



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET  
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

**DECISION  
of the Third Board of Appeal  
of 7 March 2011**

In Case R 1474/2010-3

**ConvaTec Technologies Inc.**

3993 Howard Hughes Parkway

Suite 250

Las Vegas, NV 89169-6754

United States of America

RCD proprietor/Appellant

represented by Barker Brettell LLP, 10-12 Priests Bridge, London SW15 5JE, United Kingdom

APPEAL relating to Registered Community Design No 163 159-0001

**THE THIRD BOARD OF APPEAL**

composed of Th. Margellos (Chairperson), H. Salmi (Rapporteur) and M. Bra (Member)

Registrar: P. López Fernández de Corres

gives the following

## Decision

### Summary of the facts

- 1 On 31 March 2004, a Registered Community Design (RCD) application was received at the Patent Office of the UK. It was filed in the name of Bristol-Myers Squibb Company (hereinafter ‘design holder’) by Lance Butler of Barker Brettel. The application for Community design No 000163159-0001 was received at the OHIM on 5 April 2004 and it was accepted for registration with a filing date of 31 March 2004. On 29 June 2004 the application was published in part A.1 of Bulletin 2004/055.
- 2 On 14 April 2008 a change of name and professional address of the representative was published in part B.9.1 of Bulletin 2008/089
- 3 On 3 September 2008, the Office notified Barker Brettell LLP, the registered representatives at the Office in relation to registered Community design No 000163159-0001 (hereinafter ‘the RCD’) at that time, of the need to renew the RCD according to Article 13 CDR and Article 21 CDIR.
- 4 The notification indicated, *inter alia*, the following:  
  
*‘The renewal application should be submitted and the renewal fees paid by 21/03/2009.*  
  
*If the renewal request is not submitted in time, you have a further period of six months, ending on 30/09/2009, in which to submit it and pay the fees. Late payment is subject to an additional fee, which amounts to 25% of the total renewal fee.’*
- 5 No further instructions were received.
- 6 On 29 June 2009 a change of the ID of the design holder was published in part B.2.2 of Bulletin 2009/126.
- 7 On 29 June 2009 a total transfer was published in part B.2.1 of Bulletin 2009/126, the new design holder and RCD proprietor being ConvaTec Technologies Inc (hereinafter ‘the appellant’).
- 8 On 16 October 2009, the Office sent by fax a notification to Barker Brettell LLP informing them of the expiry of the RCD registration as from 31 March 2009.
- 9 The appellant was invited to submit observations within two months.
- 10 On 15 December 2009 a request for a *restitutio in integrum*, submitted by Ms. Julie Mays of Barker Brettel was received by the Office. The arguments submitted are the following:

- The failure to pay the renewal fee was despite all due care being taken under the circumstances.
- The failure to comply with the payment of the renewal fee was an unfortunate coming together of circumstances between the appellant, ConvaTec, and their annuity agent, CPA. It is stated that the appellant has no fault attributed to them in any of the circumstances and took all due care to ensure that their rights were protected.
- The owner entrusted the renewals for their portfolio of patents and designs to an annuity agent, Computer Patent Annuities of St. Helier, Jersey (CPA). The notice concerning renewal of the design, issued by OHIM and received by fax at Barker Brettel on 3 September 2008, was forwarded to the patent department of ConvaTec by e-mail on 4 September 2008. Barker Brettel took no further action concerning the renewal until the receipt of OHIM's letter T065A.
- ConvaTec provided details of the registration to CPA electronically with a substantial number of other cases on 7 April 2009. A report on the import of the batch was issued to ConvaTec on 25 April 2009, part of which is provided by the representative.
- Page 1 of the report refers to a Client Query Report Section and has the warning 'It is important that any queries marked with a response time of 24 hours or any Miscellaneous Queries located at the end of the Client Query Report Section are reviewed and dealt with immediately'. Page 9 of the report concerns a category named by CPA as 'Invalid IP Type Code – Not Processed'. The first item in that section concerns this registration. According to CPA the case was not processed because the IP type was not correct. This had the consequence that CPA did not pay the fee.
- ConvaTec entrusted the payment of renewals to CPA. ConvaTec have a large portfolio of patents, designs and other IP rights which they track on a database using Memotech software. An extract of the entry of their database for this registration is also provided. This entry contains all the data necessary to track the renewal date and gives all the necessary numbers. The entry was created shortly after the application was filed in 2004. The CPA report of 25 April 2009 was e-mailed to Clara Navarete, a paralegal working for the legal department of ConvaTec at that time. She is no longer with ConvaTec. It is claimed that the CPA report contained no explicit warning that the renewal for the registration in question was not paid and would not be paid and ConvaTec therefore had every reason to believe that the renewal had been paid.
- The notice on page 1 of the CPA report flags two categories of entry that need to be dealt with immediately. They are firstly those marked with a response time of 24 hours and secondly those in the Miscellaneous Queries at the end of the report. Invalid IP type is neither of these. It is stated that ConvaTec therefore was not warned that the invalid IP type of entry required an immediate response. In addition page 9 informs that 'The cases listed

have not been processed as they have been reported with a blank IP Type Code which has not been recognized by CPA's system. Please update your records to ensure that CPA receives complete information in order to monitor renewal.' It is claimed that this wording does not make it clear that the renewal fee will not be paid unless the code is corrected. A warning that it has 'not been processed' omits the crucial information that this means it will not be paid. As ConvaTec were unaware that the renewal had not been paid, the registration expired.

- Barker Brettel asked CPA whether this case had featured in previous reports as it had been on ConvaTec's records or their previous owner's Bristol-Myers Squibb, for some time and in April 2009 it was already overdue for payment. CPA responded that the RCD had been included in earlier batches but offered no explanation as to why the problem of the IP type had not been addressed.
  - It is submitted that the appellant, ConvaTec, applied all due care to the renewal of the RCD in question by entrusting the renewal to an annuity agent, CPA. Although ConvaTec applied all due care the renewal fee was not paid due to an error in the IP type in CPA's database. Although the error in the IP type was pointed out by CPA in their report ConvaTec did not understand that this meant that the renewal would not be paid. An exceptional error therefore occurred in the IP type and in the misunderstanding between ConvaTec and their annuity agent, CPA.
  - Finally it is claimed that this is a case where restoration of rights is appropriate.
- 11 By decision of 31 May 2010, the examiner rejected the request for *restitutio in integrum* since she considered that the representative have not taken 'all due care required by the circumstances' in order to avoid a loss of right and reasoned further as follows:

*Non-observance of a time limit and loss of right*

- One of the basic requirements for a request for *restitutio in integrum* to be granted is that the party to the proceedings was unable to observe a time limit *vis-à-vis* the Office and that the non-observance of the time limit has the direct consequence of causing the loss of any right.
- The appellant did not observe the time limit for paying the renewal fee and as a direct consequence it has lost the right to the RCD registration.
- Thus, the first two requirements for requesting *restitutio* have been met.

*Due care*

- In order for the *restitutio in integrum* to be granted, the party must have taken all due care required by the circumstances to observe the time limit.
- The non renewal of the RCD 000163159-0001 is due to negligence or errors.

- In this particular case Barker Brettel, the representative of the owner, forwarded the information provided by the OHIM, our letter T061A, to the owner on 4 September 2008, well in advance before the expiry date.
- On 7 April 2009, one week after the expiry of the registration but still in the second renewal period, the owner requested information from CPA, the agent in charge for the renewal of the RCD. The report sent to them by CPA on 25 April 2009 clearly states the following:

*‘Client Production Log Section: This section lists all cases received in the batch, which have not been included in the Client Query Report section. It is important that all report headings and narratives are reviewed. [...]*

*For any cases where the heading includes “Not Processed” the case details should be reviewed, as CPA has taken no action to either add or amend the data reported by you. [...]*

- RCD 000163159-0001 is listed on page 9, in the Client Production Log under heading ‘Invalid IP type code – Not Processed’.
- Therefore, CPA has alerted the client that the details of the RCD in question should be reviewed and any claims that the report did not contain explicit warnings that the renewal fees had not been paid and would not be paid cannot be considered acceptable. A remark ‘Not Processed’ should not be neglected, even if it does not state that the renewal fee will not be paid unless the necessary corrections are done. If the details of the registration had been reviewed (as suggested on page 1 of the report) it would have been found out that the RCD had to be renewed. As the report was produced and received in the second renewal period the RCD could have been renewed after payment of the renewal and late payment fees.
- According to the information provided by Barker Brettel, CPA included the RCD with the same remark in previous reports (to ConvaTec or to the previous owner). However, CPA cannot be held responsible for not having received any response from the owner. It is claimed that ConvaTec did not understand the heading ‘Invalid ID Type Code – Not Processed’ and that this is an exceptional error. We consider that any misunderstanding of this kind can be easily avoided and corrected by making the appropriate examination and by requesting further information and clarifications. It seems none of these were done.
- In conclusion, the case can be classified as simple negligence and oversight rather than an exceptional error.
- The concept of excusable error can be interpreted narrowly and applied only in exceptional circumstances. Errors and oversights cannot be considered *force majeure*, abnormal, unforeseeable or exceptional circumstances.

### *Conclusion*

- Taking into account the explanations provided by Ms. Julie Mays of Barker Brettel, the Office concludes that the representative has not taken ‘all due care required by the circumstances’ in order to avoid a loss of right.
  - Therefore, the Office must reject the request for *restitutio in integrum* and will not take the request for re-establishing RCD 000163159-0001 into account.
- 12 On 29 July 2010, the appellant filed an appeal against the contested decision.
- 13 On 29 September 2010, a statement of grounds of appeal was filed. The appellant requests the Board of Appeal to overturn the contested decision, to allow the application for *restitutio in integrum* or remit the case back to the Trademarks and Register Department. It referred to its previous arguments and added, in essence, the following:
- The appellant had absolutely no opportunity to comment on the reasons upon which the Trademarks and Register Department refused the request for *restitutio in integrum*. Article 62 CDR is therefore violated. This is a substantial procedural violation in the sense of Article 37 CDIR. Therefore, the appellant requests a refund of the appeal fee, this case should be remitted back to first instance so that the appellant can have their right to comment before a decision is taken.
  - The Trademarks and Register Department appear to be applying case-law relating to Community Trade Marks Registrations not to Community Registered Designs. It is recalled that Article 67 CDR requires that for an applicant to be granted *restitutio in integrum*, it must have taken all due care required by the circumstances.
  - Community Registered Designs are subject to a novelty requirement that is not found in trade mark law. Thus, should a Community Registered Design lapse due to non-payment of a renewal fee, there is no possibility to reapply for the same design. The registration holder’s rights will therefore be extinguished without question.
  - As such the application of CTM case-law to RCD cases is unfair, unjust and inequitable. It is more appropriate to apply the case-law of the European Patent Office. The European Patent Convention is in force in all the Member States of the European Union and applies to the European Patent Application. It would be fairer to the appellant and it is required by Article 68 CDR that the Board of Appeal apply the European Patent Office jurisprudence under Article 122 EPC to requests for *restitutio in integrum* on Community Design Registrations.
  - The most relevant case-law of the European Patent Office Boards of Appeal states that an isolated procedural mistake of an otherwise properly functioning administration is an admissible ground for *restitutio in integrum*. In the present case, the system that the appellant had in place for the payment

of renewal fees worked in the vast number of cases. All due care was taken by the appellant in submitting, through a connection between their computer systems, the details of its Registered Community Design to CPA as it was already stated during the previous proceedings.

- Under the European Patent Office Board of Appeal Decision J5/80, the extent of the due care required in supervising a delegate depends on the person concerned. Given that CPA have such a long and vast experience in the payment of renewal fees, the level of supervision required by a rights holder would appear to be minimal. As such applying the European Patent Office jurisprudence, the request for *restitutio in integrum* should be allowed.
- A proprietor can delegate administrative tasks relating to the renewal of a trade mark registration as long as it ensures that the person chose offers the assurance necessary to enable it to be assumed that those tasks will be carried out properly (see judgment of 20 April 2010, T-187/08, ‘Dog’). The appellant could not foresee that its computer system would incorrectly communicate the details of the Community Design Registration to CPA’s computers or that CPA’s communication be misunderstood in this manner.

### **Reasons**

- 14 The appeal complies with Articles 55, 56 and 57 CDR and Article 34 CDIR. It is therefore admissible.

#### *Preliminary remark*

- 15 Pursuant to Article 62 CDR, decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.
- 16 The appellant claims that it had no opportunity to comment on the reasons upon which the Trademarks and Register Department refused the request for *restitutio in integrum* and that Article 62 CDR was therefore violated.
- 17 The provisions on the right to be heard in the CDR mirror those applied to the Community trade mark at Article 75 CTMR and various trade mark cases have already considered claims based on this article. However, while the right to be heard covers all matters of law or of fact and the items of evidence which form the basis of the decision-making act, it does not, however, apply to the final position which the administration intends to adopt (see judgment of 13 June 2007, T-167/05, ‘Fennel’, para. 102, and the further case-law cited therein). In the present case, the contested decision makes reference to the arguments and evidence which were submitted by the appellant, which, as an applicant for *restitutio*, had to put forward its best case in order to persuade the examiner that it was unable to observe the renewal time-limit in spite of all due care having been taken. In view of the nature of the arguments put before her, the examiner was perfectly within her rights to take a final position on the case. The appellant’s suggestion, according to which the Office should take a quasi interim decision

with a ‘provisional position’ on which the applicant could comment each time a *restitutio* request was going to be rejected, would be contrary to the principle of the smooth and proper functioning of an administrative organization, and in this case of the OHIM. Moreover, the appraisal of the arguments and evidence conducted by the first instance examiner could, in any event, be challenged before the Board of Appeal. Therefore, the Board rejects the assertion that the appellant’s right to be heard, guaranteed by Article 62 CDR, was in any way breached (see, by analogy, Decision of 23 October 2008, R 964/2008-2, ‘RYZEX’, para. 23).

*Restitutio in integrum*

18 Article 67 CDR headed ‘*Restitutio in integrum*’ materially provides the following:

1. The applicant for or a holder of a registered Community design or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time-limit vis-à-vis the Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress.
2. The application must be filed in writing within two months of the removal of the cause of non-compliance with the time-limit. The omitted act must be completed within this period. The application shall only be admissible within the year immediately following the expiry of the unobserved time-limit.
3. The application must state the grounds on which it is based and must set out the facts on which it relies. It shall not be deemed to be filed until the fee for the re-establishment of rights has been paid.
4. The department competent to decide on the omitted act shall decide upon the application.
5. The provisions of this Article shall not be applicable to the time-limits referred to in paragraph 2 and Article 41(1).

19 The appeal is, however, not well founded because, in the Board’s view, the appellant’s representative has not proved that it or the appellant itself took ‘all due care required by the circumstances’ as provided by Article 67 CDR. The reasons are explained hereunder.

20 The appellant, a United States of America based company, appointed as attorneys for the proceedings before the OHIM, London-based professional representatives (Barker Brettell, later Barker Brettell LLP), who also filed the *restitutio* request and the appeal. Article 77(2) CDR required the appellant to act through professional representatives based in the Community. That provision does not only protect the interests of the Office, namely to be able to send official



notifications to addresses inside the Community, but also the interests of the RCD applicant or proprietor, who is likely to be unfamiliar with the legal requirements to be observed before the OHIM and the specificities of the procedures.

- 21 The renewal of a RCD may be requested within six months plus a further six months subject to a surcharge, so a whole year is available under Article 13(3) CDR.
- 22 Although anybody may validly pay fees in respect of RCD applications or RCD's, there is nothing in Article 13 CDR or the Rules which allows persons other than the RCD proprietor or its representatives, authorised under Article 77 CDR, to perform renewal operations. CPA, which is based in the Channel Islands and who the appellant entrusted the renewals for their portfolio of patents and designs to, is not a professional representative before the OHIM and is not entitled to perform acts that are reserved for professional representatives.
- 23 It is true that in accordance with Article 13(1) CDR, renewal may be requested by a person expressly authorised by the proprietor. However, if CPA were to be considered a third person, the appellant could not invoke its failure to perform the renewal, and the *restitutio* request and the present appeal would have to be made by CPA. Article 13(1) CDR means a third person who, in its own right and interests, wishes to perform a renewal, and contains an exception to the rule that only the RCD proprietor can renew its own mark (see, by analogy, Decision of 12 March 2008, R 1245/2007-4, 'DEVICE OF A DOG', para. 17).
- 24 Generally speaking, it is up to the professional representative, acting of course in accordance with the instructions given by its client, to perform the legal acts provided for in the Regulations. Making the requisite requests and causing the requisite payments to be made is incumbent on the professional representative, and not on delegated persons. This means that it is up to the professional representative himself to lodge a renewal request in accordance with Article 13 CDR (see, by analogy, Decision of 12 March 2008, R 1245/2007-4, 'DEVICE OF A DOG', para. 18).
- 25 Where the party to the proceedings before the Office chooses to employ a professional representative, the relevant person for assessing the exercise of 'all due care required' is the representative. S/he has to co-ordinate his/her work in such a way that in the normal course of business time-limits will be observed. S/he needs to organise his/her office, choose, instruct and supervise his/her staff, within what is considered usual under the circumstances, so that time-limits are adhered to (see, to that effect, Decision of 23 October 2008, R 964/2008-2, 'RYZEX', para. 12 and Decision of 12 November 2002, R 984/2001-2, 'THUMB DRIVE').
- 26 The concept of (those circumstances which may justify the granting of) *restitutio in integrum* contains an objective element relating to abnormal circumstances unconnected with the party in question that make up the impediment or cause of non-compliance with the missed time-limit and a subjective element involving the obligation, on its part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. It is

not necessary that the failure is due to ‘*force majeure*’, in the sense that something happens which is out of the control of the parties. In particular, the applicant or its representative must pay close attention to the course of the procedure and, in particular, demonstrate all due diligence required by the circumstances in order to comply with the prescribed time-limits. Thus, the concept of *restitutio in integrum* does not apply to a situation such as that in the present case where, objectively, a diligent and prudent professional would have been able to take the necessary steps before the expiry of the period prescribed for observing it (see, to that effect, by analogy, judgment 20 June 2001, T-322/03, ‘Weiße Seiten’, para. 18 and the case-law cited therein, as well as Decisions of 11 February 2005, R 292/2004-2, ‘E! ONLINE / T-Online’, paras. 24-25 and of 25 January 2007, R 1044/2006-2, ‘York (FIG. MARK) / viyork’, paras. 15-18).

- 27 The purpose of Article 67 CDR is to provide applicants and RCD proprietors the possibility of remedying an omission due to the aforementioned exceptional circumstances, but not to remedy simple negligence or errors on the part of the RCD proprietor or its representative. This is an exceptional measure and the conditions for its application have to be construed strictly (see, by analogy, Decision of 26 September 2007, R 947/2007-1, ‘NEWTON’, para. 15). In the opinion of the Board, the circumstances invoked in the case at hand cannot be regarded as abnormal and inevitable within the meaning of the above mentioned provision.
- 28 In that regard, it must first be noted that careful consideration of the renewal dates of its designs is part of the basic duties of a RCD proprietor and of its representative.
- 29 In the present case, the evidence shows that Barker Brettell LLP, the representative of the appellant, forwarded the information provided by the OHIM to the owner on 4 September 2008, well in advance of the expiry date of the RCD. On 7 April 2009, one week after the expiry of the registration but still in the second renewal period, the appellant requested information from CPA, the agent who they had put in charge for the renewal of the RCD. The report sent to them by CPA on 25 April 2009 stated the following:

*‘Client Production Log Section: This section lists all cases received in the batch, which have not been included in the Client Query Report section. It is important that all report headings and narratives are reviewed. [...]*

*For any cases where the heading includes “Not Processed” the case details should be reviewed, as CPA has taken no action to either add or amend the data reported by you. [...]*

- 30 The RCD in question was listed on page 9, in the Client Production Log under heading ‘Invalid IP type code – Not Processed’. Therefore, as correctly noted in the contested decision, CPA had alerted the client that the details of the RCD in question should be reviewed and any claims that the report did not contain explicit warnings that the renewal fees had not been paid and would not be paid cannot be considered acceptable. A remark ‘Not Processed’ should not be neglected, even if it does not state that the renewal fee will not be paid unless the

necessary corrections are done. If the details of the registration had been reviewed (as suggested on page 1 of the report) it would have been found out that the RCD had to be renewed. As the report was produced and received in the second renewal period the RCD could have been renewed after payment of the renewal and late payment fees.

- 31 According to the information provided by Barker Brettell LLP, CPA had also included the RCD with the same remark in previous reports (to ConvaTec or to the previous owner of the design). The appellant claims that it did not understand the heading 'Invalid ID Type Code – Not Processed' and that this is an exceptional error. However, the Board agrees with the contested decision that any misunderstanding of this kind can be easily avoided and corrected by making the appropriate examination and by requesting further information and clarifications. It seems none of these were done. Further, whilst a proprietor of a RCD is legitimately entitled to subscribe and take advantage of a professional renewal service like the CPA, in the present case, the appellant, if in doubt, could have also sought the advice of its professional representative who is specialized in IP matters and who could have clarified the matter, if necessary.
- 32 In line with the above, the Court has stated that an error by an appellant's or representative's employee regarding a time-limit cannot be considered as an impediment or cause of non-compliance in the sense of Article 78(1) CTMR (see order of 6 September 2006, T-366/04, 'HENSOTHERM', para. 50). The same must be considered to be the case under Article 67(1) CDR.
- 33 When considering the actions of Barker Brettell LLP, it is clear that they did not exercise any care but rather left everything in the hands of other parties. Assuming that Barker Brettell LLP are the reference persons, clearly, due care was not exercised as Barker Brettell LLP did not undertake any activity or exercise any control regarding the renewal. As stated by Barker Brettell LLP, the notice concerning renewal of the design, issued by OHIM and received by fax at Barker Brettell LLP on 3 September 2008, was simply forwarded to the patent department of the appellant by e-mail and they took no further action concerning the renewal until the receipt of OHIM's letter informing them of the expiry of the RCD. The mere fact that the appellant then entrusted the renewals for their portfolio of patents and designs to an annuity agent only means that Barker Brettell LLP probably acted as expected by the appellant but does not amount to exercising any care. However, it is the professional representative's duty to ensure that no deadlines are missed which would cause a loss of right and that its client's RCD was actually renewed if the proprietor wished so. Upon receipt of the Office's notification and during the renewal period, the representative could have easily contacted the appellant to check whether it wished to renew the RCD, or the Office by correspondence, telephone or Internet (CTM-Online) to check whether the renewal of the RCD in question had been requested, and if not, to check with the appellant whether it wished to renew a registered right which was about to expire. However, the representative did nothing of the above (see, to that effect, Decision of 7 May 2009, R 1489/2008-1, 'PLANET ORGANIC', para. 28).

