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D E C I S I O N
of 25 April 1995

Case Number: T 0635/94 - 3.2.3

Application Number: 88305011.5

Publication Number: 0102825

IPC: E04B 2/74

Language of the proceedings: EN

Title of invention:
Demountable partitioning system

Patentee:
Phoenix Interiors Ltd

Opponent:
K. G. Longhurst

Headword:
-

Relevant legal provisions:
EPC Art. 108, 122
EPC R. 65(1), 78(3)

Keyword:
"Re-establishment of rights, all due care (allowed)"

Decisions cited:
J 0002/86, J 0003/86, G 0001/86, T 0130/83, T 0869/90,
T 0715/91

Catchword:
-



Case Number: T 0635/94 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 25 April 1995

Appellant I:
(Proprietor of the patent) Phoenix Interiors Ltd
Phoenix House Sunningdale Road
Cheam
Surrey SM1 2LS (GB)

Representative: Milhench, Howard Leslie
R.G.C. Jenkins & Co.
26 Caxton Street
London SW1H 0RJ (GB)

Respondent:
(Opponent) Keith Graham Longhurst
Bridleway
The Green
North Runcton
King's Lynn
Norfolk PE33 0RB (GB)

Representative: Archer, Philip Bruce
Urquhart-Dykes & Lord
European Patent Attorneys
New Priestgate House
57 Priestgate
Peterborough
Cambridgeshire PE1 1JX (GB)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office dated 27 May 1994
concerning maintenance of European patent
No. 0 102 825 in amended form.

Composition of the Board:

Chairman: C. T. Wilson
Members: L. C. Mancini
F. Brösamle

Summary of Facts and Submissions

I. The Appellant I (Proprietor of the patent) lodged an appeal on 5 August 1994 against the interlocutory decision of the Opposition Division of the European Patent Office dated 27 May 1994 stating the text of the patent No. 0 102 825 forming the basis of the maintenance in amended form. The statement setting out the grounds of appeal was received on 4 October 1994.

The Appellant II (Opponent) likewise lodged an appeal against said decision on 5 August 1994 and filed a Statement of Grounds on 7 October 1994, i.e. one day after the end of the 4-months period laid down in Article 108 EPC.

Both appeal fees were paid on 5 August 1994.

II. The Opponent's representative was then informed by the Registrar of the Boards of Appeal by letter dated 19 October 1994 that since it appeared, from the file, that the written statement setting out the grounds of appeal was not filed within the time limit laid down in Article 108 EPC, but one day later, namely 7 October 1994, it had to be expected that pursuant to Rule 65(1) EPC in conjunction with Article 108 EPC the appeal would be rejected as inadmissible. Attention was drawn to the possibility of filing a request for re-establishment of rights under Article 122 EPC.

III. In answer to said communication, the Opponent filed a request for re-establishment of rights, on 2 December 1994 (and paid the related fee).

The grounds for re-establishment were essentially as follows:

Following instructions from his client, the representative of the Opponent filed a Notice of Appeal with his letter dated 5 August 1994. The draft grounds of appeal were sent to the client on 21 September 1994.

The grounds were ready for despatch on 6 October 1994, but were held pending comments from the client until 7 October 1994, which had been calculated as the due date on the part of the representative responsible.

It was submitted that the error was the result of an unintentional and isolated mistake within a normally satisfactory system, contrary to the Opponents wishes, and had occurred in spite of due care having been exercised in the circumstances.

The representative had a computerised record system ("COMUS") and a manual diary system, with weekly cross-checks between the two. Neither system usually noted the 10-day period under Rule 78(3) EPC, which was only used as a "safety net". In the present case the 10-day period has been incorrectly calculated by both the representative for his diary and by his assistant for the update of the COMUS system, the same mistaken basis having been used by both of them.

This is the first time such an error has occurred, and it occurred at a time when the representative had had an exceptionally heavy work load.

Confirmation of these facts is provided by the counter signatures at the end of the Statement of Grounds provided by all others involved.

- IV. The Appellant I requested by letter of 10 January 1995 that the matter of the Article 122 EPC application be resolved before consideration was given to substantive matters raised in the Applicant's and the Opponent's appeals.

Reasons for the Decision

1. The application for re-establishment complies with the formal requirements of Article 122 EPC and is admissible.
2. Article 122 EPC provides for an applicant who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the EPO, thereby losing a right or other redress, to have his rights re-established upon application subject to the conditions referred to in paragraph 1, above, being met. Moreover, the Enlarged Board has decided that also an Opponent as Appellant, (as in the present case) may have his rights re-established under Article 122 EPC if he failed to observe the time limit for filing the Statement of Grounds of Appeal (Gr 01/86, OJ EPO 1987, 447). It is the established jurisprudence of the Boards of Appeal that Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2 and 3/86, OJ EPO 1987, 362).
3. Whether or not a request for re-establishment of rights may be allowed, however, depends on whether or not the Appellant can show that all due care required by the circumstances of the particular case was in fact taken to comply with a time limit. In a case such as the

present, a first consideration is whether the system for observing such a time limit can be shown by the party concerned to be normally satisfactory. If a proper reminder system has been instituted by a representative, in order to guard against the consequences of oversight in a busy office, this is itself strong prima facie evidence of the taking of care by the representative (T 130/83 of 8 May 1984, T 869/90 of 15 March 1991 and T 715/91 of 24 March 1992, all unpublished). The Board is satisfied that the computer system established with manual cross-checks in the office of the representative of Appellant II to ensure a proper observance of the various time limits under the EPC corresponds to reasonable requirements. Furthermore, the system was designed to avoid reliance on the 10-day period provided under Rule 78(3) EPC other than in exceptional circumstances. Established practice was to disregard these ten days in calculating time limits and this practice was followed in this case, the system having set the date of 27 September 1994 as the deadline for submitting the grounds of appeal. It was the task of the individual representative then to calculate the final 10-day period should he need to rely upon it, again with a second manual cross-check. This system also would appear to have worked satisfactorily in the past; the representative of Appellant II has stated that he has made no similar errors in calculation of due dates in other cases.

The Board also acknowledges that the representative was working under an exceptionally heavy work load.

The Board is thus prepared to accept that the requirement of "all due care" has been satisfied.

Furthermore, the Board has taken account of the fact that during the "normal" 4-month period up to 27 September 1994, there has been a reliable system to ensure compliance with the time limit, and that it can be said that the worst that could normally (i.e. except in February) result from any lack of due care in the calculation of the final 10-day time limit was the missing of the time limit by one day, as actually happened.

As stated in previous decisions of the Appeal Board in accordance with general principles of law, as applied in the context of administrative law, a procedural means used to achieve a given end (for instance a sanction following a procedural non-compliance) should be no more than that which is appropriate and necessary to achieve that end: and this is commonly referred to as the principle of proportionality. While the Board is not specifically applying this principle to the present case, nevertheless it would seem to be reasonable, in a case such as the present, to have this principle in mind. In assessing the question of "all due care" in the present case, the Board has in mind the fact that if there was any lack of due care, "the circumstances" include the fact that the result of any such lack of due care was that the time limit was only missed by one day.

4. The Board therefore is satisfied that in spite of all due care required by the circumstances having been taken by the representative of Appellant II, he was unable to observe the time limit for filing the Statement of Grounds of Appeal of the present case. The application for re-establishment of rights is therefore allowed.

Order

For these reasons it is decided that:

The rights of the Appellant II (Opponent) are re-established in connection with the filing of an admissible appeal, and the Statement of Grounds of Appeal shall therefore be considered as having been filed within the 4-months time limit provided by Article 108 EPC.

The Registrar:



N. Maslin

The Chairman:



C. T. Wilson