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**D E C I S I O N**  
**of 23 October 2001**

**Case Number:** T 0036/97 - 3.2.3

**Application Number:** 90402186.2

**Publication Number:** 0411999

**IPC:** B22D 41/18

**Language of the proceedings:** EN

**Title of invention:**

Stopper rod for regulating the flow of a liquid, having a free space fed with gas

**Patentee:**

VESUVIUS FRANCE S.A.

**Opponent:**

Didier-Werke AG

**Headword:**

Re-establishment/DIDIER

**Relevant legal provisions:**

EPC Art. 122, 108

EPC R. 78, 83, 85

**Keyword:**

"All due care - no"

"Satisfactory monitoring system - no"

"No independent cross-check"

**Decisions cited:**

G 0001/86, J 0005/80, J 0002/86, J 0003/86, J 0009/86,

J 0031/90, J 0032/90, J 0026/92, T 0309/88, T 0030/90,

T 0828/94, T 0486/99

**Catchword:**

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Case Number: T 0036/97 - 3.2.3

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.3**  
**of 23 October 2001**

**Appellant:** Didier-Werke AG  
(Opponent) Lessingstraße 16-18  
D-65189 Wiesbaden (DE)

**Representative:** Keil, Rainer A., Dipl.-Phys. Dr.  
KEIL & SCHAAFHAUSEN  
Patentanwälte  
Cronstettenstraße 66  
D-60322 Frankfurt am Main (DE)

**Respondent:** VESUVIUS FRANCE S.A.  
(Proprietor of the patent) 68, rue de la Gare  
F-59750 Feignies (FR)

**Representative:** Debled, Thierry  
Vesuvius Group S.A.  
Intellectual Property Department  
Rue de Douvrain, 17  
B-7011 Ghlin (BE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 26. November 1996  
rejecting the opposition filed against European  
patent No. 0 411 999 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** C. T. Wilson  
**Members:** M. K. S. Aúz Castro  
F. E. Brösamle

## Summary of Facts and Submissions

- I. By decision of 26 November 1996, posted on the same day the Opposition Division rejected the opposition against European patent No. 0 411 999.
- II. The opponent - appellant in the following - lodged an appeal against this decision on 9 January 1997 and paid the appeal fee on the same date.
- III. The statement setting out the grounds of appeal was filed on 5 June 1997 together with an application for re-establishment of rights, the fee for re-establishment being paid at the same time.
- IV. As grounds for its application the appellant submitted that due to a clerical error of the secretary of its professional representative the time limit for filing the statement of grounds of appeal was missed. This assistant who in 1994 had qualified as a patent agent assistant had, by mistake, on 14 March 1997 carried on the time limit for filing the statement of grounds to 14 May 1997 although she knew that this time limit could not be prolonged and for this reason appeared in red in the computer. The mistake was noticed on 14 May 1997 when the file was submitted to the appellant's representative.

The assistant could not account for this mistake. Due to her training she was completely familiar with the calculation and supervision of time limits and apart from that occurrence had always worked satisfactorily. With regard to choosing and supervising the person responsible for the time limits everything possible to prevent the missing of time limits had been undertaken

in the representative's office. Therefore, the appellant's representative could not be held liable for this fault.

V. Upon invitation of the board to explain the monitoring system more in detail, the appellant put forward:

- in the representative's office existed not only a double, but a multiple control system;
- a first control by the representatives took place when reading the incoming mail on which the person responsible for the time limits- the "time limit lady" had already, if necessary noticed the relevant time limits;
- a second control by the representative competent in a given case, when forwarding a given communication or decision to the client;
- a third control by the "time limit lady" when the file came back to her in order to post the communication or decision;
- further controls when noticing reminders (Wiedervorlagen) by the "time limit lady" or a representative, if necessary;
- a further safety measure against missing non prolongable time limits for the "time limit lady" were two basic rules,
  - (i) the end of a time limit for a reminder may never exceed the end of a non prolongable time limit, and

(ii) a non prolongable time limit may only be crossed out, if it is clear from the corresponding file that the act to be performed within this time limit has been accomplished.

VI. The appellant requested that the impugned decision be set aside and that its rights be re-established with regard to the time limit for filing the statement of grounds of appeal.

VII. The patent proprietor - respondent in the following - requested that the application for re-establishment of rights be rejected and that the appeal be rejected as inadmissible.

Its arguments are the following:

- the appellant has not shown that the person dealing with the time limits in the office of the appellant's representatives was sufficiently qualified for such a sensitive task. The mere indication that this person was "Patentanwalts-fachangestellte" did not seem to be sufficient in that respect;
- neither has it been demonstrated that this person had been properly instructed about the tasks to be performed;
- nor was there any control of that person's activities, included in the representative's monitoring system for time limits;
- in view of the size of the representative's office

and the number of time limits to be controlled daily an independent cross-check would have been necessary in order to prevent the system becoming inoperable because of one erroneous entry into the register for time limits. In that respect reference is made to decisions J 9/86, T 828/94 and T 486/99;

- summarizing, there was apparently neither a sufficiently instructed person nor was there a satisfactory monitoring system for time limits.

