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**D E C I S I O N**  
**of 27 October 2005**

**Case Number:** T 0249/04 - 3.2.03

**Application Number:** 96902491.8

**Publication Number:** 0833983

**IPC:** E02D 29/02

**Language of the proceedings:** EN

**Title of invention:**

Wall structure

**Applicant:**

Bertels, Augustinus Wilhelmus Maria

**Opponent:**

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**Headword:**

Restitutio/BARTELS

**Relevant legal provisions:**

EPC Art. 122(2)

**Keyword:**

"Restitutio in integrum - person responsible"  
"Admissibility (no)"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0249/04 - 3.2.03

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.03  
of 27 October 2005

**Appellant:** Bertels, Augustinus Wilhelmus Maria  
Utrechtseweg 437  
NL-6865 CL Doorwerth (NL)

**Representative:** 't Jong, Bastiaan Jacobus  
Arnold & Siedsma  
Advocaten en Octrooigemachtigden  
Sweelinckplein 1  
NL-2517 GK Den Haag (NL)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 16 June 2003  
refusing the request for re-establishment of  
right pursuant to Article 122(1) EPC in respect  
of European application No. 96902491.8.

**Composition of the Board:**

**Chairman:** U. Krause  
**Members:** J. Kollar  
J. P. B. Seitz  
G. Ashley  
M. Vogel

## Summary of Facts and Submissions

- I. European patent application No. 96902491.8 was filed in the name of Bertels, Augustinus on 11 January 1996. The applicant is since represented by Schumann, Bernard, professional representative of Arnold & Siedsma, European Patent Attorneys.
- II. In respect of said application the renewal fee for the fifth year was due on 31 January 2000 under Article 86(1) EPC. The renewal fee and the additional fee were not paid within the grace period according to Article 86(2) EPC, which ended on 31 July 2000.
- III. On 28 August 2000 a communication under Rule 69(1) EPC was sent to the applicant's representative, informing him that the European patent application was deemed to be withdrawn under Article 86(3) EPC.
- IV. By letter dated 10 November 2000 and received on the same day, the authorised representative filed a request for re-establishment of rights according to the provisions of Article 122 EPC and paid simultaneously the corresponding fee as well as the renewal fee and the surcharge.
- V. According to the decision dated 16 June 2003, the Examining Division rejected the request for re-establishment, considering that in view of the circumstances of the case, the applicant had not taken all due care, as required for re-establishment.

VI. The applicant filed an appeal against said decision together with the appeal fee on 8 August 2003. The statement of grounds was filed on 24 October 2003.

VII. In his written submission before the Examining Division the applicant brought forward the following arguments:

- the application was transferred from the original applicant Mr Bertels to Gebroeders van Kessel Buren B.V., but the transfer of rights was not recorded in the Register of European patents;
- further instructions concerning the prosecution of the application were given by the transferee, i.e. by Mrs Arnold Bik, manager of the patent portfolio, who therefore was responsible for the application;
- the payment of renewal fees would be done through the representative's office (i.e. Arnold & Siedsma) which would use the services of Arnold & Siedsma AG in Zug, Switzerland;
- the last named firm would send debit notes and reminders so as to obtain instructions from the client (i.e. Gebroeders van Kessel Buren B.V.) for paying the fee, and if no corresponding instructions were received from said client by the end of the time limit set out in Article 86(2) EPC, the authorised representative entitled to act before the European Patent Office would then be made aware of the failure, and in a position to contact the applicant to make sure that the lapse of the application was in accordance with his intention;

- the first communication of Arnold & Siedsma AG was received by Gebroeders van Kessel Buren B.V., who decided to postpone their decision to pay the renewal fee for the fifth year because of an ongoing dispute between them and the authorised representative's office. Nevertheless, on the 31 July 2000, the last day of the period of grace, the representative sent a fax to Gebroeders van Kessel Buren B.V. informing them that, if no payment was made, the application would lapse. No corresponding instructions were received, and hence the relevant fees were not paid, with the consequence that the application was deemed to be withdrawn;
  
- the person responsible for the application, Mrs Arnold Bik was at that time in the United States of America and thus absent from her office; she had transferred her duties to Mr Romijn, who was also qualified to handle patent related matters;
  
- only after the 10 September 2000 could Mrs Bik acknowledge the significance of said fax of 31 July 200, i.e. after she returned from the United States of America;
  
- hence the removal of the cause of non-compliance took place on the 10 September 2000, and the request for re-establishment of rights received at the European Patent Office on the 10 November 2000 is therefore admissible.

VIII. In a communication dated 19 May 2005 the Board informed the appellant of its provisional opinion that the request for re-establishment was filed too late.

IX. Oral proceedings were held before the Board on 27 October 2005.

### **Reasons for the Decision**

1. The appeal is admissible.
2. In accordance with Article 122(2) EPC, an application for re-establishment of rights must be filed within two months of the date of the removal of the cause of non-compliance with the missed time limit.

This occurs on the date on which the person responsible for the application becomes aware that a time limit has not been observed.

This person is either the applicant himself, who as owner may dispose of every rights conferred by the application, or his representative who is duly empowered to act through him in all proceedings established by the European Patent Convention.

In the absence of a duly registered transfer of the application, the person responsible for the purpose of the Office remains the applicant or his representative.

Hence an alleged assignment of the application to a third party in the absence of such a registration is "res inter alios acta", i.e. outside the ambit of the

legal relationship between the applicant and the Office.

3. In the absence of circumstances to the contrary, a communication under Rule 69(1) EPC to the professional representative appointed by the person entitled to the application removes the cause of non-compliance.

An alleged assignment, not duly recorded by the EPO, cannot be considered to constitute a circumstance to the contrary.

Therefore the originally empowered professional representative remains vis-à-vis the Office responsible for the application, notwithstanding the fact that he receives payment instructions and the corresponding funds from said alleged third party.

4. In the case under consideration, the noting of loss of rights under Rule 69(1) EPC was sent to the appointed professional representative on 28 August 2000. The time limit for filing a request for re-establishment expired in accordance with Rule 78(2) and 83(2) and (4) EPC on 7 November 2000.

Hence the request for re-establishment of 10 November 2000 was filed too late.

In any case, and for the sake of completeness, the Board emphasises that for the alleged responsible person to have an application for re-establishment filed exactly two months after the date on which he actually discovered the omission, instead of filing it within two months of the date on which he ought have

discovered it, is incompatible with the due care required by the provisions of Article 122 EPC.

5. For these reasons the appeal has to be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

V. Commare

U. Krause