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**Datasheet for the decision
of 20 September 2006**

Case Number: T 1401/05 - 3.4.02

Application Number: 97924339.1

Publication Number: 0973063

IPC: G03B 35/00

Language of the proceedings: EN

Title of invention:

Method and apparatus for producing three-dimensional image

Applicant:

Photo Craft Co., Ltd

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 122, 128(4)

EPC Rule 93

Keyword:

"Re-establishment of rights in case of illness: due care on the part of the applicant and its representatives (yes)"

"Exclusion of documents from file inspection (yes)"

"Exclusion of the public from the oral proceedings (partly)"

Decisions cited:

J 0041/92, J 0003/93, J 0005/94, J 0025/96, J 0019/04,

T 0166/87, T 0112/89, T 0030/90, T 0324/90, T 0525/91,

T 1070/97, T 0971/99, T 0379/01, T 0558/02

Catchword:

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Case Number: T 1401/05 - 3.4.02

I N T E R L O C U T O R Y D E C I S I O N
of the Technical Board of Appeal 3.4.02
of 20 September 2006

Appellant:

Photo Craft Co., Ltd
11-37, Yuhigaoka 2-chome
Toyonaka-shi
Osaka 560 (JP)

Representative:

HOFFMANN EITLE
Patent- und Rechtsanwälte
Arabellastraße 4
D-81925 München (DE)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 14 June 2005
refusing European application No. 97924339.1
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. G. Klein
Members: B. Müller
M. Rayner

Summary of Facts and Submissions

- I. In a letter received by the Office on 24 October 2005, the applicant requested "re-establishment of rights (Art. 122 EPC) into the term of two months for filing an appeal (Article 108 EPC)" against the decision of the Examining Division posted on 14 June 2005 to refuse European patent application No 97924339.1. The applicant also paid the corresponding fee. At the same time it filed a Notice of Appeal, together with a statement of grounds, and paid the appeal fee.
- II. In support of its request the applicant/appellant set out the following grounds and facts: The applicant's European representatives, Hoffmann Eitle, informed the applicant's domestic (Japanese) agents, NGB Corporation (hereinafter referred to as "NGB"), of the impugned decision and transmitted it to them. Hoffmann Eitle indicated the deadline for filing an appeal. NGB in turn forwarded the corresponding three letters to the applicant. The applicant company has around 200 employees. It files only a few patent applications per year. It has no specialised intellectual property (IP) department but uses NGB to act as domestic agent and to monitor all due dates, including the appeal term in the present case, and to inform and remind the applicant of such due dates. NGB informed and reminded the applicant of the appeal term of 24 August 2005. The single person in charge of IP matters in the applicant company is Mr. Minamikawa, the Executive Managing Director. After having returned from his summer holidays on Monday, 22 August 2005, he suddenly and unexpectedly fell ill on the following Tuesday suffering from a severe cold. He had to take that day and Wednesday, 24 August 2005,

off. The appeal term was missed as a consequence of Mr. Minamikawa's illness and the fact that he was the only person in the applicant company responsible for IP matters and aware of the appeal term. Finally, the system established by the applicant for monitoring terms concerning IP matters, i.e. using NGB as domestic agent and Mr. Minamikawa as responsible person within the applicant company, had worked efficiently for many years. As sole evidence, the three letters of Hoffmann Eitle referred to above were attached to the request for restoration.

III. By means of its communication posted on 27 December 2005, the Board invited the applicant to complement its request for re-establishment of rights, in particular by making more detailed submissions regarding the monitoring of time limits set for the applicant concerning IP matters and by furnishing evidence as to the seriousness of Mr. Minamikawa's illness.

