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**Datasheet for the decision
of 22 March 2023**

Case Number: T 1513/21 - 3.4.01

Application Number: 15195477.3

Publication Number: 3018757

IPC: H01Q21/00, H01Q21/06, H01Q3/26

Language of the proceedings: EN

Title of invention:
PHASED ARRAY ANTENNA

Applicant:
Leonardo UK Ltd

Headword:
Re-establishment / Leonardo

Relevant legal provisions:
EPC Art. 122
EPC R. 136, 126

Keyword:

Decisions cited:

J 0027/90, J 0005/94, J 0008/95, J 0019/05, J 0015/10,
J 0005/13, J 0014/16, J 0014/21, T 0287/84, T 0324/90,
T 0585/08, T 2450/16, T 1897/17, T 1214/20, G 0001/18



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Case Number: T 1513/21 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 22 March 2023

Appellant: Leonardo UK Ltd
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 3 May 2021
refusing European patent application No.
15195477.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. By decision of the Examining Division of 3 May 2021, European patent application 15195477.3 was refused.
- II. On 17 June 2021, the applicant paid the appeal fee related to the application in question.
- III. On 13 September 2021, the applicant filed a notice of appeal against the Examining Division's decision, and a separate statement of grounds.
- IV. By the Board's communication of 4 October 2021, the appellant was informed, inter alia, that the notice of appeal had not been filed in time. They were invited to respond within 2 months.
- V. On 3 December 2021, the applicant requested re-establishment of rights into the time limit for the notice of appeal, enclosing documentary evidence. No request for oral proceedings was made.
- VI. In the request for re-establishment of rights, the appellant, represented by a European Patent Attorney, brought forward the following:

I am the European Patent Attorney responsible for this case. Docketing and administration of the applicant's patent portfolio is undertaken by paralegals [M] and [C] ...

3. On the 17th June 2021 [the IP manager for the applicant] instructed [M] to file the notice of appeal and pay the appeal fee. An email chain

evidencing these events is enclosed.

4. [M] paid the appeal fee on the 17th June 2021; unfortunately, although instructed to do so, she accidentally omitted to file the notice of appeal.

5. On the 12th September 2021, whilst preparing the grounds of appeal, I noticed that there was no record of a notice of appeal having been filed....

6. As a precaution a notice of appeal was prepared and filed with the grounds of appeal the next day, i.e. the 13th September 2021....

The failure to file the notice of appeal by the 13th July 2021 resulted solely from an isolated mistake by an experienced patent administrator.

...

Reasons for the Decision

1. In accordance with Rule 126(2) EPC, the Examining Division's decision is deemed to have been delivered on 13 May 2021, and the two-month time limit for the notice of appeal (Article 108 EPC) expired on 13 July 2021, a Tuesday and regular working day of the European Patent Office.

2. From this, it follows that the notice of appeal, filed on 13 September 2021, was too late.
3. The payment of the appeal fee within the time limit did not suffice as a valid filing of the notice of appeal (Case Law V.A.2.5.4 a)).
4. 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 10th edition 2022 - "Case Law" -, III.E.4, cf. J 27/90, OJ EPO 1993, 422).
5. Under Article 122(2) and Rule 136(2) EPC, the request for re-establishment must set out - in a sufficiently substantiated fashion to make a conclusive case (J 15/10, reasons 3.2) - 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. Thereby, it is ascertained that the factual basis for the requested decision is not altered after the expiry of the time limit for the request (Case Law III.E.4.4).
6. Only if this requirement for immediate and complete substantiation within the time limit has been fulfilled, might it be permissible to complement the facts and evidence in later submissions, provided that they do not extend beyond the framework of the previous

submissions (J 5/94, reasons 2.3; J 19/05, reasons 5; T 585/08, reasons 9; J 15/10, reasons 3.1; see also J 8/95, reasons 3; T 324/90, reasons 5).

7. In assessing whether all due care required was taken, the circumstances of each case must be considered as a whole (Case Law III.E.5.2, e.g. T 287/84, OJ EPO 1985, 333, reasons 2; J 14/16, reasons 3.2; T 1214/20, reasons 2; J 14/21, reasons 24).
8. It rests not only with (here) the applicant to exercise all due care required by the circumstances, but with all persons acting on their behalf. Notably, an applicant's professional representative is likewise under the obligation to exercise all due care, as well as their assistants and employees. These persons' acts are ultimately attributed to the applicant (Case Law III.E.5.5; cf. for example J 5/13, reasons 3.3.1; T 1897/17, reasons 2; J 14/21, reasons 26).
9. If the cause of non-compliance with a time limit involves some error in carrying out the party's intention to comply with a time limit, due care is considered to have been taken if the failure to comply results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law III.E.5.2, III.E.5.4).
10. In a large firm with numerous time limits to monitor, a normally-satisfactory monitoring system would 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 (T 1214/20, reasons 2; T 1897/17, reasons 6; Case Law III.E.5.4.2, III.E.5.4.4 a)). The preparation of a notice of appeal by the re-

representative's assistant cannot be considered a routine task that could rightfully be entrusted to them by the representative, without further instruction or supervision (T 2450/16, reasons 3.2; Case Law III.E.5.5.4 b) (i)).

11. Based on the asserted facts, nothing casts doubt on the general reliability of M and C, who were responsible for taking the necessary steps to process the application, including the filing of an appeal. Even though not mentioned, it is assumed, in the appellant's favour, that they worked under the supervision of a qualified European Patent Attorney. There is also no reason to doubt that they have provided reliable and high-quality services over several years, and that the application was thus in experienced hands.
12. The appellant brought forward only that M had been instructed to file the notice of appeal and pay the appeal fee, but accidentally omitted the filing of the notice of appeal and that this failure resulted solely from an isolated mistake by an experienced patent administrator.
13. No specific reasons are given as to why this failure occurred, notably nothing about the specific circumstances, and why it could still be concluded that all due care was taken (Case Law III.5.4.3 as to the cause of mistake remaining unclear). Moreover, and most importantly, no evidence is given, at all, of a normally-satisfactory system of monitoring, and cross-checks, or explanation as to why the system did not work in this specific case.
14. There was thus no substantiation of the necessary grounds and facts within the time limit of Rule 136(1)

EPC. Therefore, on the basis of the appellant's own submissions and (insufficient) factual assertions, it cannot be said that all due care required by the circumstances was taken.

15. In view of the requirement for immediate and complete substantiation, the appellant could not later complement their factual assertions, in order to complete the request for re-establishment.
16. Respecting the time limit for appeal is essential for a judicial review of a decision, and requires particular attention. This attention was not given here.
17. The request for re-establishment has to be refused.
18. The applicant did not request oral proceedings for the question of re-establishment. This decision is based on the appellant's own assertions regarding the facts of the case, there is no reason to hold oral proceedings ex officio, and no other further procedural steps need be taken. No further procedural step could serve any legitimate purpose, and would run counter to the requirement of legal certainty in due time.
19. The legal consequence of this finding, as found in by G 1/18 *Formation du recours*, OJ EPO 2020, 26, is that the appeal is deemed not to have been filed, and the appeal fee is to be reimbursed.

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