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Datasheet for the decision of 25 April 2017

Case Number: T 0578/14 - 3.3.01

Application Number: 06824382.3

Publication Number: 1945424

IPC: A01N55/08, B27K3/36

Language of the proceedings: EN

Title of invention:
WOOD TREATMENT

Applicant:
Harrower, Norma Ellen Lilette

Headword:

Relevant legal provisions:
EPC Art. 107, 108, 116(1), 119, 120(b), 122, 125, 133, 134
EPC R. 99(2), 101(1), 115(1), 115(2), 126(1), 126(2), 131(4), 136(1), 152
RPBA Art. 15(3), 15(5), 15(6)
Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations, Article 1(2)

Keyword:

Representation - authorisation remains effective vis-à-vis the EPO if or for as long as termination of authorisation is not communicated to the EPO - intention to change the representative is not sufficient
Party not resident in EPC contracting state - submissions concerning its representation are taken into account
Nothing in the EPC which prevents EPO from communicating with party not resident in EPC contracting state
Cancellation of oral proceedings (yes)
Admissibility of appeal - statement of grounds - filed within time limit (no)
Re-establishment of rights - exceptional means of judicial remedy, not a usual way of extending an initial time limit - unable to observe time limit because change of representative intended (no) - due care on the part of the applicant (no) - principle of proportionality (yes)
General principles - protection of good faith and legitimate expectations - fiduciary responsibility - prohibition against venire contra factum proprium

Decisions cited:

G 0001/86, G 0005/88, G 0002/97, J 0003/87, J 0027/88, J 0031/89, J 0027/90, J 0027/92, J 0003/93, J 0010/93, J 0005/94, J 0014/94, J 0027/94, J 0002/02, J 0017/03, J 0019/04, J 0006/07, J 0012/07, J 0004/10, J 0013/11, J 0007/12, T 0191/82, T 0287/84, T 0213/89, T 0250/89, T 0030/90, T 0413/91, T 0667/92, T 0381/93, T 0840/94, T 0428/98, T 0079/99, T 0717/04, T 1401/05, T 0552/06, T 1026/06, T 0263/07, T 1465/07, T 1984/07, T 1908/09, T 0592/11

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
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Case Number: T 0578/14 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 25 April 2017

Appellant: (Applicant)
Harrower, Norma Ellen Lilette
50 Tintagel
Chapelhouse
Skelmorsdale
Lancashire WN88PF (GB)

Decision under appeal:
Decision of the Examining Division of the European Patent Office posted on 25 September 2013 refusing European patent application No. 06824382.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman A. Lindner
Members: T. Karamanli
G. Seufert

Summary of Facts and Submissions

I. The appeal is directed against the decision of the examining division, posted on 25 September 2013, refusing European patent application No. 06 824 382.3 on the basis of Article 97(2) EPC (henceforth "refusal decision").

II. International application No. PCT/NZ2006/000291 published as WO 2007/055601, on which the present European patent application is based, was filed in the name of Mr Stanimiroff, a resident of New Zealand. After the application's entry into the regional phase before the European Patent Office (EPO) on 9 May 2008, the then applicant's name and address were duly entered in the European Patent Register, as also was the name and address of the European professional representative appointed at that time. On 4 March 2013, the EPO was informed of a change of representative and of the termination of the previous representative's authorisation. The new European professional representative representing Mr Stanimiroff (henceforth "the representative") was accordingly entered in the European Patent Register.

III. The representative duly filed a notice of appeal on 2 December 2013 and stated *inter alia*: "*In the event that it is intended to refuse this application, or before any adverse decision is taken, the applicant hereby requests, in order of preference, a telephone interview, a personal interview, or oral proceedings under Article 116 EPC.*"

The appeal fee was paid on the same day.

IV. By a letter dated 10 January 2014 and received at the EPO on 17 January 2014, the then appellant, Mr Stanimiroff, filed a request for extension of the time limit for filing the statement setting out the grounds of appeal, together with submissions on the matter. In that letter, he wrote *inter alia* the following: "*After consideration I have decided that it is not an ideal situation having my current patent attorney represent me. ... So why I am writing, is to ask if there is some facility that can provide me with more time to find a patent attorney and prepare an appeal application.*"

V. By an email reply dated 21 January 2014, a patent formalities expert of the EPO informed Mr Stanimiroff as follows: "*There is **no** possibility to extend the time for filing the grounds for appeal in the above mentioned application. The time limit for doing so expires on 05.02.2014.*"

By EPO communication dated 22 January 2014, a copy of this email reply was sent to the representative for information.

VI. In a reply addressed to the EPO patent formalities expert and received at the EPO on 14 February 2014, Mr Stanimiroff referred to decision T 79/99, point 2.1, second paragraph, of the Reasons, and to a passage on page 8 of decision J 12/07, and queried the EPO's statement that there was "**no** *possibility to extend the time for filing the grounds for appeal".*

Mr Stanimiroff further stated: "*I had paid the appeal fee on time and corresponded with my representative. The reason I am seeking an extension is I disagree with a technical interpretation and wanted to replace him*

that left me in the situation. That a reply in the period previously laid down would not be possible. If I choose to change my representative because I don't agree with his technical decision I am penalized. I am penalized because you don't support my decision; I paid the fee on time and corresponded regularly. I know that your technical interpretation of the subject matter has no bearing on the decision as you don't have one. Where are the foreseeable or avoidable circumstances that you are aware of. The timeline for the conflict of decision was presented to me by my representative.

I am sure if given a 3 month extension during a productive time of year I could complete the remaining requirements of the appeal process with a new representative. The way you are interpreting this situation you are taking away the right of the inventor/owner to change representative; I am sure that can't be correct.

I would like the EPO to reconsider your decision, it would just get even more bureaucratic; an appeal to reverse an extension for an appeal."

VII. On 10 March 2014 the formalities officer acting for the examining division forwarded the case to the Board of Appeal in accordance with Article 109 EPC.

VIII. In a communication from the registrar of the board (EPO Form 3028) dated 15 July 2014 and notified to the representative on 22 July 2014, it was noted that it appeared from the file that the written statement of grounds of appeal had not been filed, and that it was therefore to be expected that the appeal would have to be rejected as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1)

EPC. The communication also contained the information that any observations had to be filed within two months of notification of the communication.

IX. The board sent a communication of 15 July 2014 to Mr Stanimiroff, informing him as follows:

(a) Since he had his residence in New Zealand and thus not within the territory of one of the EPC contracting states, he had to act through a professional representative (Article 134(1) EPC) or a legal practitioner (Article 134(8) EPC) in the present appeal proceedings, in accordance with Article 133(2) EPC. Therefore, his request and submissions relating to an extension of the time limit for filing the statement setting out the grounds of appeal needed to be filed by an authorised representative. As they had been neither filed nor endorsed by a professional representative (or legal practitioner), the board was unable to take them into account at present.

(b) The statement about his representative in his letter dated 10 January 2014 was not a clear withdrawal of the authorisation for his representative in the present appeal proceedings. Rather, the board interpreted said letter and his further letter as indicating that he intended to change his patent attorney. Since he had not yet identified a newly appointed representative to represent him in the present appeal proceedings, the representative previously appointed was deemed to be authorised in accordance with Rule 152(8) EPC until the termination of his authorisation was communicated to the EPO.

(c) The non-extendable four-month period provided by Article 108, third sentence, EPC for filing a written statement of grounds of appeal had expired on 5 February 2014 and a communication dated 15 July 2014 (of which a copy was attached) had been sent to his representative since it appeared from the file that no written statement of grounds of appeal had been filed.

By EPO communication dated 15 July 2014, a copy of the board's communication was sent to the representative for information.

X. By a letter dated 2 September 2014 and received on 8 September 2014, Mr Stanimiroff filed a statement setting out the grounds of appeal together with claims, description pages, drawings and an abstract according to a "MAIN REQUEST".

XI. In a letter dated 10 September 2014 and received at the EPO on the same day, the representative stated the following:

"*The Applicant wishes to make the enclosed submissions to the European Patent Office.*

The Applicant also requests that "the text "Text intended for grant" appearing on the European Patent Register on 24 January 2013 be removed or changed".

The submissions enclosed were a copy of the letter from Mr Stanimiroff dated 2 September 2014.

XII. By letter dated 22 September 2014 and received at the EPO on the same day, the representative requested re-establishment of rights pursuant to Article 122 EPC and

stated the following: "*The Applicant submits that, in spite of all due care required by the circumstances having been taken, he was unable to observe the time limit to file a statement setting out the grounds of appeal in accordance with Article 108 and Rule 99 EPC. The Applicant wishes to make the enclosed submissions to the European Patent Office, setting out the facts on which he relies.*"

The said enclosed submissions were a copy of an unsigned letter from Mr Stanimiroff, asking for re-establishment of rights, with the following attachments:

D1: A copy of an email exchange between Mr Stanimiroff and the representative in the period between 1 November and 28 November 2013;

D2: A copy of Mr Stanimiroff's letter to the EPO patent formalities expert received on 14 February 2014;

D3: A statement which reads "*The application of a patent is process not a contract. The EPO don't have the legal right to force contractual obligations on individuals. The Articles/Rules/Laws requiring a legal representative at all times is merely a preference by the EPO*", and a copy of the EPO communication dated 15 July 2014.

The representative also enclosed the statement setting out the grounds of appeal which he had originally filed on 10 September 2014.

The fee for re-establishment of rights was paid on 22 September 2014.

XIII. On 25 September 2014, Mr Stanimiroff re-filed his (signed) letter together with the attachments D1 to D3.

XIV. On 17 October 2014, the representative filed with the EPO his withdrawal from representation for the present application. This was registered with effect from that date.

XV. By communication (EPO Form 2502B) dated 22 October 2014, the EPO informed Mr Stanimiroff that the representative he had authorised had withdrawn from representing him, with the result that the authorisation was terminated vis-à-vis the EPO and the requirements of Article 133(2) EPC were no longer met. Mr Stanimiroff was also reminded that he had to be represented by a European professional representative and act through him in all proceedings established by the EPC. He was invited to give notice of appointment of a professional representative within two months as from notification of said communication, and his attention was drawn to the legal consequence under Article 94(4) EPC if he failed to reply in due time.

XVI. The present application was transferred to Mrs Harrower (henceforth "the appellant"), a resident of the United Kingdom. This transfer took effect vis-à-vis the EPO on 19 December 2014 and the registration of this transfer was accordingly entered in the European Patent Register. The appellant has not appointed a representative.

XVII. On 29 May 2015, the renewal fee for the ninth year, which had fallen due on 30 November 2014, was paid together with the additional fee.

XVIII. In a letter dated 17 July 2015 and received on 21 July 2015, the appellant referred to the request for re-establishment of rights dated 22 September 2014 and the documents related thereto and asked what the status of the application was. She also filed a statement of grounds of appeal with attachments (claims, abstract and description) according to a "MAIN REQUEST", which essentially corresponded to the statement and attachments filed on 10 September 2014 (and re-filed on 22 September 2014).

XIX. In a letter dated 22 July 2015 and received on 30 July 2015, the appellant referred to Mr Stanimiroff's request for extension dated 10 January 2014 and to the letter from Mr Stanimiroff received on 14 February 2014, and made further submissions with regard to said request.

XX. In a letter dated 4 June 2016 and received on 10 June 2016, the appellant requested re-establishment of rights. She also filed a letter signed by Mr Stanimiroff on 23 May 2016 which has the same content and the same attachments D1 to D3 as the signed letter from Mr Stanimiroff filed on 25 September 2014. She also re-filed the statement of grounds of appeal, with attachments, which had been filed on 21 July 2015.

XXI. By a communication dated 25 October 2016, the board summoned the appellant to attend oral proceedings on 10 January 2017 (henceforth "first summons").

In a communication accompanying the first summons, the board expressed its preliminary and non-binding opinion on

(a) who was the party to the present appeal proceedings,

(b) the consideration of the party's requests and submissions on file,
(c) the admissibility of the present appeal,
(d) the admissibility and allowability of the request for re-establishment of rights.

XXII. Since no advice of delivery of the first summons to oral proceedings had been received at the EPO, the appellant was invited by a communication dated 8 December 2016 to acknowledge receipt of the first summons.

XXIII. On 12 December 2016, the appellant filed a letter dated 14 December 2016 and informed the board that she would not be attending the oral proceedings. In this letter the following is stated with regard to the summons: "*A document found on file dated 25 October 2016, sent to the current applicant.*"

The appellant also made further submissions in reply to the board's communication. She also re-filed a copy of the email of 28 November 2011 sent by Mr Stanimiroff to the representative. Further she submitted a copy of an unsigned letter from Mr Stanimiroff which essentially has the same content as his letter dated 10 January 2014 with the following comment: "*This document was sent through the EPO help "Contact us" the enquiry had the ticket number 289803 the date was 19 December 2013*".

XXIV. On 9 January 2017 the oral proceedings scheduled for 10 January 2017 were cancelled. After their cancellation, the board received a further letter from the appellant which was dated 17 December 2016 and was filed on 9 January 2017 at the EPO. In this letter, the

appellant acknowledged receipt of the summons dated 25 October 2016.

XXV. By a communication dated 18 January 2017, the board summoned the appellant to attend oral proceedings on 25 April 2017 (henceforth "second summons"). In a communication accompanying the second summons, the board made a preliminary remark regarding the cancellation of the oral proceedings scheduled for 10 January 2017 and the fixing of a new date, and repeated its preliminary and non-binding opinion on several issues as expressed in its communication accompanying the first summons.

XXVI. Since no advice of delivery of the second summons to oral proceedings had been received at the EPO, the appellant was invited by a communication dated 10 March 2017 to acknowledge receipt of the second summons.

The EPO also submitted an investigation request for lost mail to the postal service, Deutsche Post AG. By letter dated 21 March 2017, Deutsche Post AG informed the EPO that the communication dated 18 January 2017 had been delivered to the appellant on 24 January 2017.

XXVII. On 21 March 2017, the appellant filed a letter dated 17 March 2017 which has the same content as the letter dated 14 December 2016, but without the attachments. She further filed a "Reply to EPO Document dated 18 January 2017" in which she essentially commented on the communication from the board accompanying the summons dated 18 January 2017.

XXVIII. The board held oral proceedings on 25 April 2017 in the absence of the duly summoned appellant.

XXIX. The appellant's arguments made in writing, as far as they are relevant to this decision, may be summarised as follows:

(a) *Representation*

As apparent from the exchange of emails between Mr Stanimiroff and the representative, the situation with the representative had become untenable and he therefore terminated his contract with the representative on 28 November 2013 as confirmed by the last line of the email of the same date which read: "*I don't think that you are the right person to represent the appeal, so once the fees are paid I will find someone else to represent the appeal*."

By his letter dated 10 January 2014, Mr Stanimiroff had informed the EPO accordingly. It was also clear from the statement "*In the board's view, this is not a clear statement that you withdrew the authorisation for European patent attorney ....*" in its communication dated 15 July 2014 that the board acknowledged that said letter had contained a statement about withdrawing his representation. However, in its communications, the board stated that the representative was deemed to be authorised until the termination of his authorisation was communicated to the EPO. Thus the board had decided that Mr Stanimiroff still had a contract with the representative at that time. However, the EPO did not have the right to determine whether a commercial contract was valid, over and above common law. The Republic of Ireland, and Northern Ireland, operated a common law system, and the common law definition of a contract was: "*An*

agreement between persons which obliges each party to do or not to do a certain thing. Technically, a valid contract requires an offer and an acceptance of that offer, and, in common law countries consideration." Thus, one party had the right to terminate a commercial contract with the other party. It had also to be noted that there was no contract with the EPO. The EPO did not have the power "to require commercial contract outside of the EPO that have failed to be reinforced". In summary, if the EPO was "to rule that the common law was outside its jurisdiction", it would then "be abdicating responsibility for decisions made within its jurisdiction". Moreover, the EPO had sent the correspondence dated 15 July 2014 not to the representative, but to Mr Stanimiroff. If Mr Stanimiroff was "self-contained" he would have received communications through his representative (Article 133 EPC). It would seem that the EPO had inadvertently acknowledged that Mr Stanimiroff had no representative, i.e. was not self-contained.

Although Mr Stanimiroff had no attorney and no contract with the representative at the relevant time, he felt that he had to use the representative again. On 17 October 2014, Mr Stanimiroff had found out, by looking at the EPO correspondence, that the representative no longer had a commercial contract with him. The point was that the representative had chosen to terminate his commercial relationship with Mr Stanimiroff, who himself did not have that choice; nor had the EPO been involved. Who communicated with the EPO if a non-European applicant had no representative? A non-European applicant could not communicate a termination of contract with the EPO. The EPO could not "*legally*

communicate with applicants outside the European Union" without the representative's consent. For a non-European applicant, the EPO could not reply to his request to which his representative had not given his consent. Moreover, during the relevant period Mr Stanimiroff had been communicating with the EPO directly. Allowance should be made for this error. What happened if an applicant did not have a representative and required time to find and brief one to meet a deadline, as in the present case?

The reason for the extension was that Mr Stanimiroff had terminated his commercial relationship with his representative. If the request had been from a European resident, it would have been accepted in view of Rule 152(8) EPC and the board's communication informing Mr Stanimiroff that it was not taking into account his request for an extension (and his related submissions) since they had neither been made by a professional representative (or a legal practitioner) nor endorsed by him.

(b) Re-establishment of rights

Regarding "the two months of the removal of the cause of non-compliance", decision J 27/90, point 2.3 of the Reasons, referred to "is made aware". The legal fiction from T 428/98: "*EPC 1973 was as a rule removed on the date when the applicant actually received the communication, provided that failure to complete the act was purely due to previous unawareness that the act had not been completed.*" This interpretation was that the obstruction had been removed. The term unaware

fell into the subset of obstruction. In the present case the cause of non-compliance was that Mr Stanimiroff was unable to communicate with the EPO because he did not have a representative. He was not in a position to communicate with the EPO at the relevant time; therefore re-establishment was not possible, although attempts to communicate were on file and had been submitted as annexes to the letter dated 10 June 2016. He had presented the original statement setting out the grounds of appeal on 2 September 2014, in reply to the board's communication dated 15 July 2014. Once the ability to communicate had been established, the cause of non-compliance had been removed, namely on 15 July 2014 plus 10 days. The request for re-establishment of rights had been received on 22 September 2014, and given the wording "two months of the removal of the cause of non-compliance" appeared to be compliant with Rule 136 EPC.

As for general comments on due care: "*In T 30/90 the board held that the allowability of applications for re-establishment hinged on whether the conduct of the appellant and/or his representative, during the entire period after the relevant decision, was indicative of "all due care required by the circumstances". In this connection, "all due care" meant all appropriate care*".

The EPO used "due care" to judge behaviour after undefined incidents. The only valid "due care" was "*behaviour before untenable*". Mr Stanimiroff had shown due diligence in accordance with the case law as set out in the Case Law of the Boards of Appeal, III.A.1, entitled "*Applicability of the principle*

of the protection of legitimate expectations", and with decision G 1/86 holding that "*Failure to observe these time limits frequently involves the person concerned in an irrevocable loss of rights. This is particularly harsh when that person was not actually at fault and the failure was attributable to an oversight which occurred in spite of all due care required by the circumstances having been taken.*" Mr Stanimiroff had received an email from the representative on 13 November 2013 (D1) containing his interpretation of the prior art. However, Mr Stanimiroff regarded the representative's interpretation and the EPO's technical interpretation as not only wrong but a long way from being even close, and the situation with the representative had become untenable. Mr Stanimiroff did not have the experience and knowledge to conduct or direct an appeal. There had been no procedural error; there had still been 2 months to write the appeal proposed by the representative. The situation was best described in the email dated 14 February 2014, requesting extension of time limit. Usually in this situation, things would be solved by the EPO applying the "Extension of time" definition from the Guidelines for Examination, Part E, Chapter VII-1.6, which read: "*For any communication raising a matter of substance, a request for extension, even if filed without reasons, should normally be allowed if the total period set does not exceed six months.*" This option was not available. Mr Stanimiroff had no representative and by the EPO's definition not enough time to resolve the problem. He also had no way to communicate with the EPO. The result was that he had missed the deadline for submitting a written document for the appeal. In spite of all

due care required by the circumstances having been taken, he had been unable to observe a time limit, i.e. to submit the correct appeal document within the time limit. What were his options? One of his options could have been Article 125 EPC but the formalities officer chose not to take the correct course of action and grant him the legal right to free speech. The non-extension of the time limit for the appeal process was at odds with natural evolution of the law. The justification for its existence was basically office administration; this would not stand up against issues like the "*principles of the protection of legitimate expectations*". There was a problem/oversight with the appeal time extension process; the EPO already had re-establishment of rights in order to control delays.

The decisions cited by the board did not seem relevant because decision T 413/91 concerned a time limit missed because of other concerns and the definition of "all due care" was stated as an obstacle, decision J 2/02 concerned non-payment of a fee, and decision T 1026/06 was "written in Germany from references about fees". "Untenable" was a legal concept. Regarding all due care, there seemed to be selective bias; a badly written patent was worth the same as no patent. The inventor had a right to ensure that what was invented was what was claimed. The definition of all due care was an "obstacle". The EPO presented the inventor with an estoppel situation, resulting in the EPO accusing the inventor of lying in spite of the notice of appeal and the request for a time extension dated 14 February 2014. That time to resolve the situation was needed, as Mr Stanimiroff had

submitted several times, was a convincing argument when the board acknowledged that the applicant was telling the truth. In fact he had not taken a bad decision but had had no choice.

Concerning ignorance of or erroneous interpretation of a provision of the EPC as interpreted by the case law (Case law of the Boards of Appeal, III.E. 5.5.2 c)), a representative with an undisclosed vested interest could make a mistake in order for a third party to take advantage of the situation. This interpretation could not be allowed. The applicant was the only person that suffered.

Regarding the case law on the principle of proportionality, in T 1465/07 the board had interpreted Article 122 EPC 1973 in the context of the right of access to a court, taking into account the case law of the European Court of Human Rights and the European Court of Justice. It would appear that there was a legal precedent in "*the absence of procedural provision in the convention*".

(c) *Application of Article 125 EPC; good faith and fiduciary responsibility*

In view of Article 125 EPC and the EPO's interpretation of common law, there had been an uneven display of good faith in the attempt to re-establish rights. The EPO had been aware of an estoppel situation. The board by its own admission had acknowledged the estoppel situation by highlighting Rule 152(8) EPC. Whether or not the representative corresponded correctly was a ruse. Rule 152(8) EPC created an estoppel situation. The

EPO had not demonstrated fiduciary responsibility so the issue was moot.
The EPO wrote to Mr Stanimiroff's personal address and this constituted "venire contra factum proprium" (J 27/94). Regarding the responsible person, in T 840/94 the board held that if a party instructed the authorised representative not to pass on any further communication from the EPO, it could not then rely on the fact that information notified to the representative and necessary for continuing the proceedings was lacking. Reference was also made to T 1908/09. Page 3, fifth paragraph, of the board's communication dated 15 July 2014 read: "*In the board's view, this is not a clear statement that you withdrew ....*". This was an ambiguous statement - the obligation of the applicant and the representative was not the issue in re-establishment of rights; it was the estoppel situation that existed. The EPO should have sought more clarification before making ambiguous comments; contrary to the EPO's opinion, the applicant was not responsible for the representative's actions. The whole point of this appeal was the question of what was the EPO's level of fiduciary duty. Or, did it have no fiduciary responsibility? Once again, this amounted to "venire contra factum proprium".

The board's communication dated 25 October 2016 contained a number of statements ("*deliberately refrained*"; "*contrary to the submissions on file, Mr Stanimiroff had been represented in the appeal proceedings by his appointed European patent attorney at the relevant point in time*"; "*The representative had deemed to be authorised until the termination of his authorisation was*

communicated to the EPO"; "*had deliberately abstained from instructing his representative to file the statement of grounds of appeal etc.*") that were unsatisfactory in a legal document, as there was no evidence on file of any fiduciary duty being exercised. The EPO was in possession of Mr Stanimiroff's letter dated 10 January 2014 and therefore had failed in its fiduciary duty, and it would appear that the board's communication dated 25 October 2016 also accused the then appellant of lying. The EPO was aware that an estoppel situation existed because of the absence of a procedural provision in the EPC for extending the four-month time limit for filing the statement of grounds of appeal, although Mr Stanimiroff needed time to find a new representative. The EPO chose not to accept communications; the implication of this unusual action was that it acknowledged that the then applicant had no representative, contrary to what was written in the correspondence. The applicant was responsible for the representative's actions but could not terminate his contract if he had concerns about the representative. Was the EPO's level of fiduciary responsibility lower than common-law requirements?

If the board considered that after estoppel a good-faith argument was relevant, documents regarding good-faith correspondence could be submitted. Chronology should be taken into account. The documents filed by Mr Stanimiroff himself could be presented as part of the chronological actions taken by the layman. Further, when the EPO received the first email from Mr Stanimiroff, it had to be aware of the naivety of the request. The applicant

too had changed, resulting in a financial cost to the previous applicant.

XXX. At the oral proceedings the Chairman noted that the board understood from the written submissions on file that the appellant had requested that her rights be re-established pursuant to Article 122 EPC in respect of the period for filing a statement setting out the grounds of appeal in accordance with Article 108, third sentence, EPC and Rule 99 EPC, that the decision under appeal be set aside and that a European patent be granted on the basis of the application documents filed with letter dated 4 June 2016 and received on 10 June 2016. The Chairman further noted that on the first page of the appellant's letter dated 10 September 2014 it was stated inter alia that "T*he Applicant also requests that the text "Text intended for grant" appearing on the European Patent Register on 24 January 2013 be removed or changed*."

At the end of the oral proceedings the chairman announced the board's decision.

Reasons for the Decision

Applicable EPC provisions

1. The present application entered the European phase on 9 May 2008, i.e. after entry into force of the revised European Patent Convention (EPC) on 13 December 2007. Thus, on the latter date, the present application was pending as an international application but not as a European one. Therefore the transitional provisions, which apply to European patent applications pending at the time of the entry into force on 13 December 2007 in

accordance with Article 7(1), second sentence, of the Revision Act of 29 November 2000 and the decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006 (Special edition No. 1, OJ EPO 2007, 89), do not apply to the present application.

Procedural matters

2. Party to the present appeal proceedings

The right to file an appeal against a decision of a first-instance department is afforded to all parties who were involved in the proceedings before the first-instance department and who were adversely affected by the contested decision (Article 107, first sentence, EPC).

Since the contested refusal decision mentioned Mr Stanimiroff as applicant and adversely affected him, the right to appeal against the decision was afforded to Mr Stanimiroff.

The present European patent application has been transferred to the appellant, whose residence is in the United Kingdom and thus within the territory of an EPC contracting state. This transfer took effect vis-à-vis the EPO on 19 December 2014 (see EPO's communication dated 15 January 2015) and thus after the notice of appeal and the request for re-establishment of rights had been filed. From that date on she has therefore been entitled to exercise the rights to the present application and to act in the present appeal proceedings. The appellant's letters dated 14 December 2016 and 17 March 2017 refer to "the organisation". According to the documents on file,

however, no organisation is party to the present proceedings, but only Mrs Harrower as applicant and appellant. It follows from this that, as from 19 December 2014, the appellant became party to the present appeal proceedings and, consequently, they had to be continued with her.

3. Representation

3.1 Articles 133 and 134 EPC together with Rule 152 EPC and the Decision of the President of the EPO dated 12 July 2007 on the filing of authorisations (OJ EPO 2007, Special edition No. 3, 128; henceforth "decision of the President") provide a complete, self-contained code of rules of law on the subject of representation in proceedings established by the EPC.

3.2 Article 133 EPC lays down the general principles of representation in proceedings established by the EPC. Article 133(1) EPC stipulates that, subject to Article 133(2) EPC, no person is compelled to be represented by a professional representative in proceedings established by the EPC. However, according to Article 133(2) EPC, natural persons not having their residence in an EPC contracting state must be represented by a professional representative (Article 134(1) EPC) or a legal practitioner (Article 134(8) EPC) and act through him in all proceedings established by the EPC, other than in filing the European patent application.

3.3 It follows that, according to Article 133(2) EPC, Mr Stanimiroff, whose residence is in New Zealand and thus not within the territory of an EPC contracting state, had to be represented by a professional representative (Article 134(1) EPC) or a legal practitioner

(Article 134(8) EPC) and act through him in all proceedings established by the EPC, other than in filing the European patent application. Therefore, also in appeal proceedings, Mr Stanimiroff had to be represented by and act through a professional representative (or a legal practitioner).

3.4 The representative was duly appointed when the EPO was informed of a change of representative on 4 March 2013. Rule 152(1) EPC provides that the President of the EPO determines the cases in which a signed authorisation must be filed by representatives acting before the EPO. Since the EPO had been notified that the previous representative's authorisation had terminated, the filing of an authorisation of the representative was not required (Rule 152(1) EPC and Article 1(2), first sentence, of the decision of the President). The board concludes from this course of action that Mr Stanimiroff knew how a change of representative takes place in proceedings before the EPO.

3.5 The appellant challenges the point in time at which the authorisation of the representative terminated.

According to Rule 152(8) EPC, a representative is deemed to be authorised until the termination of his authorisation has been communicated to the EPO. This legal fiction means that, if or for as long as the termination of an authorisation is not communicated to the EPO, the authorisation remains effective vis-à-vis the EPO even though, for example, as between the party and its representative, the contract which they entered into has been dissolved or the party has - vis-à-vis the representative - revoked the authorisation that it gave him. For the sake of completeness, it is also pointed out that, in the case of a change of

representative involving professional representatives, the provisions of Article 1(2) of the decision of the President also apply, i.e. usually either the termination of the authorisation of the previous representative is communicated to the EPO or the new representative files an individual authorisation (original and one copy) or a reference to a general authorisation already on file. It follows that, contrary to what the appellant submitted, it is not the EPO which dissolves a contract between a party to the proceedings before the EPO and its representative. The appellant is therefore correct in saying that a party has the right to terminate the contract with its representative and that the termination of such contract is governed by the national law applicable and not by the EPC. Of course, the same must apply if the representative wishes to terminate his contract with his client. However, in view of Rule 152(8) EPC and the decision of the President, the responsibility for informing the EPO about the termination of the contract between a party and its representative before the EPO lies with the represented party, irrespective of whether or not it has its residence in an EPC contracting state, or with its representative. It is only when the EPO receives such information that, depending on the content of the information, it might have to determine on the basis of the documents filed whether a contract between a party to the proceedings before the EPO and its representative has indeed been terminated. The board emphasises that, just like the appointment of a representative vis-à-vis the EPO and the filing of an authorisation as prescribed by Rule 152(1) EPC and the decision of the President, the communication about the termination of an authorisation of a representative vis-à-vis the EPO is of fundamental

importance for establishing whether the EPO is dealing with the entitled representative.

In the present case, Mr Stanimiroff's letter received at the EPO on 17 January 2014 contains *inter alia* the following statement: "*After consideration I have decided that it is not an ideal situation having my current patent attorney represent me. ... So why I am writing, is to ask if there is some facility that can provide me with more time to find a patent attorney and prepare an appeal application.*" In the board's view, this is not a clear statement that Mr Stanimiroff was withdrawing the authorisation for the representative in the present appeal proceedings or that he had changed the representative. The board rather interprets said letter and his further letter received at the EPO on 17 January 2014 as indicating that he **intended** to change his patent attorney. However, informing the EPO about an intention to change the representative cannot be equated with a clear withdrawal of an authorisation under Rule 152(7) EPC or with the communication of the termination of the authorisation as mentioned in Rule 152(8) EPC. Both cases concern a procedural declaration which, according to established jurisprudence of the boards of appeal, in the interest of legal certainty has to be unambiguous. Similar considerations must apply to Mr Stanimiroff's email, which was sent to the representative on 28 November 2013 and filed by the representative on 22 September 2014 for the first time in the present appeal proceedings. According to the wording of the last line of the email ("*I don't think that you are the right person to represent the appeal, so once the fees are paid I will find someone else to represent the appeal*"), an appointment of a new representative and thus the termination of the authorisation of the

representative was dependent on a condition, i.e. the payment of fees. However, since it is not clear which fees are meant and whether they have been paid, it has not been possible to assess if and when this condition was met. In fact, even after said letters and said email, the representative continued to act on behalf of Mr Stanimiroff, filing the request for re-establishment of rights together with the statement of grounds of appeal. Moreover, in the course of the present appeal proceedings, the EPO has never been informed of an appointment of a new representative, which would have been another option for Mr Stanimiroff because, under the EPC, he was not obliged to keep the same representative if he did not wish to do so. Therefore, in accordance with Rule 152(8) EPC, the representative was deemed to be authorised until the termination of his authorisation had been communicated to the EPO by the representative himself in his letter dated 17 October 2014.

3.6 The appellant has her residence in the United Kingdom and thus within the territory of an EPC contracting state and therefore, under Article 133(1) and (2) EPC, she does not have to be represented by a European professional representative (or by a legal practitioner) and act through him in proceedings established by the EPC. Consequently, unlike Mr Stanimiroff, she herself had the right to act in the present appeal proceedings, but only as from 19 December 2014.

4. Cancellation of the oral proceedings scheduled for 10 January 2017 and fixing a new date of oral proceedings

According to Article 119, first sentence, EPC, summonses must be notified by the EPO in accordance with the Implementing Regulations. Notifications are governed by Rules 125 to 130 EPC. Rule 126(1), first sentence, EPC provides that summonses must be notified by registered letter with advice of delivery or equivalent.

4.1 First summons

Since no advice of delivery of the first summons or equivalent had been received by the EPO, the appellant was invited by a communication from the board dated 8 December 2016 to acknowledge receipt of the first summons. In the appellant's reply dated 14 December 2016, it was stated that a "*document has been found on file dated 25 October 2016, sent to the current applicant*". The board takes the view that this statement indicates that the appellant only became aware of the first summons via online file inspection. However, neither this statement nor any other statement in the appellant's letter can be considered as an acknowledgement of receipt of the first summons. Therefore, at the date of receipt of the appellant's letter, the board could not establish whether and, if so, when the first summons had reached the appellant. Thus it could not be verified whether the first summons had been duly notified, i.e. whether it complied with the requirement to give at least two months' notice (Rule 115(1), second sentence, EPC). Consequently, the oral proceedings scheduled for 10 January 2017 had to be cancelled and a new date of oral proceedings had to be fixed.

After the cancellation of the first oral proceedings on 9 January 2017, the board received a further letter

from the appellant dated 17 December 2016 and filed on 9 January 2017 at the EPO. In this letter the appellant acknowledged receipt of the first summons, but did not indicate when she had received it. Hence, it was still not clear whether the first summons complied with the requirement to give at least two months' notice, pursuant to Rule 115(1), second sentence, EPC. Moreover, this letter also states: "*Written confirmation and details of such were sent on 4 December 2016 (please see receipt, tracking number and confirmation of delivery on 10 December 2016).*" However, there is no letter on file which is dated 4 December 2016 or which was received on 10 December 2016 at the EPO. Consequently, even if the appellant's letter dated 17 December 2016 had reached the board before the first oral proceedings were cancelled, their cancellation would still have been necessary. Therefore, the board was not satisfied that the first summons complied with the requirement to give at least two months' notice, pursuant to Rule 115(1), second sentence, EPC. Consequently, the oral proceedings scheduled for 10 January 2017 had to be cancelled.

4.2 Second summons

The second summons was sent to the appellant on 18 January 2017. Again no advice of delivery of the summons to oral proceedings or equivalent was received by the EPO, and the appellant was therefore invited by a communication dated 10 March 2017 to acknowledge receipt of the second summons. It is not clear from the appellant's reply to this invitation, which was received on 21 March 2017, when the appellant received the second summons. However, in reply to an investigation request in respect of the second summons, the postal service, Deutsche Post AG, confirmed that

the appellant received the second summons on 24 January 2017. Therefore, the board was satisfied that the second summons complied with the requirement to give at least two months' notice, pursuant to Rule 115(1), second sentence, EPC. Consequently, the oral proceedings scheduled for 25 April 2017 could be held.

5. Absence of the appellant at the oral proceedings of 25 April 2017

5.1 As announced in advance, the duly summoned appellant did not attend the oral proceedings. The proceedings were however continued without the appellant in accordance with Rule 115(2) EPC.

According to Article 15(3) of the Rules of Procedure of the Boards of Appeal (RPBA, published in OJ EPO 2007, 536 ff.), a board "*shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case*".

The purpose of oral proceedings is to give the party the opportunity to present its case and to be heard. However, a party gives up that opportunity if it does not attend the oral proceedings. This view is supported by the explanatory note to Article 15(3) (former Article 11(3) RPBA) which reads:

"This provision does not contradict the principle of the right to be heard pursuant to Article 113(1) EPC since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity" (see CA/133/02 dated 12 November 2002).

In view of the above, the board takes the view that the duly summoned appellant, who of her own volition did not attend the oral proceedings, cannot be placed in a more advantageous position than she would have been if she had attended. The appellant's voluntary absence cannot therefore be a reason for the board not to raise issues it would have raised if the appellant had been present.

5.2 Also the fact that in the notice of appeal a telephone interview, a personal interview, or oral proceedings under Article 116 EPC (in that order of preference) were requested before any adverse decision was taken, was not a reason for the board to delay its decision.

According to established jurisprudence, Article 116(1) EPC gives every party the right to oral proceedings in appeal proceedings (cf. Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, III.C.1.1). However, it does not give parties the right to informal communication such as interviews or telephone consultations in proceedings before the boards of appeal (see for example decisions T 552/06, T 263/07, T 1984/07). Hence the board was not required to contact the appellant and hold an interview with her in person or by telephone - conducted for instance by the rapporteur - either before or on the day of the oral proceedings.

5.3 In view of the above, the voluntary absence of the appellant was not a reason for delaying the decision (Article 15(3) RPBA) and the board was also in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(5) and (6) RPBA).

6. Consideration of the party's requests and submissions on file

Mr Stanimiroff had to act through a representative in the present appeal proceedings. Therefore, the board cannot take into account requests and submissions filed in these appeal proceedings before 19 December 2014, which were made neither by the representative nor endorsed by him (see also decisions T 213/89, point 2 of the Reasons; T 717/04, point 1 of the Reasons; and J 4/10, point 5.6 of the Reasons). This of course does not apply to submissions which exclusively concern the appointment or change of a representative or the filing of an authorisation or of any information that the representative's authorisation has terminated.

Regarding the appellant's submission that the EPO could not "*legally communicate with applicants outside the European Union*" without the representative's consent, the board notes that there is nothing in the EPC which prevents the EPO, without such consent, from communicating with or notifying communications to parties not resident in an EPC contracting state. In particular, Article 133(2) EPC does not prevent the EPO from doing that. Article 133(2) EPC solely concerns whether and to what extent these parties can act in proceedings established by the EPC. Moreover, under Rule 152(3) and (2) EPC, if a party whose residence or place of business is not in an EPC contracting state has not appointed a representative as required by Article 133(2) EPC, the EPO must invite it to do so within a specified period. It goes without saying that, if a representative is appointed, the EPO has to keep him informed, e.g. by sending him a copy, as it did in

the present case, of any communications it sends direct to the party.

In view of the above, the board has considered all requests and submissions presented in the present appeal proceedings by the representative or endorsed by him before 19 December 2014. For establishing when the representative's authorisation terminated in the present case, the board has also taken into account Mr Stanimiroff's submissions on this matter and in particular his letter dated 10 January 2014 and received at the EPO on 17 January 2014.

The board also takes into account requests and submissions made by the appellant as from 19 December 2014.

Admissibility of the appeal

7. Requirements of Article 108 EPC

According to Article 108, first sentence, EPC, notice of appeal has to be filed at the EPO within two months of notification of the decision. The second sentence of this provision stipulates that the notice of appeal is not deemed to have been filed until the fee for appeal has been paid.

In the present case, the decision under appeal was issued on 25 September 2013 and deemed to be notified on 5 October 2013 (Article 119 and Rule 126(1) and (2) EPC). Accordingly, the period specified in Article 108, first sentence, EPC expired on 5 December 2013 (Article 120(b) and Rule 131(4) EPC). Therefore, on

2 December 2013, the notice of appeal was filed and the appeal fee was paid in due time.

For an appeal to be admissible, it is also necessary that, within four months of notification of the decision, a statement setting out the grounds of appeal be filed in accordance with Article 108, third sentence, and Rule 99(2) EPC. Under the EPC, this four-month period is not extendable because it is fixed by the European Patent Convention itself, namely its Article 108, third sentence. This conclusion is in line with the provisions of Article 120(b) and Rule 132(2) EPC because they only allow extension of periods specified by the EPO. Decisions T 79/99 and J 12/07, cited by the appellant, do not exclude it, since both decisions concern periods specified by the EPO. It goes without saying that the Guidelines for Examination in the EPO, which were cited by the appellant, can only refer to the extension of periods specified by the EPO.

In the present case, the four-month period expired on 5 February 2014 (Article 120(b) and Rule 131(4) EPC). Neither the notice of appeal nor any other document filed during said four-month period contains anything that could be regarded as a statement of grounds of appeal pursuant to Article 108 EPC and Rule 99(2) EPC. A statement setting out the grounds of appeal was filed on 10 September 2014 and thus not in due time. The appeal therefore has to be rejected as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC, unless the appellant's request for re-establishment of rights is allowed or the board sees in the present case a breach of the appellant's legitimate expectations.

8. Request for re-establishment of rights (Article 122 and Rule 136 EPC)

8.1 In the present case, the representative filed the request for re-establishment of rights and the statement of grounds of appeal. It is only after filing this request that the transfer of the present European patent application took effect vis-à-vis the EPO. So the appellant, as Mr Stanimiroff's legal successor, may pursue the request for re-establishment of rights as if it were her own, provided that she gives notice to this effect. The appellant did indeed do so several times.

Therefore, the present case differs from that underlying decision J 10/93 (OJ EPO 1997, 91), in which the request for re-establishment of rights was not filed by the original applicant but only by his successor in title.

However, for establishing whether the requirements of re-establishment of rights are fulfilled, the party concerned is Mr Stanimiroff, since the transfer of the present application took effect vis-à-vis the EPO on 19 December 2014 and therefore after the four-month period under Article 108, third sentence, EPC had expired. According to established EPO jurisprudence, the duty of due care under Article 122(1) EPC applies first and foremost to the applicant himself and then, by virtue of the delegation implicit in his appointment, to the professional representative (see for example decisions J 3/93, point 2.1 of the Reasons; J 17/03, point 5 of the Reasons; J 7/12, point 3 of the Reasons; T 1401/05 of 20 September 2006, point 13 of the Reasons). In considering it, the boards of appeal have ruled in numerous decisions (for example, T 287/84, OJ EPO 1985, 333) 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 period concerned expired. This means that the steps the applicant took to observe the time limit have to be judged solely on the basis of the circumstances as they were at that time (T 667/92 of 10 March 1994, point 3 of the Reasons; T 381/93 of 12 August 1994, point 3 of the Reasons).

8.2 According to Article 122(1) EPC, an applicant can have his rights re-established upon request if, in spite of all due care required by the circumstances having been taken, he was unable to observe a time limit vis-à-vis the EPO.

The word "unable" in Article 122(1) EPC implies an objective fact or obstacle preventing the action required from being taken. Unawareness of the expiry of a time limit must be distinguished from a deliberate course of action taken by the applicant due to tactical or strategic considerations. Article 122 EPC is an exceptional means of judicial remedy, not a usual way of extending an initial time limit. In decisions T 413/91 and J 2/02, the boards have also taken this approach on the legal interpretation of the term "unable" in Article 122(1) EPC. The board considers these decisions relevant for the present case, and therefore does not share the appellant's view that they are irrelevant.

It is clear from the submissions on file and in particular from the EPO's email sent to Mr Stanimiroff on 21 January 2014 (see copy annexed to EPO's communication dated 22 January 2014 and sent to the representative) that Mr Stanimiroff was aware of the

exact date of expiry of the four-month period for filing a statement of grounds of appeal.

So the question arises whether Mr Stanimiroff deliberately refrained, for motives extraneous to the proceedings, from instructing his representative to file the statement of grounds of appeal, and intentionally allowed the four-month period to expire.

According to the submissions on file, Mr Stanimiroff disagreed with the representative's interpretation regarding the prior art, as expressed in the latter's email dated 13 November 2013, and thus considered that the situation with the representative "had become untenable". However, taking into account the course of action that occurred after the aforementioned email, it is difficult to see why the situation described would have objectively prevented Mr Stanimiroff from instructing his representative to file a statement of grounds of appeal within the period prescribed by the EPC. The board notes that the representative filed the notice of appeal on 2 December 2013 and thus after the date of his aforementioned email. Moreover, contrary to the submissions on file, Mr Stanimiroff was represented in the appeal proceedings by the representative at the relevant point in time, i.e. at the date of expiry of the four-month period for filing a statement of grounds of appeal. In fact, throughout the present appeal proceedings, Mr Stanimiroff has not informed the EPO or the board that he has withdrawn the authorisation for the representative or has appointed a new representative. Therefore, the representative was deemed to be authorised until the termination of his authorisation was communicated to the EPO. This is confirmed by the fact that the representative filed the statement of grounds of appeal together with the

request for re-establishment of rights under Article 122 EPC on 22 September 2014. It was only afterwards that the authorisation of the representative was terminated, namely as from 17 October 2014 when the representative informed the EPO of his withdrawal.

In view of the foregoing, the board concludes that Mr Stanimiroff, who had the same representative throughout the appeal proceedings until 17 October 2014, deliberately refrained from instructing his representative to file the statement of grounds of appeal before the expiry of the four-month period and thus intentionally allowed this period to expire. He decided to instruct his representative to file the statement of grounds of appeal only with the request for re-establishment of rights under Article 122 EPC dated 22 September 2014. Since Mr Stanimiroff had an authorised representative at the relevant time, the argument that he "did not have enough time to resolve the situation" is not convincing.

However, even assuming that Mr Stanimiroff had no authorised representative at the relevant time and intended to entrust the matter to a new representative, he deliberately did not undertake any steps necessary for filing a statement of grounds of appeal in due time. While Mr Stanimiroff was certainly free to change his representative - as he had already done in 2013 during the examination proceedings - he should have been aware that he could not handle the matter himself in the meantime, and that under Article 133(2) EPC he had to appoint a new representative. He should have also been aware that he had to arrange to appoint a new representative promptly, and at the latest before expiry of the four-month period, so that the new representative could file the statement of grounds of

appeal in due time. However, according to the submissions on file, he deliberately chose not to appoint a new representative.

A party, however, cannot deliberately choose not to fulfil the conditions for a valid appeal, and then achieve an appellate review through the back door of a request for re-establishment of rights (see also decision T 413/91, point 4 of the Reasons). Thus, the board concludes that the "untenable" situation with the representative did not objectively prevent Mr Stanimiroff from instructing his former or a new representative to file a statement of grounds of appeal within the four-month period under Article 108 EPC. Not instructing a representative for strategic or tactical reasons falls however outside the scope of Article 122 EPC, and deprives the applicant from the possibility of invoking this article (see also decision J 2/02, point 7 of the Reasons). Consequently, Mr Stanimiroff has not fulfilled the first condition under Article 122(1) EPC. It follows that, on that ground alone, the request for re-establishment of rights has to be rejected.

8.3 Even assuming, in favour of the appellant, that Mr Stanimiroff mistakenly believed that the EPC allowed the four-month period for filing the statement setting out the grounds of appeal to be extended, and that he would be given more time to instruct a representative to file the grounds of appeal, the request for re-establishment of rights could not be granted for the following reasons.

8.3.1 A request for re-establishment of rights in respect of the period specified in Article 108, third sentence, EPC has to be filed in writing within two months of the removal of the cause of non-compliance with the period,

but at the latest within one year of expiry of the unobserved time limit (Article 122(2) and Rule 136(1), first sentence, EPC). The request is not deemed to have been filed until the prescribed fee has been paid (Article 122(2) and Rule 136(1), third sentence, EPC).

According to the established jurisprudence of the boards of appeal, the removal of the cause of non-compliance occurs on the date on which the person responsible for the application (i.e. the applicant or his authorised representative) is made aware of the fact that a time limit has not been observed (J 27/88, point 2.3 of the Reasons; T 191/82, OJ EPO 1985, 189; T 287/84, supra). The removal of the cause of non-compliance has to be determined in the light of the circumstances of the case in point (see e.g. J 27/90, OJ EPO 1993, 422). If the failure to observe the prescribed time limit was based on an error of law, the cause of non-compliance is removed on the date on which the error of law should have been noticed. This approach is in line with the finding in decisions J 19/04 and T 1026/06 regarding the basic question of when the cause of non-compliance is removed in case of an error of law. That the latter decision was written in German and related to the re-establishment of rights in respect of the prescribed period for filing a notice of appeal is therefore not a reason for not considering it in the present case. Further, the cause of non-compliance with a time limit is removed not when the underlying error is actually discovered by the person concerned but when he or she ought to have noticed it, if all due care had been taken (see decisions J 27/88, point 2.7 of the Reasons, J 27/90, supra, point 2 of the Reasons, T 840/94, point 2 of the Reasons).

In the present case, Mr Stanimiroff received the EPO's email dated 21 January 2014 which states: "*There is no possibility to extend the time for filing the grounds of appeal in the above mentioned application. The time limit for doing so expires on 5 February 2014.*" Hence Mr Stanimiroff was informed on 21 January 2014 (i.e. two weeks before the expiry of the period for filing the grounds of appeal) that this period was non-extendable, and he should have noticed the error. Therefore, on that date the cause of non-compliance was removed. Consequently, the two-month period for filing a request for re-establishment of rights and for performing the omitted act expired on 21 March 2014 (Rule 131(4) EPC). However, the request for re-establishment of rights and the statement of grounds of appeal were filed (and the requisite fee was paid) on 22 September 2014, and thus long after expiry of the two-month period under Article 122(2) and Rule 136(1), first sentence, EPC. Therefore, the request for re-establishment of rights is inadmissible for that reason too.