IV. In its response of 8 May 2006, the applicant sought to establish that at the expiry of the appeal period, a satisfactory general system for monitoring important time limits set for the applicant concerning IP matters was in place. The applicant set out how due dates were dealt with in general, both by its agent, NGB, and within the applicant company in which the number of files having a due date was small per day, amounting to a maximum of three or four. As to the appeal term in the present case, the applicant provided the following information, together with the respective letters: NGB received the letter from Hoffmann Eitle with attached decision dated June 14, 2005 on June 27, 2005. NGB reported to the applicant with the letter of July 4,

2005 mentioning a Patent Office due date of August 14, 2005. Hoffmann Eitle's letter dated July 18, 2005 was received by NGB as a facsimile on the same date. NGB reported to the applicant with the letter of August 5, 2005 indicating the non-extensible term of August 24, 2005. With another letter of August 5, 2005 NGB commented on the decision of rejection. NGB proposed a due date of August 19, 2005 for a reply and again indicated the Patent Office due date of August 24, 2005. The applicant then explained verbatim: "On August 9, 2005 NGB received a telephone call from the applicant, in which the applicant informed NGB that the applicant considered to file an appeal, but that more time was needed to make a final decision in this respect. NGB entered a hand-written memorandum ... which translates in the English language as follows: 'For the time being, Photo Craft ... wants to appeal. The decision ... as to whether actually do it or not will follow. August 9'. The applicant made the decision to file an appeal and communicated the decision to NGB on August 25, 2005 due to Mr. Minamikawa's sudden and unexpected illness, a cold with high fever and a severe cough such that Mr. Minamikawa was suffering from a groggy slumber. Mr. Minamikawa does not regularly suffer from illnesses and does not have long-standing complaints, such that his illness at that point of time when the appeal term expired could not be expected. It is general practice in the applicant's company, similar to most Japanese companies, that it is not necessary to obtain and submit a medical certificate in respect of an illness, unless long leave for a medical treatment is taken. Therefore, Mr. Minamikawa was not required to file a medical certificate, and actually he does not have such a certificate."

- V. In the annex to the summons to oral proceedings appointed *ex officio* on 20 September 2006, the Board, in particular, assumed *arguendo* that a satisfactory monitoring system of time limits set for the applicant was operational. It noted that the applicant appeared to have failed to submit any *prima facie* evidence for the existence and the nature of the alleged illness of Mr. Minamikawa. Should no medical certificate be available, it appeared that *prima facie* evidence of the illness could still have been furnished by other means, in particular sworn statements in writing pursuant to Article 117(1)(g) EPC or declarations *in lieu* of an oath.
- VI. In response to the annex the applicant, on 21 August 2006, made a submission, together with enclosures. It requested that the oral proceedings be not public based on Article 116(4) EPC and that the submission and its enclosures be excluded from file inspection, based on Article 128(4), Rule 93(d) EPC and the decision of the President of the EPO dated September 3, 1999 concerning documents excluded from file inspection (Sections(2)(a)b) thereof). In support of its request it argued that company-internal details of the parties involved in the present case should not be made available to the general public, in particular not to the parties' competitors. The secrecy of such company-internal details was usually protected by law. Availability of the documents to the general public might also influence the career opportunities of particular persons involved in the present case.

- VII. At the oral proceedings the public was excluded during the discussion of the applicant's request that its response of 21 August 2006 be excluded from file inspection. The public then was re-admitted. The applicant's representative was advised that he might make a request for exclusion of the public in the further course of the hearing on other points of the debate should he deem this to be appropriate. The representative made no further request to this effect.
- VIII. At the request of the Board during the oral proceedings, the applicant produced a letter from NGB dated 25 August 2005 and a reply by Hoffmann Eitle of the same date to show that the applicant indeed instructed NGB on that day to file an appeal. The appellant did not request that these documents be also excluded from file inspection.
- IX. At the end of the oral proceedings, the decision of the Board was announced.

Reasons for the Decision

A. The requests for exclusion of documents from file inspection and exclusion of the public from the oral proceedings

1. The applicant requested that the submission of 21 August 2006 and its enclosures be excluded from file inspection. According to Article 128(4) EPC, subsequent to the publication of the European patent application, the files relating to such application and the resulting European patent may be inspected on request,

subject to the restrictions laid down in the Implementing Regulations. Rule 93 EPC lists the parts of the file which shall be excluded from inspection pursuant to Article 128(4) EPC. Rule 93(d) EPC refers to "any other document excluded from inspection by the President of the European Patent Office on the ground that such inspection would not serve the purpose of informing the public about the European patent application or the resulting patent".

