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**Datasheet for the decision
of 16 December 2020**

Case Number: T 0538/20 - 3.2.02

Application Number: 11704937.9

Publication Number: 2542286

IPC: A61M16/00, A61M16/20

Language of the proceedings: EN

Title of invention:

VENTILATION DEVICE

Patent Proprietor:

Forschungszentrum Borstel Leibniz-Zentrum für
Medizin und Biowissenschaften

Opponent:

Löwenstein Medical Technology GmbH + Co. KG

Headword:

Relevant legal provisions:

EPC Art. 122(1)

EPC R. 136(1)

Keyword:

Re-establishment of rights - (no)

Decisions cited:

G 0001/86, J 0002/86

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0538/20 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 16 December 2020

Appellant: Löwenstein Medical Technology GmbH + Co. KG
(Opponent) Kronsaalsweg 40
22525 Hamburg (DE)

Respondent: Forschungszentrum Borstel Leibniz-Zentrum für
(Patent Proprietor) Medizin und Biowissenschaften
Parkallee 1-40
23845 Borstel (DE)

Representative: Gerstein, Hans Joachim
Gramm, Lins & Partner
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 January 2020
rejecting the opposition filed against European
patent No. 2542286 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: S. Böttcher
C. Schmidt

Summary of Facts and Submissions

- I. The appeal is against the opposition division's decision posted on 2 January 2020 rejecting the appellant's opposition against the European patent No. 2 542 286 entitled "VENTILATION DEVICE".
- II. The appeal was filed on 28 February 2020, followed by the statement setting out the grounds of appeal dated 2 June 2020 and received on 3 June 2020.
- III. In a communication from the board's registrar issued on 29 June 2020, the appellant was informed that the statement setting out the of grounds of appeal had been filed out of time and that it should therefore expect the appeal to be rejected as inadmissible.
- IV. On 30 July 2020 the appellant filed a request for re-establishment of rights with respect to the time limit for filing the statement setting out the grounds of appeal.
- V. The appellant (opponent) requested either the re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal, or that the statement of grounds of appeal be deemed to have been received in due time pursuant to Rule 134(5) EPC.

The respondent (patent proprietor) requested that the request for re-establishment of rights be rejected and that the appeal be rejected as inadmissible.
- VI. The appellant argued that the Notice from the European Patent Office dated 16 April 2020 concerning the disruptions due to the COVID-19 outbreak (OJ 2020, A43)

was applicable to the case in hand and provided for an extension of the relevant time limit until 2 June 2020.

VII. With its request for re-establishment, the appellant submitted that on 2 June 2020 exceptional reasons had prevented it from filing the grounds. At 18.48 hrs on the day of the deadline its in-house representative had started to submit the letter setting out the grounds of appeal via fax using the computer fax equipment installed at the appellant's office. Since the representative had not yet received a confirmation of receipt or a notice that sending had failed, he sent the letter again at 20.27 hrs in the same way. After sending the second fax, the representative left the office. The next day he found two "delivery delayed" reports received at 22.58 hrs (for the first fax) and 00.27 hrs (for the second fax). The representative then informed the appellant's IT expert, who found that the computer fax equipment used at the representative's office was limited to a maximum file size of 10 MB and that the letter to be sent on 2 June 2020 had a size of 14 MB, attachments included.

The appellant stated that its computer fax equipment was normally configured to send faxes of up to 50 MB. However, the capacity had been inadvertently reduced from 50 to 10 MB when the appellant's telephone system was updated by an external technician between 22 and 25 April 2020; the appellant had not noticed this. Once the IT expert had reset the limit to 50 MB, the letter was sent to the EPO without issue at 11.02 hrs on 3 June 2020. The appellant was of the opinion that it missed the time limit because of a unique and unintended misconfiguration of its computer fax equipment. This isolated error did not change the fact

that the appellant had exercised all due care required to meet the time limit.

With a letter dated 8 December 2020 the appellant submitted an affidavit from its representative dated 7 December 2020. The representative declared that the appellant's company, a manufacturer of respiratory equipment, had an important role to play during the COVID-19 pandemic. To ensure employees could continue production while being adequately protected, special safety measures had been taken, including reducing contacts between the company's various divisions and introducing multi-shift operations. Employees also had to limit their presence at the office to certain times, which was why the appellant's representative had had to leave the office after sending the second fax.

