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I N T E R L O C U T A R Y
D E C I S I O N
of 18 December 1997

Case Number: T 0099/96 - 3.2.3

Application Number: 87630144.1

Publication Number: 0258169

IPC: D21F 3/02

Language of the proceedings: EN

Title of invention:

A press apparatus

Patentee:

BELOIT TECHNOLOGIES, INC.

Opponent:

J.M. VOITH GmbH

SULZER-ESCHER WYSS GmbH

Headword:

Re-establishment/VOITH/SULZER-ESCHER WYSS

Relevant legal provisions:

EPC Art. 122, 108

Keyword:

"Re-establishment of rights"

"Isolated mistake"

"All due care (yes)"

Decisions cited:

J 0002/86, J 0003/86

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0099/96 - 3.2.3

**I N T E R L O C U T A R Y
D E C I S I O N**
of the Technical Board of Appeal 3.2.3
of 18 December 1997

Appellant:
(Opponent I)

J.M. VOITH GmbH
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Representative:

Weitzel, Wolfgang, Dr.-Ing.
Patentanwalt
Friedenstrasse 10
89522 Heidenheim (DE)

Other party:
(Opponent II)

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Representative:

Weitzel, Wolfgang, Dr.-Ing.
Patentanwalt
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Respondent:
(Proprietor of the patent)

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Delaware 19803 (US)

Representative:

Schmitz, Jean-Marie
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Decision under appeal:

Interlocutory decision of the Opposition Division of
the European Patent Office posted 8 January 1996
concerning maintenance of European patent No. 0 258 169
in amended form.

Composition of the Board:

Chairman: C. T. Wilson

Members: M. K. S. Aúz Castro

J. du Pouget de Nadaillac

Summary of Facts and Submissions

- I. By interlocutory decision of 19 October 1995, posted on 8 January 1996 the Opposition Division found that in view of the amendments made by the patent proprietor, patent No. 0 258 169 and the invention to which it related met the requirements of the European Patent Convention.
- II. The opponent I lodged an appeal against this decision on 19 January 1996 and paid the appeal fee on the same date.
- III. On 28 June 1996 the appellant was informed by a communication of the Registry that a statement setting out the grounds of appeal had not been filed.
- IV. The appellant filed a request for re-establishment of rights on 26 August 1996 and paid the appropriate fee. Together with that request the statement setting out the grounds of appeal was filed.
- V. As grounds for its request the appellant submitted that its representative had a strict monetary system for all time limits. Deadlines for the Office were registered immediately on receipt of the mail from the Office, a time limit was recorded for consideration and its finishing was verified.

This applied also to the time limit for filing the present statement setting out the grounds of appeal. On receipt of the communication of the European Patent Office of 28 June 1996 on 1 July 1996 the appellant's

representative had the matter investigated and established that the statement setting out the grounds of appeal had been prepared in time, namely only a few days after filing the appeal, but due to a clerical error, was sent to the representative's Japanese colleague

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Unfortunately, the Japanese colleague or his clerks did not immediately recognize that the letter had been sent to the wrong address and did not send it back until some days before filing the request.

- VI. Upon invitation of the Board the appellant's representative filed the original statement of grounds of appeal which had been sent to the Japanese attorneys. It bears a red round stamp with the date "FEB 7, 1996" in the middle, in its upper part the word "RECEIVED" and in its lower part the words "SAN- \square PATENT".

The appellant's representative submitted that the copy of the statement was not accompanied by a letter but just by a slip of paper on which the word "misrouted" was written by hand. The copy of the statement was put into the file, the slip of paper thrown away.

- VII. Upon objection of the respondent that the receipt of the grounds of appeal in the EPO has apparently not

been checked within the time limit the appellant submitted that its representative had included the appeal in question into the monitoring system of his office and that one of his assistants had noted the 18 March 1996 on which to check by telephone call with the European Patent Office as to whether the statement of grounds of appeal had reached the Office. As has come to light now, that day the assistant crossed out the date without having checked the receipt of the grounds of appeal by the Office. This, according to the assistant, happened because at that time she was very worried about one of her children who was suffering from an inflammation of the hip. Due to her worries the omission occurred.

These facts were expressly confirmed by the assistant, Mrs Karasek, in a written declaration.

Reasons for the Decision

1. Under Article 108, third sentence EPC, a written statement setting out the grounds of appeal must be filed within four months of the date of notification of the decision. In the present case, this period elapsed on 18 May 1996 (Rules 78(3), 83(1), (2) and (4) EPC).
2. The appeal's admissibility, therefore, depends on whether re-establishment of rights in respect of the time limit for filing the statement of grounds is allowed or not.
3. According to the wording of Article 122(1) EPC, only

the applicant for or proprietor of a European Patent who was unable to observe a time limit vis-à-vis the European Patent Office shall, upon application, have his rights re-established. The Enlarged Board of Appeal, however, held in its decision G 1/86 (OJ EPO 1987, 447) that an appellant may as opponent also have his rights re-established under Article 122 EPC if he has failed to observe the time limit for filing the statement of grounds of appeal. Therefore, Article 122 EPC is applicable in the present case.

4. The application for re-establishment complies with the formal requirements of Article 122(2) EPC. The cause of non-compliance with the time limit was, according to the appellant removed on 1 July 1996. Although the exact date of when the statement of grounds of appeal having been sent by error to a Japanese patent attorney arrived again at the office of the appellants' representative could not be established, there is no indication that it arrived there before 1 July 1996. It is true that according to the stamp the statement of grounds was received at the Japanese patent attorney's office on 7 February 1996 and it seems unusual that a professional representative should take several months to return a wrongly addressed letter, but the Board has no reason to doubt the appellant's allegations. Therefore, the starting point for calculating the two months time limit, within which, according to Article 122(2), first sentence EPC, the application must be filed, is 1 July 1996. The time limit was complied with, namely on 26 August 1996. The omitted act, i.e. failure to file the statement of grounds of appeal was also completed on that day.

5. Since, furthermore, the grounds and facts on which the application is based, have been filed within the prescribed time limit together with the payment of the fee for re-establishment, the application complies also with Article 122(3) EPC and is, therefore, admissible.

6. As to the allowability of the application, Article 122(1) EPC makes it a condition for re-establishment of rights that the person applying for re-establishment show that "all due care required by circumstances" was taken.

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). 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. The Board is satisfied that the monitoring system of the appellant's representative seems to ensure a proper observance of the various time limits under the EPC and to correspond to reasonable requirements. Here, in any case, the monitoring system was not the cause for missing the time limit. On the contrary, all the necessary steps were taken to comply with the time limit for filing the statement of grounds of appeal. Only the last step, namely the mailing, failed. Nobody is immune from a human error such as occurred in the present case. Such a mistake can happen to anyone, be it the party itself, the representative or a clerk. The Board, therefore, considers it to be an isolated mistake in an otherwise satisfactory system.

It is an unfortunate coincidence that with regard to the same time limit a second failure occurred and thus the safety measures provided for by the monitoring system could not take effect.

The first mistake would have been without consequences if the check foreseen in the representative's monitoring system had been performed accordingly. But here again the failure did not occur because of negligence or oversight. The deadline was taken into account but no proper action was taken. The representative has explained that at the time the mistake was made the assistant competent for the observance of the time limit was very worried about the illness of her child. The Board is satisfied, therefore, that this also was an isolated mistake in a normally satisfactory system. It is understandable that in a situation of great tension and concern the concentration for the daily work may diminish at a particular moment and a mistake occur in spite of all safety measures.

7. The Board can therefore accept that all due care required by the circumstances was taken for observing the time limit in question.
8. The application for re-establishment of rights is allowed and the statement setting out the grounds of appeal shall consequently be deemed to have been filed in time.

Order

For these reasons it is decided that:

The rights of the appellant are re-established in relation to the filing of the statement setting out the grounds of appeal within the time limit prescribed by Article 108 EPC, third sentence.

The Registrar:

The Chairman:

N. Maslin

C. T. Wilson