2. Based on this provision the President of the EPO issued a decision concerning documents excluded from file inspection. The current version is dated 7 September 2001 (see OJ EPO 2001, 458). It supersedes the decision of 3 September 1999 cited by the applicant who relies on paragraphs (2)(a) and (b). These provisions are identical in the 1999 and 2001 versions. According to paragraph (2)(a) documents or parts thereof "shall be excluded from file inspection at the reasoned request of a party or his representative if their inspection would be prejudicial to the legitimate personal or economic interests of natural or legal persons". Pursuant to paragraph (2)(b), on which the appellant also relies, documents or parts thereof "may, exceptionally, be excluded from file inspection by the Office of its own motion if their inspection would be prima facie prejudicial to the legitimate personal or economic interests of natural or legal persons other than a party or his representative".
3. Another board interpreted paragraph (2)(a) in case T 379/01 where the opponent requested that a document relevant for the admissibility of its opposition, namely the rules of an association (in German:

"Vereinssatzung"), be excluded from file inspection. As the document appeared to have been an essential means of giving evidence, the board could not deny a substantial public interest in making such evidence accessible to third parties by file inspection. (See point 4 of the decision.) In that board's view, "[s]uch evidence can only be excluded from file inspection if it is prejudicial to the legitimate personal or economic interests of a natural or legal person involved ... In view of the public interest in accessing evidence relevant for deciding a case, it appears that, in this connection, a merely abstract prejudice to hypothetical personal or economic interests is not a sufficient bar. The party requesting such exclusion should rather show that public access to certain documents would be prejudicial to specific and concrete personal or economic interests." (See point 5 of the decision.) "The provisions ... concerning the exclusion of documents from file inspection lay down exceptions from the principle of public inspection of files pursuant to Article 128(4) EPC, thus requiring a narrow construction of these provisions. In particular if a key document relating to a fundamental issue in an inter partes case is concerned, such as the contested admissibility of an opposition, a strict standard has to be applied." (See point 6.1. of the decision.)

4. The board ruling on the present case notes that Article 128(4) EPC lays down the principle of public access to files pertaining to published European patent applications and the resulting patents. Yet Article 128(4) EPC does not grant public access unconditionally, but subjects it to blanket restrictions, which should be specified in the

Implementing Regulations. Rule 93(d) of those Regulations, in turn, delegates the power to specify such restrictions to the President of the Office who may exclude from inspection any other document "on the ground that such inspection would not serve the purpose of informing the public about the European patent application or the resulting patent". The President made use of this power by virtue of the decision cited under point 2 above.

5. This Board is of the opinion that in deciding about requests for inspection of files a balance must be struck between the right of the public to know about their contents and any fundamental rights of natural or legal persons affected by their inspection. For situations like the present one, where the documents do not furnish information about the European patent application, paragraphs (2)(a) and (b) of the President's decision obviously have taken account of this principle as, on the basis of these provisions, documents may be excluded from file inspection if their inspection were prejudicial to legitimate personal or economic interests. In this context the Board agrees that only a specific prejudice can be taken into account. For if a prejudice were considered that is possible in the abstract only, it would be hard to fix its boundaries. Thus, there would be a clear danger that the public interest in having access to the files of a case would be unduly curtailed. These considerations seem to be reflected in paragraphs (2)(a) and (b) according to which inspection "*would* be prejudicial" (emphasis added) instead of "*could* be prejudicial". The Board is of the opinion that, in case of such a specific prejudice, documents that do not

furnish information about patent applications or patents are generally subject to be excluded from file inspection, in line with paragraphs (2)(a) and (b). For they do not serve the paramount purpose of such inspection, i.e. obtaining patent information, to which the public is entitled in return for the exclusive monopoly rights that patents confer.

