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**Datasheet for the decision
of 20 December 2023**

Case Number: T 1550/21 - 3.5.05

Application Number: 13871351.6

Publication Number: 2946606

IPC: H04W48/08, H04W24/00

Language of the proceedings: EN

Title of invention:

Discovery signal in cluster-based small cell

Applicant:

Apple Inc.

Headword:

Rule 115(1) period/APPLE

Relevant legal provisions:

EPC Art. 111(1)
EPC R. 103(1) (a), 115(1)
RPBA 2020 Art. 11, 12(8)

Keyword:

Substantial procedural violation - (yes): summons with less than two months of notice without demonstrated consent by the appellant

Direct remittal of the case to the examining division - (yes)

Reimbursement of the appeal fee - (yes)

Decisions cited:

J 0007/82, T 111/95, T 0863/08, T 1051/20



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Case Number: T 1550/21 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 20 December 2023

Appellant: Apple Inc.
(Applicant) One Apple Park Way
Cupertino, CA 95014 (US)

Representative: Rooney, John-Paul
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 19 March 2021
refusing European patent application
No. 13871351.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair K. Bengi-Akyürek
Members: N. H. Uhlmann
C. Almberg

Summary of Facts and Submissions

I. The applicant appealed against the examining division's decision to refuse the European patent application in suit.

The examining division found that a main request did not meet the requirement of Article 56 EPC and that an auxiliary request did not meet the requirements of Articles 56 and 84 EPC.

II. In the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the main request on which the appealed decision is based, or of an auxiliary request submitted with the statement.

III. In view of the reasons below, it is not necessary to reproduce the wording of these claim requests.

Reasons for the Decision

1. Substantial procedural violation

The board holds that the examining division committed a substantial procedural violation by summoning the appellant to oral proceedings with less than two months of notice, without the appellant's agreement, contrary to Rule 115(1) EPC. The reasons are as follows.

1.1 The appellant was summoned with less than two months' notice.

1.2 The examining division issued a summons to oral proceedings, to be held on 19 November 2020. On this date, a notification was sent to the appellant, announcing that the summons is cancelled and that a new summons will follow.

1.3 A new summons was issued, dated 14 January 2021 and setting 27 January 2021 as the date for the oral proceedings. Four further prior-art documents, labelled as **D5 to D8**, were attached to the summons; the arguments in the accompanying communication were largely based on document D5.

1.4 However, three weeks earlier, in its letter dated 24 December 2020 and received at the EPO on the same date, the appellant wrote, *inter alia*,

"We write in reply to the reissued summons to oral proceedings.

In view of the new line of argumentation in relation to documents D5 to D8, we request more time to consider the documents."

In view of this passage, it is evident that the summons was received by the appellant *before* it wrote this letter, i.e. on or before 24 December 2020, and certainly before the 14 January 2021.

1.5 *When* precisely the new summons was in fact dispatched to the appellant cannot be established with certainty from the file, although it appears highly plausible, in view of the indication in the EPO Form 2008 (bottom right corner) dated 14 January 2021 "to EPO postal

service: 22.12.2020" that the summons was dispatched electronically on 22 December 2020.

Even if, for the sake of argument and hypothetically, it were assumed that the re-issued summons was dispatched immediately after the first summons was cancelled on 19 November 2020, this would still be less than 10 days (Rule 126(2) or 127(2) EPC) and two months (Rule 115(1) EPC) before 27 January 2021, the date of the re-scheduled oral proceedings.

- 1.6 The appellant did not demonstrably agree to a shorter period of notice.
- 1.7 According to Rule 115(1), second sentence, EPC "[a]t least two months' notice of the summons shall be given, unless the parties agree to a shorter period". This legal provision contains the basic rule that the notice must be at least two months, and an **exception** in that the period can be shorter provided the **parties agree**.
- 1.8 In the present case, the examining division exceptionally pursued a "shorter period". The onus of establishing that the appellant indeed agreed to deviate from the normal minimum notice was no doubt on the examining division (cf. T 111/95, Reasons 3).
- 1.9 The public file relating to the present application includes **no statement of agreement** by the appellant to a "shorter period" of notice, let alone one preceding the only record, in said file, of the new summons (on 14 January 2021).

1.10 The fixing of a new date for the oral proceedings is addressed in point 6 on page 6 of the communication accompanying the summons issued by the examining division on 14 January 2021:

"6. As agreed with the Applicants during the telephone conversation to postpone the previous oral proceedings the date of these oral proceedings has been fixed within two months instead of the normal four months. For the same reason any submissions made prior to the oral proceedings shall be filed at latest 14 day before the date of the oral proceedings".