The appellant's representative further affirmed that, on the evening of 2 June, he had spoken with the appellant's head of IT on the phone. The representative described how he had assumed the EPO's receipt of the fax was delayed because of the large number of deadlines expiring on that day. The head of IT had agreed and said that nothing could be done in that case because the company's fax was working properly. The head of IT had not been allowed to come to the office because of the restrictions in place.

In addition the appellant affirmed that, due to the pandemic, its postal service was considerably restricted until 15 June 2020.

VIII. The respondent argued that the representative had not taken all possible steps to ensure the letter was sent. The representative should not have left the office without having received a notification. Instead he

should have tried another way of sending the letter - for example by using a public copy shop or a conventional fax machine, to which he should have had access within the appellant's office building. The respondent also criticised the appellant for having waited until shortly before the deadline to submit the grounds of appeal, meaning that it was also responsible for the fact that technical support was not immediately available.

Reasons for the Decision

1. The request for re-establishment is admissible. It was filed in due time according to Rule 136(1) EPC, i.e. within two months from notification of the removal of the cause of non-compliance. The appellant (opponent) was also entitled to file such a request. It correctly pointed out that decision G 1/86 extended the scope of Article 122(1) EPC beyond its wording to also cover the time limit for the grounds of appeal to be filed by an opponent.
2. The board also accepts, in the appellant's favour, that the time limit to file the statement setting out the grounds of appeal ended on 2 June 2020. This, however, is based not on the Notice dated 16 April 2020, cited by the appellant, but on the Notice dated 1 May 2020 (OJ 2020, A60), which replaced the older notice and ultimately extended the time limit until 2 June 2020.
3. Under Article 122(1) EPC, for their rights to be re-established the requester must show that they missed the time limit despite taking all due care required by the circumstances of the case (Case Law of the Boards

of Appeal, 9th edition, III.E.5). As a "standard requirement" for due care in connection with meeting time limits, the case law of the boards normally requires that the appellant has arranged a proper system for dealing with the time limits and that the circumstances surrounding the case are special (see J 2/86, OJ 87, 362, point 4 of the reasons with respect to a time limit for the payment of a renewal fee).

4. The board is not convinced that the appellant exercised all due care to meet the time limit for filing the statement setting out the grounds of appeal.
 - 4.1 Despite there being other ways to send documents to the EPO, for example online filing, the appellant relied solely on the functioning of its computer fax system. Since these technical systems can be prone to faults, this alone makes the board question whether this satisfies the requirements of due care. This applies all the more in a time when technical support is not readily available. In any case, the appellant should have checked the configuration of the computer fax equipment after the maintenance work performed by the external company in April 2020.
 - 4.2 The efforts made on the evening of 2 June do not meet the requirements of all due care either. According to the representative's affidavit of 7 December 2020, the troubleshooting efforts were limited to considerations that the EPO's receiving equipment might be overloaded. In this respect, the board emphasises that stating that it was impossible to make a more qualified analysis of the problem contradicts the submission that the appellant's company had a shift system in place at that time. Against this background, the fact that the appellant's representative left the office without

having received a sent report despite two attempts to submit the grounds of appeal via computer fax also fails to satisfy the requirements of all due care.

- 4.3 Finally, it has to be noted that the case law of the boards on isolated errors in a normally satisfactory working system does not apply in this case. This case law was developed for deadline monitoring systems and requires further safety mechanisms or monitoring systems to be installed (see Case Law of the Boards of Appeal, 9th edition, III.E.5.4).

This case law cannot be applied to the failure of a technical system that occurred solely in the sphere of one party. Moreover, as explained before, the technical system that failed in this case was not backed up by any monitoring systems or safety mechanisms.

- 4.4 The request for re-establishment of rights for the time limit to file the grounds of appeal therefore has to be rejected.
5. In requesting that the statement of grounds of appeal be deemed to have been received in due time pursuant to Rule 134(5) EPC, the appellant is looking to have the late filing of the statement of grounds of appeal excused on account of the impact of the COVID-19 pandemic. However, this was why time limits had already been extended until 2 June 2020 by the aforementioned Notice from the European Patent Office dated 1 May 2020 concerning the disruptions due to the COVID-19 outbreak. The board sees no reason for any further extension.
6. The appeal therefore has to be rejected as inadmissible.

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:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated