

Veröffentlichung im Amtsblatt	Ja/ Nein
Publication in the Official Journal	Yes/ No
Publication au Journal Officiel	Oui/ Non

Aktenzeichen / Case Number / N^o du recours : T 210/89 - 3.5.1

Anmeldenummer / Filing No / N^o de la demande : 81 304 345.2

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 051 361

Bezeichnung der Erfindung: Radar apparatus

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : G01S 13/30

ENTSCHEIDUNG / DECISION

vom / of / du 20 October 1989

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /

Titulaire du brevet :

The Marconi Company Limited

Einsprechender / Opponent / Opposant : Hollandse Signaalapparaten B.V.

Stichwort / Headword / Référence : Re-establishment of rights by
opponent appellant/MARCONI

EPO / EPC / CBE Arts. 108, 1st sentence, 122, 125 EPC; Rule 36(5) EPC;
Decision of the President of the EPO dated 29.07.1987*)

Schlagwort / Keyword / Mot clé :

"Appeal not in existence" - "Re-establishment
of rights - appellant as opponent" -
"Principle of equality before the law"

Leitsatz / Headnote / Sommaire

An opponent (appellant) seeking to have his rights re-established under Art. 122(1) EPC, cannot rely on the principle of "equality before the law" (applying Art. 125 EPC), where appeal is not in existence for procedural reasons: distinguishing G 01/86, "Re-establishment of rights of opponent/VOEST ALPINE" (OJ EPO 1987, 447). He is not entitled to have his rights re-established under Art. 122(1) EPC when he misses the time limit for filing an appeal (Art. 108 1st sentence EPC).

2. The legal position of such an opponent/appellant differs from that of one whose appeal does exist, but whose statement of grounds of appeal is filed out of time: cf. G 1/86, "Re-establishment of rights of opponent/VOEST ALPINE" (OJ EPO 1987, 447).

3. Changes in the Rules of the EPC are non-retrospective (principle of legal certainty).

4. When the two-week period laid down by the President of the EPO pursuant to Rule 36(5) EPC in the decision dated 29.07.1987, OJ EPO 1987, 323*) has not been observed, the appeal is deemed not to have been received.

*) Legal situation before 1st July 1989

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vom / of / du 20 October 1989

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Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

The Marconi Company Limited

Einsprechender / Opponent / Opposant :

Hollandse Signaalapparaten B.V.

Stichwort / Headword / Référence :

Request for restoration of rights by
opponent/appellant

EPÜ / EPC / CBE

Arts. 122 & 125 EPC; Rule 36(5) EPC.

Schlagwort / Keyword / Mot clé :

"Appeal not in existence"

"Due care exercised by opponent/appellant"

"Restoration under Art. 122 EPC not available,
distinguishing GR01/86"

"Principle of equality before the law"

"Non-retrospective operation of Presidential
announcements"

Leitsatz / Headnote / Sommaire

Headnote follows

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number : T 210/89 - 3.5.1

DECISION
of the Technical Board of Appeal
of 20 October 1989

Appellant : Hollandse Signaalapparaten B.V.
(Opponent) Zuidelijke Havenweg 40
 P.O. Box 42
 NL-7550 GD Hengelo

Representative :

Respondent : THE MARCONI COMPANY LIMITED
(Proprietor of the patent) Marconi House
 New Street
 Chelmsford Essex CM1 1PL
 GB

Representative : Tolfree, Roger Keith
 GEC-Marconi Research Centre
 West Hanningfield Road
 Great Baddow
 Chelmsford
 Essex CM2 8HN
 GB

Decision under appeal : Decision of the Opposition Division of the European
 Patent Office dated 19 January 1989 rejecting
 the opposition filed against European patent
 No. 0 051 361 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : P.K.J. van den Berg

Members : J. Stephens-Ofner

C.G.F. Biggio

Statement of Facts and Submissions

- I. In this matter of an opposition to European patent No. EP-B-051.361, the Opposition Division, by decision dated 19 January 1989, decided to maintain the patent.
- II. The Opponent, (Appellant), Hollandse Signaalapparaten BV, of the Netherlands, filed a Notice of Appeal by telefax, on 29 March 1989, i.e. within the notional period allowed by Rule 78(3) EPC. At the same time the Appellant also paid the appeal fee.
- III. The Appellant failed to confirm his faxed Notice of Appeal in writing within the two-week period laid down by the President of the EPO pursuant to Rule 36(5) EPC (decision of the President of the EPO dated 29.07.87, OJ EPO 7/87, 323).
- IV. By communication dated 19 May 1989, and in compliance with Art. 113 EPC, the Appellant was advised of his omission and of the legal consequences thereof, namely, that the notice of Appeal will be deemed not to have been filed and that, accordingly, the appeal would likely be rejected as inadmissible. He was also invited to file observations within a period of two months, which he duly did by letter dated 30 May 1989 received on 1 June 1989. At the same time, and as an enclosure to his above-mentioned letter of observations, he sent a copy of the originally faxed Notice of Appeal.
- V. Unlike the original Notice of Appeal that was faxed to the EPO on the 29 March 1989, this enclosure bears the printed designation "verronden 29 maart 1969 per telefax", meaning that it was faxed on 29 March 1969 and at the bottom in

handwriting "confirmation copy verronden 30.03.89" meaning that a confirmation copy had been sent on 30.3.89.

- VI. The Appellant maintains that a written copy of his originally faxed Notice of Appeal was sent to the EPO on the 30 March 1989 in compliance with Rule 36(5) EPC, but admits at the same time, that that copy had gone astray. He goes on to explain that the Dutch PTT have since been requested to locate the missing confirmation copy. He therefore seeks restoration of rights under Art. 122 EPC, in support of which claim he states that the secretary of his patent department is an extremely experienced and reliable person, who has never missed a time limit in 25 years, and who is willing, pursuant to Art. 117 EPC, to testify on oath that he had indeed posted the confirmation copy on the alleged date.

Reasons for the Decision

1. The first question for the Board's decision is the legal one of whether or not restoration of rights under Art. 122 EPC is available to an opponent Appellant, whose Notice of Appeal is, under Rule 36(5) EPC, deemed not to have been received and whose appeal, therefore, does not exist in law.
2. It has been established in GR/01/86, OJ 1987, p. 447, that restoration of rights under Art. 122 may be available not only, as expressly stated in that Article, to an applicant for, or the proprietor of a European patent, but also to an opponent. This departure from the clear and express wording of Art. 122 is, however, strictly limited, for the reasons set out in the above case, which are also germane to the issue in this one.

3. Paragraph 6 of the Reasons for the above decision states that a historical analysis of the background to Art. 122, as well as a comparison of the national laws of the Member States, suggests that opponents may not have their rights re-established in respect of missed time limits for starting appeals. By contrast, applicants for or proprietors of European patents are not thus disadvantaged, because the time limit for their starting appeals is dealt with by Arts. 108 and 122 EPC.
4. In paragraph 11, by contrast, the above decision explains that neither the wording of Art. 122 EPC, nor the above historical analysis, militates against let alone precludes the re-establishment of opponents' rights during valid appeal proceedings, i.e. once such proceedings had come into being by timely service of a Notice of Appeal and the payment of the requisite fee (Art. 108 EPC).
5. Thus, in line with the principles stated in paragraph 11 of GR/01/86, and pursuant to Art. 125 EPC, the principles of procedural law generally recognised by the Contracting States need to be invoked to answer to the legal question in this case, namely, whether or not opponents may have their rights re-established under Art. 122 in respect of missed time limits for starting appeals as well as time limits missed in the course of appeals already validly commenced.
6. The relevant principle here is 'equality before the law', according to which all parties to proceedings before a Court must be granted the same procedural rights. It is, of course, well recognised, and is indeed expressly stated in paragraph 4 of GR/01/86, that the Boards of Appeal of the EPO function as Courts so that the above principle of equality before the law applies to their proceedings in

the same way as it does to the proceedings of other Courts.

7. The Enlarged Board, in GR/01/86, dealt only with the specific issue before it, and therefore gave its answer only to the second half of the question of law set out in paragraph 5 above. Thus it held that, for the purposes of restoration under Art. 122, applicants for, or proprietors of European patents on the one hand and opponents on the other hand should be treated equally in the case of appeals already validly in being. The question for this Board, however, is whether or not the principle of equal treatment should be extended to cover restoration of rights under Art. 122 in respect of missed time limits for starting proceedings, that is to say, time limits falling due before the actual legal commencement of an appeal.

8. From GR/01/86, paragraph 13 follows that it is well accepted that the principle of equality before the law applies only to similar legal situations, and then only if a differentiation of treatment between the parties cannot be objectively justified: (cf. judgment of the EC Court of Justice of 8 October 1980 in Case 810/79 - Peter Übershar, reports of cases before the Court of Justice of the European Communities 1980 p. 2747).

Furthermore, GR/01/86, paragraph 5 makes it clear that the legal situation of an opponent Appellant is not similar to that of an applicant (or patentee) Appellant, in cases where, for procedural reasons, appeal proceedings have not yet come into being. Whilst it is true that in both cases the first instance's decision becomes final, the absence of an appeal by an opponent results in a European patent being maintained, whilst the like omission by an applicant/proprietor leads to the revocation or limitation

of the European patent which involves an irrevocable loss of his rights. Thus the applicant or proprietor, having failed to set in motion his appeal, finds himself at the end of the legal road, for he has no further European or national legal remedy available to him. By contrast, an opponent, having failed to set his appeal in motion, can, if he wishes, seek revocation in the national courts into whose jurisdiction the European patent will have passed: Arts. 2(2) and 64(1) EPC.

9. In the Board's view, therefore, the correct legal position is that in cases where the appeal procedure had not been set in motion, the principle of equality before the law cannot be applied so as to give an opponent the same right to restoration under Art. 122 as an applicant or a proprietor enjoys.
10. Applying the above general principle to the present case, there is no appeal legally in being, the faxed Notice of Appeal of 29 March 1989 not having been confirmed in writing: Rule 36(5) EPC. For the reasons stated above, the ratio of the judgment of the Enlarged Board in GR/01/86 cannot validly be extended to cover such a situation, but must be construed as being restricted to cases where an appeal is legally extant.
11. It follows that it is not necessary for the Board to decide whether the Appellant had fulfilled the conditions laid down by Article 122(1) and (2) EPC.
12. Lastly, the Board notes the recent decision of the President of the EPO published in Vol. 6 OJ 1989, revoking, with effect from 1 July 1989, his earlier decision of 29 July 1987 and thereby modifying from that date the operation of Rule 36(5) EPC. The applicant for restoration in the present case cannot, however, avail

himself of this decision, because his faxed Notice of Appeal was filed on 29 March 1989, and the principle of legal certainty precludes any retrospective application of the President's recent amendment of the operation of Rule 36(5) EPC.

Order

For these reasons, it is decided that:

1. There is no appeal in existence.
2. The application for re-establishment of rights is rejected.
3. The decision of the first instance is confirmed in its entirety.
4. The appeal fee will be re-imbursed.

The Registrar:

The Chairman:

M. Beer

P. van den Berg