6. Moving on now to the request for exclusion from file inspection under paragraph (2)(a) in the present case, the Board notes that, during the non-public part of the oral proceedings, the appellant provided information as to the specific prejudice which would follow from public availability of certain parts of the documents filed on 21 August 2006. On this basis, the Board has come to take the following view:

- First, those documents include company-internal details concerning the monitoring of time limits by the applicant and NGB, which would allow a competitor to set up an identical or similar system and could thus deprive the applicant and NGB of valuable commercial assets.
- Second, other details of the documents relate to business information that competitors could also use to obtain a competitive edge over the appellant.
- Third, a number of additional details could adversely affect the career opportunities of certain employees of the applicant and NGB.

7. In the light of the foregoing, the Board comes to the conclusion that public inspection of essential parts of the documents would be prejudicial to legitimate

economic interests of legal persons, namely the applicant and NGB, and to legitimate personal and economic interests of natural persons, namely certain employees of the applicant and NGB. As the documents in question do not furnish patent information, the Board applies the rule referred to above, under point 5, which is reflected in paragraph (2)(a) of the above-referenced President's decision, and according to which in such situations the legitimate personal and economic interests prevail.

8. Therefore, as the applicant requested, the Board excludes the documents under paragraph (2)(a). The exclusion pertains to the documents as a whole as they are interrelated. The provisional exclusion of the documents ordered pursuant to paragraph (3) on their reception will thus become permanent. As this exclusion fully meets the appellant's request, there is no need to assess whether the conditions of paragraph (2)(b) for an exceptional exclusion of documents *ex officio*, on which the appellant also relies, would, at least partly, be met as well.

9. The public was excluded during the debate on the exclusion from file inspection. For similar grounds as those relied on in relation to its request for exclusion from file inspection, the appellant requested that the oral proceedings be not public, based on Article 116(4) EPC. Under that provision, oral proceedings shall in principle be public, in so far as the board "does not decide otherwise in cases where admission of the public could have serious and unjustified disadvantages, in particular for a party to the proceedings." As the debate dealt with the request

for exclusion of certain documents from file inspection, which had been excluded provisionally, it follows that the public could not be admitted to the hearing on this point. Otherwise the purpose of the provisional exclusion would have been frustrated. In such a situation, therefore, the danger of serious and unjustified disadvantages must be deemed to exist.

B. The request for re-establishment of rights

Applicability

10. Under Article 108, first and second sentences of the EPC, Notice of Appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. The notice shall not be deemed to have been filed until after the fee for appeal has been paid. In the present case this time limit elapsed on 24 August 2005 (Rule 78(2), Rule 83(1), (2) and (4) EPC). As no notice of appeal was given nor was the fee paid in this time limit, the appeal should be deemed not to have been filed resulting in the loss of the right of appeal (Article 122(1), 106(1), 107 EPC), unless the application for re-establishment of rights that the appellant submitted on 24 October 2005 is granted.

Admissibility

11. The application for re-establishment complies with the formal requirements of Article 122(2) EPC. The cause of non-compliance with the time limit could not have been removed before its end, i.e. on 24 August 2005. Consequently, the time limit was complied with by the letter received on 24 October 2005 containing the application for re-establishment of rights. The omitted

act, i.e. the filing of notice of appeal, was also completed on that day. Furthermore, the application complies with Article 122(3) EPC as the grounds and facts on which the application was based, together with the payment of the fee for re-establishment, were submitted together with the application for re-establishment. This application is, therefore, admissible.

Due care in general

12. Under Article 122(1) EPC the request for re-establishment of rights can be allowed only if the person applying for it shows that it has taken "all due care required by the circumstances". In considering it, the boards have ruled in numerous decisions that the circumstances of each case must be looked at as a whole. The obligation to exercise due care must be assessed in the light of the situation as it stood before the time limit expired. In the boards' case law, due care is considered to have been taken if non-compliance with the time limit results 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, at VI.E.5.1, and the cases cited there). Such a monitoring system is normally satisfactory if it can be shown that it operated efficiently for many years (see *ibid.*, at VI.E.5.1.2a)). This generally implies the existence of an effective cross-check mechanism. In a large firm where a large number of deadlines have to be monitored at any given time it is normally to be expected that at least one effective cross-check is built into the system (see *ibid.*, at VI.E.5.1.2c)). However, in T 166/87, it was

held that in a relatively small patent department consisting of 7 full-time staff, normally working in an efficient and personal manner, employing normally reliable personnel, a cross-check mechanism for monitoring time limits may be dispensed with without offending against the duty of all due care. In that case the applicant's "system" was in essence the particular representative in the patent department who was entrusted with the filing and the prosecution of the appeal (together with the supporting secretarial staff and the Office Manager).

13. As far as the persons required to exercise all due care are concerned, the boards have held that this duty applies first and foremost to the applicant and then, by virtue of the delegation implicit in his appointment, to the professional representative authorised to represent the applicant before the EPO. The fact that the representative has acted correctly does not exempt his client from suffering the consequences of his own mistakes, or even negligence. See Case Law of the Boards of Appeal, at VI.E.5.3.1a). Where, as in the present case, there are two representatives, a non-European domestic representative and a European representative, the duty of due care applies to both of them. The standard of due care for the non-European agent is equal to that of an applicant (see J 25/96, at point 3.2).

14. The number of days by which a time limit had been missed (one day in the case at hand) is irrelevant for deciding whether all due care was applied or not as Article 122(1) EPC does not leave any room for the application of the principle of proportionality. Only

the character of the conduct before the time limit expires is decisive for the consideration of the due care issue, not the length of the ensuing delay. (See T 1070/97, at point 4.6., affirmed by T 971/99.)

Due care in case of illness

15. A number of decisions of the boards of appeal have dealt with the situation where a time limit was missed in the context of illness. In T 558/02 the Board found it self-evident that sudden illness, over which a person (in this case a professional representative) has no control, may excuse that person from having to take measures to ensure that time limits are met. Similarly, in T 525/91, the representative's proven illness was considered to amount to an inevitable event (in German: "unabwendbares Ereignis") generally justifying re-establishment of rights.

On the other hand, T 324/90 (OJ 1993, 33) dealt with the requirement of due care in the context of unexpected absences of employees. It was held that, in a large firm, where a considerable number of deadlines have to be monitored at any given time, it must normally be expected that at least an effective system of staff substitution in the case of illness and for absences in general is in operation. The purpose of such a system is to ensure that official documents such as decisions by the European Patent Office, which start periods within which procedural steps have to be carried out, are properly complied with.

In J 41/92 (OJ 1995, 93), the board, after having referred to T 324/90, conceded that, in the case of a professional working alone and having a much smaller

number of time limits to comply with, less strict standards, in this respect, might be applied. However, the board was of the opinion that a "careful and diligent professional representative must, in any case, be expected to take into account that he or she might fall ill and be prevented, for some time, from taking care of time limits. Therefore, if a professional representative runs a one-person office, appropriate provisions should be made so that, in the case of an absence through illness, the observance of time limits can be ensured with the help of other persons" (see point 4.4).

In J 5/94 the board made allowance for the fact that the appellant was an individual applicant who had not appointed a representative and who was neither familiar with the requirements of the EPC nor in possession of an established office organisation attuned to ensuring that procedural deadlines were met. The board pointed out that in such a case the same standards of care as those required of a professional representative or the patent department of a large firm could not be applied. However, the single applicant could not refrain from making reasonable provisions to safeguard the respect of time limits (see point 3.1.). In expressing its understanding for the failure to observe the time limit in that particular case, the board cautioned that the illness at issue would not have justified the failure to take sufficient precautions for an extended period of time with respect to actions whose need to take could be anticipated (see point 3.2.).

16. The Board deciding on the present case follows decisions T 324/90, J 41/92 and J 5/94. Illness may be

a valid excuse for not having observed a time limit. However, as any person is liable to fall ill, the Board deems it necessary that reasonable provisions for absence due to the illness of a person who is in charge of monitoring time limits are made, unless in the particular circumstances of a case imposing such provisions would have to be considered as an undue burden. Only where any necessary provisions have been taken will it be possible to deem the monitoring system of time limits to be "normally satisfactory" (see T 324/90, at point 7), which is a condition for a finding of due care and, thus, for considering illness to be an excuse for not meeting a deadline.

Due care on the part of the applicant

17. From the evidence submitted on 21 August 2006, the Board is convinced that Mr. Minamikawa came to suffer from an unexpected illness on the last two days of the appeal term, i.e. on 23 and 24 August 2005, a cold with high fever and a severe cough such that he was suffering from a groggy slumber, which prevented him from giving instructions to appeal the decision at issue. It also follows from that evidence that Mr. Minamikawa did not regularly suffer from illness and did not have long-standing complaints. Consequently, there was no special risk that he would fall ill shortly before the point of time when the appeal term expired, let alone that his illness would prevent him from giving instructions to file an appeal.

18. Regarding the need for a back-up of Mr. Minamikawa in this specific case of illness, it is of relevance that the number of time-limits to be complied with before expiry of the time limit was small. Insofar, the

appellant, by means of its submission of 21 August 2006 and the explanations given in the non-public part of the oral proceedings, has, to the Board's satisfaction, proven its statement in the application for restoration that it filed only a few patent applications per year. Under these circumstances, the Board accepts that it was not necessary for meeting the standard of due care to make specific provisions for the unforeseeable two-day illness of Mr. Minamikawa's, the sole employee in charge of the monitoring of time limits; more specifically, no substitute for him had to be appointed.

19. From the evidence submitted on 21 August 2006 the Board also concludes that, before expiry of the time limit to file the present appeal, a normally satisfactory monitoring system was in place in the applicant company. The system operated by only one senior employee, Mr. Minamikawa, met the conditions of a "relatively small patent department" set out above, at point 12, in which a representative was entrusted with the filing and the prosecution of the appeal.

20. The existence of a normally satisfactory monitoring system, the proven illness of the sole employee in control of it and the redundancy of a back-up for that employee cannot alone establish that the time limit for filing an appeal was missed despite all due care having been taken on the part of the applicant. It must still be established that Mr. Minamikawa's illness was in fact the cause of the missed time limit, which is the sole ground on which the application for restoration is based. Had Mr. Minamikawa had to give instructions before he fell ill, his failure to have done so would constitute a lack of due care thus making his illness

become immaterial. The question therefore is whether Mr. Minamikawa was entitled to wait with giving instructions until the last two days of the time-limit or whether he was required to act some time earlier. NGB had proposed Friday, 19 August 2005, as due date.

21. As a matter of principle it should be noted that time limits may be fully exhausted, i.e. the action required can be taken at the last moment at which the applicant can expect with reasonable certainty that timely action will still be taken by the representative. This principle also applies to a non-European applicant authorising a representative (directly or via an intermediate domestic representative) to perform the procedural act in question. An internal deadline usually set by the representative a few days before the last possible date to facilitate the drawing up of documents is therefore not decisive.

22. The case law of the boards of appeal does not run counter to this opinion. It is true that, in case T 30/90, it was held that the authorisation of the appeal by the US based applicant at 9 a.m. on the day *before* expiry of the time limit was too late in all the circumstances of the case. In that case, difficulties of last minute communications between the US and UK agents and problems of making urgent payments to the EPO existed. However, special circumstances of this kind are not apparent in the case at hand. From the mere fact that an applicant is located far away from the EPO, even on a different continent, it does not necessarily follow that instructions to perform the procedural act in question must be given before the last day of the time limit. Given the worldwide

telecommunications network, it has become largely immaterial in which geographical area of the world parties and their representatives are based, as long as they have access to that network. Transmission of information via the telecommunications network is quasi instant. What has, however, be to taken into consideration is the time shift which may make it difficult, if not impossible, for an agent to meet the deadline on the last day, if the applicant is located far west of the agent, for instance in the US, with the agent being in the UK (see T 30/90 for the problems alleged by the London based agent arising from the time difference of six hours to Chicago).

23. In the present case, the Japan-based appellant has established that its communications with its domestic agent NGB and between NGB and the European representatives Hoffmann Eitle, located in Munich, Germany, went efficiently by fax. This conclusion can be drawn from the correspondence that took place on 25 August 2005. On that day, Mr. Minamikawa contacted NGB. That firm, on the same day, sent a fax to Hoffmann Eitle, who in turn replied on that very same day as well. The applicant and its representatives could avail themselves of additional time gained from the time shift between Germany and Japan (which, different from the situation above where the applicant was based in the US, "prolongs" the term instead of "shortening" it). Furthermore, the document to be drawn up in the present case, namely the Notice of Appeal, could be finished rapidly given the limited requirements of the EPC for such a notice. Therefore, in the present case, the appellant was entitled to give instructions to have the

procedural act at issue, i.e. the filing of an appeal, performed on the last day of the time-limit.

24. To sum up, the Board finds that the appellant's sole employee on whom the monitoring tasks were entrusted, Mr. Minamikawa, suffered from a sudden and unexpected illness during the last two days of the time limit. Therefore, he was unable give instructions to file an appeal during those last two days of the end of the time limit, which he was entitled to exhaust up until the last day. The Board also holds that a normally satisfactory monitoring system for deadlines was in place in the applicant company as, in particular, there was no need for a back-up for Mr. Minamikawa in this particular case. As a consequence, the appellant has exercised all due care required by the circumstances within the meaning of Article 122(1) EPC.

Due care on the part of the representatives

25. Regarding the European representatives, Hoffmann Eitle, the Board has no doubts as to their taking of due care. They provided the relevant information to the domestic agent NGB swiftly and comprehensively. On 11 May 2005 Hoffmann Eitle informed NGB of the decision of the Examining Division which had refused the application at the end of the oral proceedings that had taken place on the same day. On 22 June 2005 Hoffmann Eitle sent the written decision posted on 14 June 2005 to NGB indicating an appeal term of two months and asking for reply by 14 August 2005. On 18 July 2005 they sent comments on the decision to NGB and informed them of the inextensible deadline of 24 August 2005. The copies of the three letters that Hoffmann Eitle submitted are evidence of the foregoing.

26. In respect of the exercise of due care on the part of NGB, reference is made to their contacts with the applicant detailed above, under point IV. As set out there, NGB, in their letters to Mr. Minamikawa, mentioned due dates for an appeal. In a letter of 5 August 2005, a due date of 19 August 2005 was proposed and 24 August 2005 was mentioned as the Patent Office due date. On 9 August 2005 Mr. Minamikawa called NGB informing NGB that he considered filing an appeal but that more time was needed to make a final decision in this respect. On 25 August 2005, i.e. on the day after the expiry of the time limit for filing an appeal, Mr. Minamikawa instructed NGB to have such an appeal filed. The question is whether an exercise of due care by NGB would have required them to issue an additional reminder to the applicant subsequent to the phone call that took place on 9 August 2005, i.e. roughly two weeks before the deadline expired. As the monitoring of IP related time limits of the applicant company, and in particular the informing and reminding of due dates, was entrusted on NGB, it was their task to remind Mr. Minamikawa to the extent required under the circumstances.
27. The boards have addressed a representative's duty to remind his client on several occasions. In J 3/93 a reminder sent on 16 July 1991 in relation to the payment of renewal fees was held to be sufficient to meet a professional representative's obligation where the time limit expired on 30 November 1991. Conversely, in J 19/04, the representative issued the last of three reminders in respect of the payment of renewal fees also more than four months before the end of the time

limit. In that case the board was of the opinion that the representative would have had to issue a further and last reminder shortly before expiry of the deadline. In T 112/89 the representative having received no answer to a first letter sent a reminder on 23 November 1988 asking the client to authorise him to file an appeal before the expiry of the time limit on 8 December 1988. This conduct was considered *obiter* to reflect the "right attitude". In T 30/90 (already referred to above), the representative's stated expectation of not receiving final instructions until very shortly before 30 November 1989 did not, in the Board's finding, justify his failure to seek those instructions at least a few days before the expiry of the time limit which was known to him, particularly in view of the difficulties of last minute communications with his US instructing agent, and of the problems of making urgent payments to the EPO.

28. Against the backdrop of the case law referred to under the previous point, the Board considers that NGB would not have had to remind Mr. Minamikawa again shortly before the expiry of the time limit. The Board believes that this finding is in line with the opinions expressed in all of the four decisions above. This is obvious for J 3/93. Given that the last contact between NGB and Mr. Minamikawa took place roughly two weeks before the end of the deadline, the present situation is similar to that quoted from T 112/89 where the representative was found to have acted properly. The present case is clearly distinguishable from J 19/04 where the agent took his last action four months before the end of the deadline, whereas in the present case the last contact took place roughly two weeks before

the expiry of the time limit. Furthermore, different from the situation in T 30/90, communications between the Japan-based applicant and agent as well as the European representatives worked efficiently, and the time difference between Japan and Germany played in their favour (see above under point 23). Thus, NGB could expect that it would be possible to successfully process an instruction by Mr. Minamikawa to lodge an appeal even on the last day of the time limit. From the phone call on 9 August 2005, for whose contents the hand-written memorandum on the letter of 5 August 2005 is credible evidence, it is clear that Mr. Minamikawa was conscious of the time limit but needed more time to take a final decision on whether or not notice of appeal should be given. Given his post in the applicant company of Executive Managing Director, he could be held to a special degree of responsibility. In this situation, the Board is of the opinion that NGB was entitled to rely on Mr. Minamikawa's awareness of the expiry of the time limit for the following roughly two weeks and in particular during the last days preceding it. NGB were therefore not required to issue a further reminder to meet their obligation of due care. This is independent of whether or not a reminder shortly before the expiry of a time limit would be appropriate in other cases. NGB were entitled to assume until the expiry of the appeal term that Mr. Minamikawa would contact them once he had thoroughly studied the case and therefore was in a position to take a decision as to whether or not an appeal should be lodged. That such an assumption was correct follows for the Board from the letters produced during the oral proceedings, according to which, immediately after return from his sick leave, Mr. Minamikawa asked NGB to lodge an appeal.

29. Consequently, the Board has detected no mistake in the exercise of NGB's duties in the present case. Thus, the question as to whether a normally satisfactory monitoring system existed in that company has become moot. The Board therefore considers that NGB took all due care required by the circumstances.

Conclusion

30. The Board is accordingly satisfied that, in spite of all due care required by the circumstances having been taken by the applicant and its representatives, the applicant was unable to observe the time limit for filing a Notice of Appeal in this case.
- Mr. Minamikawa's immediate reaction when he returned to work from his sick leave, as evidenced by the correspondence of 25 August 2005 filed during the oral proceedings, indeed shows that he had actually been aware of the deadline for filing an appeal, and that the only cause for the missed term was his physical inability to act during his illness, not any overlooking of the deadline as a result of a deficient monitoring system. Consequently, the application for re-establishment of rights is allowed and the Notice of Appeal in the letter dated 24 October 2005 shall be deemed, therefore, to have been filed within two months after notification of the decision of the Examining Division dated 14 June 2005.

Order

For these reasons it is decided that:

1. The appellant's submission received on 21 August 2006, together with its enclosures, and the original documents submitted on 25 August 2006 are excluded from file inspection.

2. The appellant's rights in connection with the filing of an appeal within the time-limit of two months prescribed by Article 108 EPC are re-established.

The Registrar:

The Chairman:

M. Kiehl

A. G. Klein