1.11 Unfortunately, however, no minutes of this telephone conversation are available in the public file of the present application. This means that the date of the conversation, thereby also the starting point of the two months' period mentioned, cannot be established. The same goes for the appellant's position in view of the summoning to the re-scheduled hearing which is not clearly stated here. At the same time, some circumstances may make the new summons, dated 14 January 2021, and the accompanying communication, look like an *ex-post* record of earlier events, further supporting the view of a dispatch preceding the date they bear (cf. point 1.5 above), and, due to the content of cited point 6, speaking somewhat in favour of a agreement to a shorter period of notice. In points 3 and 6 of the communication (thus dated 14 January 2021), the appellant is reminded that any submissions made prior to the hearing (scheduled for 27 January 2021) must be filed "at least 14 days [...] before the date of the oral proceedings", which seems impossible to comply with. In their submissions preceding the date borne by the new summons, the

appellant made statements that seem contrary to any suggestion that the conversation mentioned in point 6 would have occurred on or later than 22 December 2020: see its request for more time by letter of 24 December 2020 (cf. point 1.4 above); their request for written procedure by letter of 8 January 2021; their withdrawal of the request for oral proceedings and notice of non-attendance at the forthcoming oral proceedings by letters of 13 January 2021.

- 1.12 Nevertheless, in the overall assessment, the board finds a broken, non-chronological and inconsistent chain of events recorded in the public file which is unfit to establish that, at the time of the summoning to the oral proceedings to be held on 27 January 2021, there was a pending agreement with the appellant to a "shorter period" of notice than the regular minimum of two months. Those events can also not demonstrate retroactively the occurrence of such an agreement. In other words, the examining division has not fulfilled their onus as required for applying the exception provided in Rule 115(1) EPC. Lastly, it is noted that the decision under appeal does not at all address the procedurally highly important question of compliance with the provision of Rule 115(1) EPC.
- 1.13 In the board's view, this amounts to a "fundamental procedural deficiency" which, as a rule, constitutes "special reasons" to remit the case to the first-instance department (Article 11 RPBA 2020).
- 1.14 In view of the above observations, it is clear that, for the new summons, less than two months of notice were given without demonstrated consent, thus putting an undue pressure onto the appellant. This not only amounts to a violation of Rule 115(1) EPC. In addition,

the communication accompanying the new summons included an entirely new line of arguments based on four new prior-art documents D5 to D8 also attached to the summons. In effect, the **substantive** examination was re-started less than two months before the date of the re-scheduled oral proceedings. Thus, the violation of Rule 115(1) EPC constitutes a decisive part of the examination proceedings and hence amounts to a substantial procedural violation.

2. Remittal for further prosecution

2.1 The above-detailed substantive procedural violation amounts to a "fundamental deficiency" apparent in the first-instance proceedings within the meaning of Article 11 RPBA 2020 which, as a rule, constitutes "special reasons" for remitting the case.

2.2 For these reasons, the board decides to set aside the appealed decision and to remit the case to the examining division for further prosecution (Article 111(1) EPC).

3. Reimbursement of the appeal fee

3.1 According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed in full where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.

3.2 Since the decision under appeal has to be set aside (cf. point 2.2 above) and, thereby, we follow the relief sought by the appellant, albeit only in part,

the appeal is considered to be allowable (see e.g. T 863/08, Reasons 6).

3.3 In the present case, there is also a causal link between the substantial procedural violation (cf. point 1.14 above) and the necessity of filing an appeal against the examining division's decision. Thus, the reimbursement is also equitable within the meaning of Rule 103(1) (a) EPC.

3.4 Hence, even if the appellant has not requested reimbursement of the appeal fee, such reimbursement is ordered on the board's own motion in accordance with Article 114(1) EPC (cf. J 7/82, Reasons 6).

4. Decision in written proceedings

4.1 The appellant did not request oral proceedings. Furthermore, the board's decision to set aside the decision under appeal and to remit the case to the examining division is not adverse in substance to the appellant.

4.2 Consequently, the decision was handed down in written proceedings without the holding of oral proceedings (see Article 12(8) RPBA 2020; cf. T 1051/20, Reasons 4, with further references).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.
3. The appeal fee is reimbursed in full.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated