

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [] To Chairmen
(D) [X] No distribution

D E C I S I O N
of 23 June 2003

Case Number: T 0122/02 - 3.2.4

Application Number: 00200747.4

Publication Number: 1038454

IPC: A41C 3/14

Language of the proceedings: EN

Title of invention:

Bra padding

Applicant:

Parah S.P.A.

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 108, 122

Keyword:

"Appeal fee not paid within time limit"
"Re-establishment of rights - request refused"
"All due care required by the circumstances - (no)"

Decisions cited:

T 0014/89, J 0021/92, J 0024/92

Catchword:

-



Case Number: T 0122/02 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 23 June 2003

Appellant:

Parah S.P.A.
C.so Leonardo Da Vinci 50
I-21013 Gallarate (VA) (IT)

Representative:

Gandini, Claudio
Via Durini 23
I-20122 Milano (IT)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 16 August 2001
refusing European patent application
No. 00200747.4 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
H. Preglau

Summary of Facts and Submissions

I. European patent application No. 0 200 747.4, filed 3 March 2000, was refused by the Examining Division's decision of 16 August 2001.

Against this decision a reasoned appeal was lodged on 24 October 2001, including the statement that "The fee for appeal (EUR 1022) were yet payed."

II. On 15 January 2002 the Appellant's Representative was informed by fax that "as already discussed with you on 10.12.01, we haven't received any payment for the appeal fee. We convened, that you would send some proof of payment but unfortunately we haven't received any corresponding documents yet." The Representative was requested to provide the Office with a proof of payment at the latest within one week from the day of the fax.

III. The Representative answered the same day by fax, explaining that he had given the order to pay the appeal fee on 16 October 2001 but the bank had not carried out the payment and had lost the order of payment. The Representative had been told that it was not the policy of the bank to admit this type of error. The fax included a copy of what was said to have been the order of 16 October 2001 and a copy of a further order dated 15 January 2002 to pay the appeal fee, both stamped by the bank.

IV. On 16 January 2002 the Representative was informed by fax that the matter would be immediately referred to the Board of Appeal "to deal with the admissibility and/or allowability of the appeal."

V. The Representative sent a further fax on 11 February 2002 repeating his explanation concerning the circumstances of the non-payment of the appeal fee in October 2001 and asked for re-establishment of rights (*restitutio in integrum*). The amount of EUR 706 was paid for the fee for re-establishment of rights.

On 12 February 2002 the Representative sent a further fax with a payment printout of EUR 706 for re-establishment of rights.

VI. In a communication dated 24 May 2002 the Board stated that the fee for re-establishment of rights had been received on 12 February 2002 (one day after the expiry of the time limit for paying the fee for re-establishment of rights laid down by Article 122(2) EPC) and that this could only be accepted if it could be proved that the order to pay had been given at the latest on 11 February 2002 and that the Appellant would agree to pay a surcharge of 10%. Furthermore the Board requested that the documents promised in the fax of 11 February 2002 be provided and that the facts on which the request for re-establishment of rights was based be set out (Article 122(3)EPC). The Board also invited the Representative to file an affidavit confirming formally the facts which led to the non-payment of the appeal fee within the prescribed time limit.

VII. In response to this communication the Representative sent a letter from the bank and an English translation. In this letter the bank stated that they had not been able to discover the cause of the error of not making the credit transfer. A further copy of the original payment order was also attached.

VIII. In a detailed communication dated 7 August 2002 the Board again explained what had to be done to support the request for re-establishment of rights. The Board set a final time limit of two months for the Representative to satisfy the Board on the points in the communication.

Section 12 of the communication reads:

"You must prove to the board that you gave the order to your bank to transfer the fee for the application for re-establishment of rights on or before 11 February 2002.

If you cannot do this, then the board will refuse the application for re-establishment of rights. The appeal will then be deemed not to have been filed. The patent application will then be finally dead."

In section 14 of the communication the Appellant was asked to agree to pay the surcharge of 10% of EUR 75 for the late arrival of the fee for re-establishment of rights.

Moving on from the payment of the fee for re-establishment of rights to the payment of the appeal fee, section 16 of the communication stated that Article 122(1) EPC refers to the applicant being unable to observe a time limit (i.e. in this case for paying the appeal fee) in spite of all due care required by the circumstances having been taken and that Article 122(3) EPC states that the application for re-establishment of rights must state the grounds on

which it is based, and must set out the facts on which it relies.

Section 18 of the communication reads:

"If you cannot prove to the board that you **took all due care required by the circumstances** then the application for re-establishment of rights will be refused. The appeal will then be deemed not to have been filed. The patent application will then be finally dead."

- IX. The Representative answered by letter dated 23 September 2002 enclosing a letter from the bank confirming that the order to pay the fee for re-establishment of rights was given on 8 February 2002 and that it was carried out on 11 February 2002.

The payment of the surcharge for the late arrival of the fee for re-establishment of rights was agreed.

As to the question of all due care required by the circumstances, the Representative stated that "the bank ... caused difficulty also for other applications and my assistant ... was not meticulous." The Representative continued that he now had a new bank and a deposit account at the EPO and that the assistant "who did not take all due care, after numerous reproaches to take all due care required by circumstances, was expelled by my law firm."

Reasons for the Decision

1. *Admissibility of the appeal*

It is clear that no appeal fee was paid within the time limit prescribed in Article 108 EPC. The appeal fee was paid only after the expiry of the four month time limit together with a request for re-establishment of rights.

The admissibility of the appeal depends on the decision on the request for re-establishment of rights.

Therefore the Board firstly has to deal with this request. Only if the Board comes to a positive decision on this request could the appeal be found admissible.

2. The conditions for *restitutio in integrum* are listed in Article 122 EPC.

The applicant for a European patent 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 European Patent Office can apply for re-establishment of rights if the non-observance has the direct consequence of a loss of rights.

The application has to be filed in writing within two months from the removal of the cause of non-compliance with the time limit and the omitted act has to be completed during this period of two months. The grounds on which the request is based, supported by the facts on which it relies, have to be stated and a fee for re-establishment of rights has to be paid.

3. In the present case the non-payment of the appeal fee was the omitted act. The appellant was informed about this on 10 December 2001, which was therefore the beginning of the two month period for filing a request for re-establishment of rights. The last day for filing such a request together with the completion of the omitted act (i.e. payment of the appeal fee) was 11 February 2002 (because 10 February 2002 was a Sunday).

The appeal fee was paid into the bank account of the EPO on 22 January 2002 i.e. within the two month time limit for completing the omitted act.

The request for re-establishment of rights was filed on the last possible day. Although the fee for the request was not received until the next day, it can be accepted as having been paid in time as the bank confirmed that the order to pay was given on 8 February 2002 and the Appellant agreed to pay the surcharge according to Article 8(3)(b) of the Rules Relating to Fees.

4. It remains to be examined whether all due care required by the circumstances was taken to avoid the non-observance of the time limit for paying the appeal fee.

Due care is considered to have been taken if non-compliance with the time limit resulted either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (see Case Law of the Boards of Appeal of the European Patent Office, 4th edition 2001, page 306, last paragraph).

5. According to the explanation of the Appellant's Representative, the bank entrusted with the transfer of the appeal fee did not carry out the order. It was not described how the Representative's office was organised to guarantee that all tasks in the name of his clients were carried out correctly. There was no mention of any means of control or supervision to ensure that necessary actions governed by time limits really were carried out in time.

The Representative stated, for the first time in the letter of 23 September 2002, that he had changed his bank because of various difficulties they had caused for other applications, and that he had ceased to employ his assistant for failing to take all due care required by circumstances.

The Board does not see these actions as preventive measures constituting all due care to avoid mistakes but instead as actions after the mistakes had already occurred.

6. In the communications of 24 May 2002 and 7 August 2002 the Board drew attention to the importance of providing evidence that all due care had been taken. The Board also asked for an affidavit of the Representative to confirm formally the facts which led to the late payment of the appeal fee.
7. Such an affidavit has not been presented. Moreover the Representative's letters do not explain to the Board's satisfaction who was effectively involved in the order to pay the appeal fee (e.g. the Representative alone, the assistant or a secretary) and why there was no system to check that the appeal fee had been paid. The

Board also questions why there was no check of bank statements which would have shown that the amount of EUR 1020 had not been deducted.

8. The Appellant's Representative has not described the organisational structure of his office and the Board cannot see that his office had a normally well functioning system aiming to avoid mistakes and to avoid missing time limits. Therefore the Board is not in a position to decide that the non-observance of the time limit for the payment of the appeal fee was an isolated error in an otherwise well functioning system.

9. Other excuses for missing a time limit could be exceptional circumstances such as internal reorganisations or removals (see T 14/89, OJ EPO 1990, 432) or a change of time-limit monitoring systems (J 21/92 and J 24/92, not published in the OJ). However at no time in these proceedings has any such possible excuse been mentioned.

Exceptional circumstances have not been asserted and also cannot be derived from the arguments on file.

10. Following these considerations the request for re-establishment of rights must fail and the admissibility of the appeal be denied.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.
2. The appeal is inadmissible.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries