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**Datasheet for the decision
of 15 May 2013**

Case Number: J 0018/12 - 3.1.01

Application Number: 10723736.4

Publication Number: 0

IPC: B68B 1/00, B68B 5/00,
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Language of the proceedings: EN

Title of invention:
A visual aid

Patentee:
Vision Limited

Headword:
-

Relevant legal provisions:
EPC Art. 108, 153
EPC R. 142(1)(b), 142(1)(a), 103(1), 159(1)
PCT Art. 22

Keyword:
"Interruption of proceedings (no)"
"Reimbursement of appeal fee (no)"

Decisions cited:
J 0009/94, J 0010/94

Catchword:
-



Case Number: J 0018/12 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 15 May 2013

Appellant: Vision Limited
(Applicant) Unit 235
2 Lansdowne Crescent
Bournemouth
Dorset BH1 1SA (GB)

Representative: Hutchinson, Thomas Owen
Hutchinson IP Ltd
57 Hoghton Street
Southport PR9 0PG (GB)

Decision under appeal: Decision of the Legal Division of the European
Patent Office dated 9 July 2012

Composition of the Board:

Chairman: B. Günzel
Members: T. Bokor
C. Schmidt

Summary of Facts and Submissions

- I. This is an appeal from the decision of the Legal Division posted on 9 July 2012, according to which the proceedings in respect of European patent application No. 10723736.4 were not to be interrupted under Rule 142(1)(b) EPC.
- II. The notice of appeal was filed, together with the grounds for appeal, on 7 September 2012. The appeal fee was paid later in accordance with the procedure foreseen by the Arrangements for deposit accounts (Supplement to OJ EPO No. 3/2009), but with an effective date of 7 September 2012.
- III. The application was filed on 6 May 2010 as international patent application No. PCT/GB2010/000905, claiming the priority of two GB patent applications of 6 May 2009 and 8 October 2009 respectively. According to the standard practice of the EPO, the application had a European application number assigned to it already before it entered the regional phase under Article 22 PCT (Article 153 EPC). The application was assigned to the present appellant company during the international phase, and the transfer of rights was recorded by the International Bureau on 9 November 2011.
- IV. The time limit to enter the regional phase, i.e. to perform the acts prescribed by Article 22(1) PCT (Rule 159 EPC), expired on 6 December 2011 (Article 22(3) PCT in conjunction with Rule 159(1) EPC). No action was taken by the applicant, and the EPO issued a Noting of loss of rights on 13 January 2012 (EPO Form 1205A).

V. By letter dated 2 March 2012, the applicant requested interruption of the proceedings under Rule 142(1)(b) EPC. The applicant submitted that a County Court Judgment by the Northampton County Court (hereinafter the CCJ) had been issued on 11 August 2008 - erroneously - against the applicant, which judgment the applicant had not been aware of. This circumstance only surfaced much later when the applicant company had applied for a bank loan, which had been refused due to the company's adverse credit rating, this latter being the direct consequence of the CCJ. The applicant, not having been able to raise sufficient funds, had not been able either to enter the regional phase before the EPO.

VI. The Legal Division informed the applicant in two communications dated 9 March 2012 and 5 April 2012 that the requirements of Rule 142(1)(b) EPC did not seem to be fulfilled, and finally the decision under appeal was issued. In this the Legal Division held that neither the CCJ nor the refusal of the loan application could be considered to be an action against the property of the applicant. Further, it had not been shown that the applicant had been prevented by legal reasons from acting, in the sense that it had not been shown that the applicant had been in a situation in which it had been factually and legally impossible for it to continue the proceedings.

VII. In the grounds of appeal the appellant argued that all the conditions for an interruption as established by the case law of the Boards of Appeal were given. Though the fee payment would not have been legally impossible, the appellant actually had been unable to pay, and this

actual inability to pay had been a direct consequence of the CCJ, clearly a legal action against the appellant company. Evidence was presented that the inability to pay had not been limited to the EPO fees, but to all other financial obligations of the company, so that it had indeed been factually and legally impossible to continue the proceedings before the EPO. The CCJ fulfilled the required condition of a "legal action against the property" of the appellant. Taking account of the totality of the circumstances, the requirements for an interruption as foreseen in Rule 142(1)(b) EPC were met. Further documents were submitted along with the grounds to provide evidence that the appellant company had had no financial means at its disposal, so that the factual and legal impossibility for the appellant to continue the proceedings should be sufficiently proven.

