this case, no evidence was provided to support the appellant's assertions and to complete the information with regard to the facts and circumstances of the delay and of the procedure followed.

At the oral proceedings, the appellant brought in new allegations which had not been presented with the grounds for re-establishment, without explaining how the new alleged facts related to those mentioned in the statement of grounds for re-establishment of rights. It is not clear how the incorrect forwarding of emails relates to the erroneous closure of tasks in the CPA system and the internal workflow management database (see points 5.3 and 6.3 above). With the grounds for re-establishment, the appellant alleged that the COVID-19 crisis had caused difficulties due to the need to change the computer system to support remote work,

whereas at the oral proceedings the representative mentioned mainly communication problems with the appellant due to the lockdown measures (see points 5.1 and 6.1 above).

The appellant's submissions do not convincingly support the appellant's claim that all due care had been taken as required by the circumstances which were well known to the appellant and representative.

Since no evidence was presented, the board cannot rely on the alleged facts nor fully understand the circumstances of the non-compliance.

Even taking the alleged facts into account, the occurrence of several different problems at the same time demonstrates that the non-compliance was not the result of an isolated mistake in a normally satisfactory monitoring system.

7.3 It is perfectly credible that the disruptions caused by the COVID-19 pandemic caused difficulties for the appellant in complying with the normal time limit of 23 March 2020.

However, to compensate for these disruptions the period for filing the grounds of appeal was extended under Rule 134(2) EPC by two months to the 2 June 2020.

Moreover, the board is not convinced, and the appellant did not provide any evidence, that the disruptions caused by the pandemic affected the telecommunication systems in Italy to such an extent that the communication between the representative and the appellant could not take place, for example, by telephone. It is not clear either whether communication problems with the appellant were decisive since it is

mainly the representative's task to write the statement of grounds of appeal, and the appeal fee had already been paid with the notice of appeal.

There is no evidence that the conditions of the lockdown played any part in the mistake of the paralegal since the filing of the notice of appeal - and presumably the mistaken closure of the two tasks in the systems - occurred in January, long before the start of the COVID-19 crisis in Europe in March 2020.

The special circumstances of the lockdown brought additional difficulties. However, the representative was aware that the new paralegal had not been trained on "the main features relevant for the term management of the appeal proceeding", and both the representative and the appellant knew that the circumstances caused by the lockdown might lead to disruption. In addition, the representative submitted that he had few appeal proceedings. Under these circumstances, the representative should have used the time period of more than two extra months provided under Rule 134(2) EPC to correct any possible omissions caused by the disruption.

7.4 Therefore, the board concludes that the requirement of Article 122(1) EPC that all due care required by the circumstances be taken is not met.

8. *Conclusion*

8.1 Since the request for re-establishment of rights in respect of the filing of the grounds of appeal is not allowable under Article 122(1) and (2) EPC, the grounds of appeal are not deemed to have been filed within the time limit of Article 108 EPC and the appeal is to be

rejected as inadmissible in accordance with
Rule 101(1) EPC.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is rejected.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



L. Malécot-Grob

J. Geschwind

Decision electronically authenticated