- 34 In view of Article 77 CDR, it is also inappropriate to relieve an appointed professional representative from tasks for which the representation requirement exists but at the same time leaving the representatives on the Office's records as authorized representatives.
- 35 It may be argued that under the circumstances and as Barker Brettell LLP had no duties in regard to the renewal, the responsibility fell back to the appellant with the consequence that the standard of due care has to be assessed by reference to the latter. In that regard, however, it has to be observed that already the decision to relieve a fully qualified representative before the OHIM from tasks regarding the legal status of the RCD and from requests in relation to the RCD was careless.
- 36 The decision to entrust CPA with the renewal operation was a deliberate choice made by the appellant. It constituted an outsourcing of certain operations regarding the renewal. However, while on the one hand, the renewal as such, which is an official request to the Office under the Regulations, may not be outsourced to persons who are not representatives before the Office; the filing of requests may not be delegated to clerical staff but remains the responsibility of the representative himself (see Decision of 16 November 2006, R 1027/2006-4, 'MISSION HILL', para. 32), on the other hand, he who outsources cannot by that very fact relieve himself of his own responsibilities and must bear the consequences if the other entity is not able to perform the desired operation (see Decision of 12 March 2008, R 1245/2007-4, 'DEVICE OF A DOG', para. 26). In any case, it should be noted that the reason for missing the time-limit was not that CPA had not informed the appellant, but rather that the employee of the appellant did not make the appropriate examination of the information given by requesting further information and clarifications. Therefore, assuming that the appellant is the reference person, clearly, due care was not exercised by it as it did not undertake the necessary activity or exercise to control the time-limit concerning the renewal.
- 37 Therefore, the Board fully agrees with the contested decision that the case at hand can be classified as simple negligence and oversight rather than an exceptional error. The appellant's account of the reasons which led to missing the time-limit does not, in the Board's view, demonstrate all due diligence required by the circumstances.
- 38 In relation to the reference to two decisions of the European Patent Office the Board stresses that the OHIM and the EPO are unrelated organisations operating under different legal regimes. The provisions on *restitutio in integrum* in the CDR mirror those applied to the Community trade mark. The OHIM's case-law under provisions on *restitutio in integrum* does not, in principle, provide for the possibility of remedying a party's or its representative's negligence; it is limited to restitution of time-limits in cases when it follows from the statements and facts submitted by the appellant that all due care under the circumstances was observed (see, to that effect, Decision of 7 February 2008, R 940/2007-1, 'MINI-BAG', para. 24). The claim that RCD's are subject to a novelty requirement that is not found in trade mark law and that thus, should a RCD lapse due to non-payment of a renewal fee, there is no possibility to reapply for the same design, is true. However, in the opinion of the Board, this cannot be a reason to apply a less strict

criterion to what can be considered negligence. The said provisions of the CTMR and the CDR on this point are practically identical and the legislator has not seen any reason to differentiate them from each other. The fact that the end result of the negligence may be somewhat more irreversible in the case of RCD's is a fact that at least a professional representative should be aware of (and in this case clearly has been aware of) and therefore it should be clear to it that it should be even more diligent concerning design matters.

- 39 The Board further notes that even if the decisions of the EPO mentioned in the statement of grounds by the appellant were to be taken into account, they are clearly different on many crucial points from the case at hand. The type of mistake made, by whom the mistake was made and the reasons behind it, to what party the tasks were delegated to and by whom, and the evidence provided to prove the cases, are all notably different from the case at hand.
- 40 In the light of the above considerations, the circumstances cited by the appellant cannot be regarded as exceptional within the meaning of the above-mentioned provisions. The application for *restitutio in integrum* cannot avail him either of the inadequate functioning of his own organisation or of the representative's failure to comply with Office's notifications and act accordingly (see, to that effect, Decision of 29 April 2010, R 1048/2009-1, 'COOK'S', para. 29).
- 41 Consequently, the Board is led to the conclusion that neither the appellant nor its representative has shown that 'all due care required by the circumstances' was taken. The Office was right in rejecting the application for *restitutio in integrum* and confirms the cancellation of the RCD.
- 42 Since the Board has found no evidence of a procedural violation on the part of the first instance department, the request for reimbursement of the appeal fee must be rejected.

**Order**

On those grounds,

THE BOARD

hereby:

**Dismisses the appeal.**

Th. Margellos

H. Salmi

M. Bra

Registrar:

P. López Fernández de Corres