VIII. The appellant requested that the decision under appeal be set aside, and the request for interruption of proceedings be allowed. It further requested a refund of the appeal fee, for which request no reasons were given, and also oral proceedings.

IX. The Board issued a summons to oral proceedings on 11 January 2013. In the annexed communication the Board indicated its preliminary opinion that the circumstances of the case did not fulfil the conditions for interruption of the proceedings pursuant to Rule 142(1)(b) EPC, essentially for the reasons given in the present decision. Further, it was not apparent from what date the proceedings could have been considered to be interrupted.

X. By letter dated 10 May 2013 the representative of the appellant reiterated the previous arguments, and indicated that he would not attend the oral proceedings. It was further submitted that the present case was highly exceptional in that the legal action had been erroneously issued against the appellant company, due to similar company names. In this manner the applicant was a victim of a miscarriage of justice. The EPO had a wide discretion in establishing whether an interruption occurred. This exceptional circumstance had to be given weight, given its disastrous and unjust effect on the applicant. Grounds were also given as to why the appeal fee should be refunded.

XI. By telefax dated 14 May 2013 the director of the appellant company reiterated the arguments of the representative, and further explained that these events had had such devastating effects on the appellant company that securing further patent protection and the commercialization of the patented product had become extremely difficult. This should be given due consideration and the appeal should be allowed, given the appellant's highly exceptional situation.

XII. Oral proceedings were held on 15 May 2013. The decision of the board was announced at the end of the oral proceedings.

Reasons for the decision

1. The appeal is admissible.

Interruption of proceedings

2. Rule 142(1)(b) EPC provides that:
Proceedings before the European Patent Office shall be interrupted ... in the event of the applicant (condition A), as a result of some action taken against his property (condition C), being prevented by legal reasons (condition B) from continuing the proceedings.

3. An examination of the question of interruption based on these three conditions A,B and C was developed by the Legal Board in its decisions J 9 and 10/94 of 18 January 1996 (not published in the OJ EPO). These criteria are helpful whenever the applicability of the rule is not immediately apparent. The cases underlying decisions J 9 and 10/94 concerned a situation in which the action - an order by a French Court to freeze the accounts of the appellant company - at least formally did not affect the legal capacity of the appellant. Otherwise the freezing of the accounts resulted *de facto* in the insolvency of the appellant company. To that extent, there are certain similarities to the case before the Board. Given that the appellant also argues along these lines, the present Board finds the examination of these three conditions to be a suitable approach in determining whether the interruption of the proceedings should be established in the present case.

4. The three conditions A,B and C were also examined by the Legal Division following the *ratio decidendi* of the aforementioned decisions J 9 and 10/94. The Legal Division concluded that neither condition B nor C was met, and that therefore the proceedings were not to be interrupted under Rule 142(1)b EPC.

5. The Board essentially concurs with the opinion of the Legal Division that neither condition B nor condition C is met in the present case, i.e. the chain of events presented by the appellant cannot be subsumed under the conditions required by Rule 142(1)(b) EPC in order to establish that the proceedings were interrupted.
6. The present case hinges on the question whether the factual and legal impossibility of continuing the proceedings, i.e. that the party was prevented from continuing, can be considered to be the result of the legal action (condition C). The appellant contends that this is the case, because the CCJ was undoubtedly the cause of the adverse credit rating, which then directly resulted in the appellant company being left without any financial means.
7. This Board holds that the correct interpretation of Rule 142(1)(b) EPC requires there to be a close relationship between **the action taken against the property** of the applicant and the condition that this action should be the cause of the applicant **being prevented by legal reasons** from continuing the proceedings (in the English wording of the Rule: "**as a result of** some action..."). This requirement of causality between conditions B and C is normally fulfilled only if the "action" is a legal action (which does not appear to be disputed in the present case), and it is directed against the property of the applicant (Vermögen, biens) **as a whole**, i.e. against the totality of the applicant's assets (such as a company going into receivership, etc.). Put differently, the legal action is not just any action having some, even serious, effect on the financial situation of the

applicant, but must be one with a legal effect which directly and immediately prevents the applicant from proceeding, effectively causing a situation which is comparable to the legal incapacity or death of natural persons (Rule 142(1)(a) EPC). Typically, the fact that the legal action is directed against the totality of the assets will be clear from the legal effect of the legal action, such as the legal effect of a court order, or an order issued by some other legal authority.

8. In the present case, it is clear that the legal action, the CCJ, was not at all directed against the totality of the assets of the appellant, but merely ordered the payment of a specified amount (GBP 520.72, for an only partially paid invoice of a public utility company and related costs). It did not have any other legal effects. The fact that the CCJ was erroneously issued against the appellant company is immaterial for this finding. Likewise, the separate decisions of two banks to refuse the opening of a credit line cannot be regarded as an action with a legal effect, even if their other related effects may well have had a bearing, even a significant one, on (the future fate of) the property of the appellant. The refusal of a loan application does not alter the legal situation of the appellant. At most, it makes clear that for it as a potential client **no** legal effects, such as contractual obligations of the client towards the bank, came into existence. In particular, it has no legal effect on the (existing) property of the customer. Nor is the legal character of such a loan application refusal established by the fact that a bank may offer a possibility of "appealing" the decision (e.g. see Annex B, page 3 filed with the original request for interruption), such an "appeal" apparently

resulting in a further internal review by the bank, but not in genuine legal proceedings.

9. Thus the Legal Division was correct in finding that neither the CCJ nor the rejection of the loan application could be considered to be an "action" falling under Rule 142(1)(b) EPC, in the sense that neither of these actions can be considered an action taken against the property of the applicant. In the absence of such an action, Rule 142(1)(b) EPC cannot be applied.

10. Contrary to the opinion of the appellant, neither the Legal Division nor the Board of Appeal has any discretion in the application of Rule 142(1)(b) EPC, but is rather obliged to interpret the rule on an objective basis and to apply it to the facts before it. Accordingly, there is no room to compensate the appellant for injustice suffered by means of a generous application of this rule, however exceptional its situation may be.

11. Under these circumstances, the question whether the applicant was prevented by "legal reasons" from continuing the proceedings, i.e. whether its difficult financial situation indeed amounted to legal and factual impossibility *per se* and whether this was sufficiently proven, need not be answered. Even if this were to be accepted for the benefit of the appellant, such legal impossibility would not have been caused by the presumed "action" as required by Rule 142(1)(b) EPC, but by the fact that from the outset the appellant did not have the financial means to continue the proceedings.

Reimbursement of the appeal fee

12. In his response to the communication of the Board (see point X), the representative submitted that either the Legal Division was wrong to refuse the request for interruption, which then amounted to a substantial procedural violation, or, if the Legal Division was correct, this effectively meant that the European patent application never came into existence, so that the appeal fee could not have been validly paid.

13. Neither of these arguments can justify a reimbursement of the appeal fee. Reimbursement is primarily granted if the appeal is allowed (Rule 103(1)(a) EPC), and this is not the case here. Furthermore, no special circumstances are apparent to the Board which could support the reimbursement even though the appeal is not allowed. The final non-existence of the European patent application in a substantive sense is not relevant, and does not mean in itself that the appeal proceedings did not come into existence either (as opposed to the legal fiction of non-existence when an appeal is deemed not to have been filed, see Article 108, second sentence, EPC). In fact, this situation regularly arises in proceedings before the EPO, e.g. where a decision of the Receiving Section not to accord a filing date is appealed.

14. Accordingly, the request for the reimbursement of the appeal fee cannot be allowed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:

C. Eickhoff

B. Günzel