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File Number: T 715/91 - 3.5.1

Application No.: 86 100 040.4

Publication No.: 0 192 021

Title of invention: Modification of device configuration by user

Classification: G06F 9/44

D E C I S I O N
of 24 March 1992

Applicant: International Business Machines Corporation

Headword: Restitutio in integrum/IBM

EPC Article 122

Keyword: "All due care" (no) - "responsibility for technically qualified assistant"

Headnote



Case Number : T 715/91 - 3.5.1

D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 24 March 1992

Appellant : International Business Machines
Corporation
Old Orchard Road
Armonk, NY 10504 (US)

Representative : Colas, Alain
Compagnie IBM France
Département de Propriété Intellectuelle
F - 06610 La Gaude (FR)

Decision under appeal : Decision of Examining Division 065 of the
European Patent Office dated 9 April 1991
refusing European patent application
No. 86 100 040.4 pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : P.K.J. van den Berg
Members : E.M.C. Holtz
W.B. Oettinger

Summary of Facts and Submissions

- I. European patent application No. 86 100 040.4 was refused by the Examining Division of the European Patent Office in a decision of 9 April 1991. Against this decision a Notice of Appeal and the appeal fee were submitted on 10 June 1991. In a communication dated 8 October 1991, the Registrar of the Boards of Appeal notified the Appellants that the Statement of Grounds seemed not yet to have been filed and drew their attention to the possibility of filing a request for restitutio in integrum.
- II. On 18 December 1991, the Appellants filed a request for restitutio in integrum, paid the corresponding fee and submitted their Statement of Grounds.
- III. In support of their request for restitutio, the Appellants have submitted essentially the following:

Certain tasks with regard to the application, such as responding to communications from the Examining Division had been entrusted to an engineer, who was still training for the European Qualifying Examination, and who had newly been hired by the representative of the Appellants. However, matters regarding the appeal were handled by the representative himself, who filed the Notice of Appeal. The representative supervised this assistant primarily in making sure that answers would be provided in due time. The supervision relied on a computerised "follow-up" system that handled hundreds of other applications by the Appellants. At the time, however, it was being replaced by another system, and the transfer of information did not go smoothly, as information regarding the appeal was erased from the first system and not entered into the new one.

A second reason for the failure was that the assistant confused the appeal with other types of communication, in that he expected the EPO to invite the Appellants to file the grounds for appeal. Therefore the mistake was not discovered until they were informed on 8 October 1991 through the communication from the EPO that the statement had not been filed.

Reasons for the Decision

1. The request for restitutio satisfies the formal requirements under Article 122 EPC and is therefore admissible.
2. The loss of rights as a result of the lapse of a time limit is a widely used legal formula in the interest of expedience and for the legal security of third parties. The possibility to be reinstated into such rights under Article 122 EPC thus constitutes an extraordinary remedy, which calls for strict standards of application.
3. The allowability of the request for restitutio depends on whether or not the Appellants can show due care, i.e. that the failure to file their Statement of Grounds occurred in spite of the exercise of all due care required by the circumstances in accordance with Article 122(1) EPC.

In the present case, two issues seem particularly pertinent. The first is whether or not the system used for monitoring deadlines for actions to be taken before the EPO was satisfactory when seen against the specific facts of the case. The second relates to the duties under the requirement of "all due care" incumbent upon a representative who has entrusted tasks to others.

- 3.1 As established by the constant case-law of the Boards of Appeal, an isolated mistake in an otherwise satisfactory system to monitor due dates for acts to be taken before the EPO does not of itself demonstrate a lack of due care (cf. i.a. J 2/86 and J 3/86, OJ EPO 1987, 362). The fact that at the time a new monitoring system was being introduced and that a mistake occurred in this transition may thus be overlooked, although precisely because a transition to a new system presents particular problems and risks with regard to the proper transfer of such dates (typing errors, omissions, etc.), the circumstances at the time were such as to require extra care and double-checking before the requirements of Article 122(1) could be said to have been met. That the monitoring system is satisfactory has to be shown by the party concerned, cf. i.a. J 9/86 of 17 March 1987 (not published in the OJ EPO), where restitutio was allowed.
- 3.2 However, in the present case, the second issue seems to be more important, namely if the mistake by the assistant may be imputed to the representative of a party, and hence to that party. Again, a considerable number of decisions in appeal cases is available. At first it was established through J 5/80, OJ EPO 1981, 343, that where an assistant has been entrusted to perform routine tasks such as typing, posting letters and noting time limits the same strict standards of care are not expected as of the representative. However, the representative must himself have shown due care in dealing with his assistant, i.e. that a suitable person had been chosen and that he had been properly instructed and was being reasonably supervised. This decision finally points out that, if other than routine task are delegated which normally would fall to the representative by virtue of his professional qualification, the representative would not be able to establish that he exercised all due care.

This last point of J 5/80 seems particularly pertinent with regard to the circumstances of the present case. On the one hand, the assistant was an engineer training for the European Qualifying Examination, thus presumably familiar to some degree with the EPC. On the other hand, the task of writing and at least supervising the despatch of submissions having substantial as well as legal significance would normally fall to the representative himself. Further, the assistant had newly been hired. The representative could not be expected to have been able in a short time to ascertain to what degree the assistant did know the rules and regulations of the EPC, in short whether he was knowledgeable enough to handle legal matters on his own, such as filing submissions on appeal independently.

Subsequent confirmation and development of this principle of responsibility for assistants are to be found in i.a. J 16/82, OJ EPO 1983, 262, restitutio not allowed, T 105/85 of 5 February 1987 (not published in OJ EPO), restitutio not allowed, T 110/85, (OJ EPO 1987, 157), restitutio allowed, T 11/87 of 14 April 1988 (not published in the OJ EPO), restitutio allowed. From these, it can be summarised that the representative is responsible for the delegation of tasks and for choosing, instructing and supervising his assistants. These duties are incumbent upon him also with regard to substitutes for holidays, special leave and other emergency situations. New assistants must be supervised on a regular basis for a period of at least some months (J 3/88 of 19 July 1988, not published in OJ EPO).

The advice from the representative to the assistant to file a Statement of Grounds on time did not suffice, in the opinion of this Board, to meet the strict standards

which have to be set for restitutio, as established by the case-law. As mistakes in law are not excusable (cf. T 491/89 of 19 November 1990, not published in the OJ EPO), the error by the assistant imputed to the representative must also affect the Appellants negatively.

The representative's contention that he supervised his assistant reasonably has not been substantiated by any facts, nor has the normal monitoring system used been described in order to establish that it was satisfactory. However, this information is not needed, since it was incumbent upon the representative anyhow to supervise that the assistant had prepared a Statement of Grounds, if for no other reason than to check that the substance of the submission was appropriate and satisfactory from the Appellants' point of view. Should the representative not have envisaged to read the Statement before it was filed, but left it entirely to his assistant to handle the appeal, there would be a clear case of failure to exercise due care, because the assistant could not be considered as qualified for these tasks.

- 3.3 In none of the above alternative situations can the request for restitutio be allowed. Consequently, the appeal has to be rejected as inadmissible under Rule 65(1) EPC since the Statement of Grounds was filed out of time (Article 108 EPC).

Order

For these reasons, it is ordered that:

1. The request for restitutio in integrum is dismissed.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

M. Beer

P.K.J. van den Berg



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