### **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 7 April 1997, 6 April being a Sunday (Rule 78(3) - as in force until 31 December 1998 - Rule 83(1), (2) and (4), Rule 85(1) 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 of appeal 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 14 May 1997, when the erroneously entered prolongation of the time limit for filing the statement of grounds of appeal had come to an end. 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 14 May 1997. The time limit was complied with, namely on 5 June 1997. 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 shows that "all due care required by the circumstances" was taken.
7. When an applicant is represented by a professional representative (Article 134(1) EPC), an application for re-establishment of rights under Article 122 EPC cannot be acceded to unless the authorised representative can



show that he has taken the due care required of an applicant by Article 122(1) EPC (cf. J 5/80 [OJ EPO 1981, 343], point 4 of the reasons).

However, if the representative has entrusted to an assistant the performance of routine tasks, the same strict standards of care are not expected of the assistant as are expected of the applicant or the applicant's representative (cf. J 5/80, point 6 of the reasons). Hence, a culpable error on the part of the assistant made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has himself or herself shown that he or she exercised the necessary due care in dealing with the assistant. In this respect, it is incumbent upon the representative to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision over the work (cf. J 5/80, point 7 of the reasons).

8. It seems that, in the present case, the first two requirements have been complied with.

The representative's assistant, entrusted with noting and controlling the time limits was, according to her own declaration as well as to the representative's submissions a carefully trained and experienced person.

The fact that she had passed the examination as a patent agent assistant (Patentanwaltsgehilfin) is, contrary to the respondent's allegations, sufficient to establish that she was indeed familiar with all the time limits of the European Patent Convention and their calculation. To this the experience of several years of practice is to be added. It can thus be assumed that

she was qualified for her work.

As to the third requirement of exercising reasonable supervision over the work of the assistant it has to be concluded from the submissions of the appellant's representative that random controls i.e. outside the reminders were apparently not performed.

9. Instead, the supervision consisted in controlling whether an entered time limit was correct when the file was submitted to one of the representatives in the frame work of the reminder system or when the incoming mail was studied.
10. Thus, a later (incorrect) change of a time limit, as in the present case was only to be noticed when this changed time limit came to an end, all the more since most of the controls were performed by the "time limit lady" herself.
11. In view of the size of the office of the appellant's representatives their control system seems to rely too much on the conscientiousness of the assistant responsible for the time limits.
12. Pursuant to the established case law of the boards of appeal 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).
13. This, however, can not be said about the system under consideration, which does not include any effective cross check. A simple failure by one person to keep the

- previously entered correct time limit resulted in filing the statement of grounds of appeal outside this time limit. None of the foreseen controls could become effective and the above mentioned rules were forgotten.
14. The question whether a particular system used in a particular office to ensure that acts are performed within the prescribed time limit satisfies the requirements of "all due care" according to Article 122(1) EPC depends on the individual circumstances of each case.
  15. Nevertheless, in a large firm where a large number of dates have to be monitored daily (more than a hundred time limits according to the appellant) it is to be expected that an independent cross-check is built into the system in order to counterbalance human errors (cf. J 9/86, J 26/92, T 828/94). Insofar the board concurs with the submissions of the respondent.
  16. In the present case it would be appropriate that someone within the representatives' office of the appellant would be responsible for independently checking the time limits, at least those which cannot be prolonged. In J 26/92 the system used included complete lists of all time limits for a period of about two months in advance, which were made available to everyone in the office.
  17. The appellant denies that the above mentioned decisions are pertinent for the case under consideration. It is true that here no misunderstanding between the representative and his technical assistant has occurred. An independent objective cross-check is, however, a good remedy against any human mistake

related to the observance of time limits. Had such an independent cross check been installed in the representatives' office there would have been good chances that the mistake would have been detected and the loss of the time limit would have been prevented.

18. On the other hand, the decisions relied upon by the appellant (J 31/90, J 32/90, T 309/88, T 30/90) are not pertinent for the present case because they are either not concerned with the problems of a satisfactory monitoring system or where this is the case (T 309/88) the individual circumstances are completely different since in the case underlying decision T 309/88 the office of the representative was a small one-man office with one assistant where both worked closer together than in a large firm and where less time limits were to be observed and the supervision of the assistant could be performed by random controls.
19. For the reasons given above, the Board is not convinced that the appellant's monitoring system can be considered as being satisfactory. The fact that so far no case of re-establishment into a missed time limit has occurred in the representatives' office is gratifying but cannot overcome the lack of an effective cross-check.
20. The appellant has, therefore, not shown all due care required by the circumstances, Article 122(1) EPC with the consequence that the application for re-establishment of the appellant's rights can, thus, not be allowed. Hence, the appeal is inadmissible.

## **Order**

**For these reasons it is decided that:**

1. The application for re-establishment is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

A. Counillon

C. T. Wilson