8.3.2 Regarding "*the two months of removal of the cause of non-compliance*", the appellant referred to decision T 428/98 (OJ EPO 2001, 494). In that decision, it was held that if a communication from the EPO informing an applicant that he has missed a time limit has duly been served, it may, in the absence of circumstances to the contrary, be assumed that the removal of the cause of non-compliance was effected on the actual date of receipt of this communication.

Even supposing in favour of the appellant that the cause of failure to file the statement of grounds of appeal was removed on 22 July 2014 (the date when the representative received the board's communication dated

15 July 2014), and that, therefore, the two-month period under Article 122(2) and Rule 136(1), first sentence, EPC expired on 22 September 2014 (Rule 131(4) EPC), meaning that the request for re-establishment of rights was filed in due time, the question arises whether Mr Stanimiroff has taken "all due care required by the circumstances" as prescribed by Article 122 EPC. In accordance with decision T 30/90, which was cited by the appellant, the board has to assess whether Mr Stanimiroff's conduct throughout the period after the decision under appeal was issued was indicative of "all due care required by the circumstances". When determining this, the word "all" is important, and failure to observe a time limit has to be the result of an oversight, not a culpable error (see for example decisions G 1/86, OJ EPO 1987, 447, and T 250/89, OJ EPO 1992, 355).

With regard to the requirement of "all due care", the fact that the failure to instruct a representative to file a statement setting out the grounds of appeal within the prescribed period might have resulted from a misinterpretation of the EPC by Mr Stanimiroff is irrelevant. It is clear from the established jurisprudence of the boards of appeal that a mistake of law is not a ground for re-establishment of rights (see for example decision J 31/89), not even in the case of an individual applicant. In the case of individual applicants, a lesser degree of due care is acceptable than in the case of professional representatives or the patent departments of large firms, but even then, ignorance of the law cannot be accepted as an excuse (see also decision J 5/94, point 3.1, last sentence, of the Reasons). In other words, an individual applicant such as Mr Stanimiroff cannot rely on his ignorance of European patent law. He therefore should have

familiarised himself with the relevant EPC provisions and the jurisprudence on the possibility of extending the period for filing a statement of grounds of appeal, or should at least have sought advice about it from his existing representative or a new one. That Mr Stanimiroff might have misinterpreted the EPC because he possibly drew the wrong conclusions from decisions T 79/99 and J 12/07, which he referred to in his reply dated 14 February 2014, is irrelevant for the present case. As set out above, the relevant articles and rules of the EPC make it very clear that the four-month period under Article 108 EPC is non-extendable. Moreover, in its email dated 21 January 2014 the EPO had clearly informed him that there was no possibility of extending it. Therefore, there was no excusable basis for any such erroneous interpretation of the EPC on the part of Mr Stanimiroff.

8.3.3 The appellant argued that Mr Stanimiroff "*missed the deadline for submitting a written document for the appeal*" because at that time he had no patent attorney and thus no way to communicate with the EPO and, by the EPO's definition, not enough time to resolve the problem.

The board does not accept this argument. Mr Stanimiroff was informed by the EPO's email dated 21 January 2014 that the period for filing the statement of grounds of appeal was non-extendable and expired on 5 February 2014. In this situation, according to the appellant's submissions, Mr Stanimiroff chose to terminate his contract with his existing representative and entrust the matter to a different one. While he was certainly free to change his representative, he should have been aware that, under Article 133(2) EPC, he could not in the meantime handle the matter himself and that he had

to appoint a new representative as soon as possible. Further, in view of the content of the email dated 21 January 2014, he could also not simply rely on the assumption that the information from the EPO that there was "*no possibility to extend the time limit for filing the grounds of appeal*" was wrong. The standard of all due care enshrined in Article 122(1) EPC requires that, in case of doubt or legal uncertainty, the applicant takes all such steps as can be reasonably expected from a diligent person. As he apparently had doubts about said information, Mr Stanimiroff should at least have sought advice about the possibility of extending the prescribed period - either from his existing or another representative - before the four-month period expired on 5 February 2014. Instead, Mr Stanimiroff chose to contact the EPO again on 14 February 2014, i.e. after expiry of this period, querying the EPO's information and submitting more arguments in support of an extension. As is apparent from the submissions on file, he did not undertake any steps to instruct his existing representative or a new representative to file the statement of grounds of appeal before 5 February 2014. However, the requirement to take all due care means that the applicant must take all possible steps to ensure that he can properly and punctually do whatever is required during the grant procedure to prevent any loss of rights (J 6/07, point 2.5 of the Reasons; see also J 2/02, point 8 of the Reasons). It follows that, taking all due care, Mr Stanimiroff should and could have instructed the representative or a new representative to file the statement of grounds of appeal before the expiry of the prescribed period.

In these circumstances, the board has come to the conclusion that Mr Stanimiroff also failed to take all due care. Consequently, it is irrelevant whether the

representative took all due care required by the circumstances.

8.4 The appellant has invoked the principle of proportionality because "*it would appear that there is a legal precedent in the absence of procedural provision in the convention*". In support of this argument, she referred to decision T 1465/07, where the board interpreted Article 122 EPC 1973 in the context of the right of access to a court, taking into account the case law of the European Court of Human Rights and the European Court of Justice, and held that the principle of proportionality applied to limitations of the right of access to the boards of appeal, such as rules on time limits, by legislative measures or their application. The appellant also submitted that, regarding all due care, "*there seemed to be selective bias; a badly written patent was worth the same as no patent*".

The board finds the appellant's arguments on this point without merit for the following reasons:

In decision T 1465/07, the board held: "*The principle of proportionality applies to limitations of the right of access to the boards of appeal, such as rules on time limits, by legislative measures or their application. This means that those measures or their application must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures or ways of applying them recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.*" (Headnote 1; see also point 13 of the

Reasons). In said decision, the board also found: "*As for the application of Article 108 EPC 1973 in conjunction with Article 122 EPC 1973 the principle of proportionality has the consequence that the interpretation of those provisions must not impose means that are not appropriate, necessary or disproportionate in relation to the aim sought to be achieved, namely legal certainty and the proper administration of justice by avoiding any discrimination or arbitrary treatment. Correspondingly, the conditions for granting restoration, in particular the requirement of due care, must not be interpreted in an excessive manner that unreasonably restricts access to the board and thus prevents the board from deciding on the merits of the case. This is the balance between legal certainty and proper administration of justice on one hand and substantive justice on the other, which has been struck under the EPC in this context. It follows that the principle of proportionality must always be applied in connection with the interpretation of those conditions, which determine whether or not an application for re-establishment can be allowed. It is not permissible to consider the result of a procedural irregularity, such as the loss of a patent or patent application, separately in relation to the kind of procedural irregularity and allow the application because of the severity of the result and a minor degree of irregularity, even though the conditions of Article 122 EPC are not met, no matter whether a case is "borderline" or not.*" (Headnote 2; see also point 15 of the Reasons).

It follows from these findings that the provisions of the EPC seek to strike a balance between legal certainty and the proper administration of justice on the one hand, and substantive justice on the other (see

also decisions J 13/11 and T 592/11). Decision T 1465/07 is also in line with established jurisprudence of the boards of appeal holding that the time limits in the EPC aim to serve legal certainty and proper administration of justice by avoiding any discrimination or arbitrary treatment and that the severe consequence of a loss of a patent application cannot be considered in isolation but has to be assessed against the values of legal certainty and proper administration of justice that are embodied by the time limits appropriate to Article 122 EPC.

The board agrees with the finding in decision T 1465/07 that the principle of proportionality prohibits an excessive interpretation of the due care requirement that unreasonably restricts access to the boards of appeal.

As set out above, the board in the present case takes the view that Mr Stanimiroff, taking all due care, should have taken the following measures after he had received the email dated 21 January 2014 from the EPO:

(a) If he had doubts about the information from the EPO, he should have familiarised himself with the relevant EPC provisions and the jurisprudence on the possibility of extending the period for filing a statement of grounds of appeal, or should at least have sought advice about it from his existing or a new representative before the four-month period expired on 5 February 2014.

(b) Mr Stanimiroff, as an applicant who under Article 133(2) EPC could not act in proceedings under the EPC, should have instructed his existing or a new representative to file the statement of

grounds of appeal before the expiry of the prescribed period.

The board is of the opinion that to expect an individual applicant to inform himself about EPC provisions, or instead to seek advice from a European professional representative, for example, is not disproportionate but the normal thing to do. It is also in line with the principle of proportionality, and does not unreasonably restrict access to the boards of appeal, to expect an individual applicant to authorise and instruct a representative in a timely manner that enables the statement of grounds of appeal to be filed before the expiry of the prescribed period. To expect this is in particular not disproportionate in the present case where Mr Stanimiroff had already changed his representative during the examination proceedings and, therefore, knew how this was done.

In addition, given that the legislator has provided only for re-establishment of rights under Article 122 EPC to remedy a failure to observe the four-month period for filing the statement of grounds of appeal, and has laid down onerous conditions for this, it can only be assumed that the legislator considered the importance of filing the grounds of appeal on time to justify severe consequences if the time limit was not met and all due care could not be shown, including the potential loss of an application for an important invention. This also means that, for the application of the provisions of Article 122 EPC, the importance of an application to the applicant, or the merit of the invention concerned, cannot be taken into account as a factor in favour of allowing re-establishment.

In view of the above, the board considers that applying "the principle of proportionality" in the manner the appellant seeks would vitiate the provisions of Article 122 EPC and render their application uncertain. In addition, the boards of appeal do not have the power to apply provisions of the EPC *contra legem*, i.e. in a manner contrary to their unambiguous meaning and purpose.

9. Application of Article 125 EPC; good faith and legitimate expectations

9.1 As far as Article 125 EPC and good faith in view of "the principles of procedural law generally recognised in the Contracting States" are concerned, the appellant's arguments are not convincing for the following reasons:

The EPC provides a complete, self-contained code of rules of law governing representation and the extension of time limits in proceedings established by the EPC. The procedure defined in the EPC for requesting re-establishment of rights is also self-contained and complete. Therefore, Article 125 EPC is not applicable to the present case since this provision requires "the absence of procedural provisions in the Convention".

9.2 With regard to the appellant's submissions on "good faith" and "fiduciary duty", the board cannot accept her point of view.

9.2.1 It is well established that the principle of protection of legitimate expectations applies in proceedings before the EPO (e.g. decisions of the Enlarged Board of Appeal G 5/88, OJ EPO 1991, 137, point 3.2 of the Reasons; G 2/97, OJ EPO 1999, 123). Users of the

European patent system are to be protected in their legitimate expectations and are not to be disadvantaged by conduct of the EPO which was misleading or erroneous (J 3/87, OJ EPO 1989,3; J 14/94, OJ EPO 1995, 825). This principle also requires the EPO to warn the applicant of any loss of rights if such warning can be expected in good faith, provided that the deficiency can be easily identified by the EPO. It further requires that communications addressed to applicants must be clear and unambiguous, i.e. drafted in such a way as to rule out misunderstandings on the part of a reasonable addressee.

In the present case the board sees nothing in the conduct of the EPO which could have given rise to a belief on Mr Stanimiroff's part that he could be given more time than the prescribed four-month period for filing his statement of grounds of appeal. On 17 January 2014, Mr Stanimiroff filed a request for extension of that period because he had to find a new representative and, by email dated 21 January 2014, i.e. about two weeks before that period expired, he received the clear and unambiguous information from the EPO that said period was not extendable and that the period for filing the grounds of appeal expired on 5 February 2014. The board fails to see that this communication from the EPO contained information which could have misled Mr Stanimiroff into the failure to act that caused the inadmissibility of his appeal. In addition, as explained above, the information which Mr Stanimiroff had received from the EPO was not erroneous; it was perfectly correct. Moreover, it was not readily apparent from Mr Stanimiroff's inquiry that he would subsequently challenge the EPO's reply to it. Nor did the EPO receive anything from him or the representative before 5 February 2014 indicating that

he would not file a statement of grounds of appeal on time. Only on 14 February 2014, i.e. after expiry of the prescribed four-month period, did the EPO receive Mr Stanimiroff's reply challenging the information it had given him. It follows that nothing on file implies that the EPO should have warned Mr Stanimiroff of an impending loss of rights following non-compliance with the four-month period for filing the grounds of appeal.

9.2.2 According to decision G 2/97 of the Enlarged Board of Appeal, it is also incumbent on the users of the European patent system who are parties to proceedings before the EPO to act in good faith. They are responsible for taking all necessary steps to avoid a loss of rights. There is also no justification for the suggestion that the principle of good faith imposes on a board an obligation to warn a party of deficiencies falling under the party's own responsibility. The appellant's responsibility for fulfilling the conditions of an admissible appeal cannot be devolved to the board of appeal. There can be no legitimate expectation on the part of users of the European patent system that a board of appeal will issue warnings about failing to meet such responsibilities. To take the principle of good faith that far would imply, in practice, that the boards of appeal would have to systematically assume the responsibilities of the parties in proceedings before them, a proposition for which there is no legal justification in the EPC or in general principles of law.

It follows from the above that, in the present case, Mr Stanimiroff must have been aware that he had to file the statement of grounds of appeal no later than 5 February 2014 and that he would be given no additional time to find a new representative. Although

Mr Stanimiroff was free to change his representative if he considered this necessary, it was his own responsibility to take all necessary steps to avoid a loss of rights regarding his appeal. This means that he should have promptly arranged for the appointment of a new representative, and at the latest before expiry of the four-month period, so that the new representative could have filed the statement of grounds of appeal in due time. He as party to proceedings before the EPO was expected to know the relevant provisions of the EPC, even if they are intricate (see decision J 27/92, OJ EPO 1995, 288, point 3.2 of the Reasons). It follows that Mr Stanimiroff's responsibility for finding a new representative in time to ensure that the prescribed period for filing the grounds of appeal was met cannot be devolved to the board. There can be no legitimate expectation on the part of the appellant that the board should have warned Mr Stanimiroff about what the appellant calls "estoppel situation".

9.2.3 The appellant also submitted that the board failed to demonstrate "fiduciary responsibility". As explained above, the board had to apply the relevant EPO provisions and jurisprudence in the present case, and even in view of the so-called "estoppel situation" it did not have an obligation to warn Mr Stanimiroff that his appeal might be inadmissible if he did not find a representative in time to file his statement of grounds of appeal. The board therefore sees no breach of its "fiduciary duty" in the present case.

9.2.4 The appellant also referred to decisions J 27/94, T 840/94 (OJ EPO 1996, 680) and T 1908/09 and submitted that the board had acted in contravention of the generally recognised prohibition against "venire contra factum proprium" because:

(a) the EPO had written to Mr Stanimiroff at his private address; and
(b) in its communication dated 15 July 2014, the board made the statement "*In the board's view, this is not a clear statement that you withdrew ....*", which was ambiguous, and in view of the known "estoppel situation" it should have sought more clarification before making ambiguous comments; and
(c) although the board acknowledged the "estoppel situation" by highlighting Rule 152(8) EPC, it had sent communications to Mr Stanimiroff's private address.

However, the board does not accept the appellant's view. In decision J 27/94, the board held that it would contravene the principle of good faith if the EPO were allowed to contradict its earlier conduct of the proceedings which served as a basis for the applicant's decision on how to proceed, since this would constitute "venire contra factum proprium" which was not allowed in proceedings before the EPO (point 9 of the Reasons). In the present case, the board cannot recognise any such contradiction in its own or the EPO's conduct. The EPO, being aware that Mr Stanimiroff wished to change his representative, had informed him that there was no possibility to extend the four-month period for filing his statement of grounds of appeal. However, Mr Stanimiroff failed to observe this period. At no time throughout the entire appeal proceedings did any communication from the board or its registrar contradict this information. Regarding the question whether Mr Stanimiroff's representative was still authorised, the board followed the provisions on representation as explained above, which includes communications sent direct to Mr Stanimiroff's private address. There again the board did not contradict its

earlier conduct of the proceedings, but simply followed the relevant EPC provisions. Therefore, the board sees no violation of the generally recognised prohibition against "venire contra factum proprium" in its conduct.

Request for correction of entry in the European Patent Register

10. Lastly, the board turns to the request that the entry *"Text intended for grant"* appearing in the European Patent Register be removed or changed. Since the entry in the European Patent Register is not subject to the present appeal, the board takes the view that this request has to be dealt with by the competent department of first instance.

Conclusion

11. In view of the above, the appellant's request for re-establishment of rights has to be rejected and the board sees in the present case no breach of the legitimate expectations of the appellant. Thus the statement setting out the grounds of appeal was not filed in due time. The appeal therefore has to be rejected as inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is rejected.

2. The appeal is rejected as inadmissible.

The Registrar: The Chairman:

M. Schalow A. Lindner

Decision electronically authenticated