



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

The Boards of Appeal

**DECISION
of the Third Board of Appeal
of 9 April 2010**

In Case R 1292/2009-3

McKechnie Specialist Products Limited

Precision House
Arden Road B49 6HD
Alcester
Warwickshire
United Kingdom

Applicant / Appellant

represented by WALKER & CO., CPA Global, 1 Oliver's Yard, London EC1Y 1DT,
United Kingdom,

APPEAL relating to a decision of the Department for Designs and Register on
Community Design No 000067061-0001

THE THIRD BOARD OF APPEAL

composed of Th. Margellos (Chairperson), M. Bra (Rapporteur) and D.T. Keeling
(Member)

Registrar: J. Pinkowski

gives the following

Decision

Summary of the facts

- 1 On 11 August 2003 the application for Community design No 000067061-0001 was received at the OHIM. The application was assigned the 7 August 2003 as a filing date as it was filed with the UK Intellectual Property Office on that date. On 10 February 2004 the application was published in part A.1 of Bulletin 2004/06.
- 2 On 13 January 2008, the Trade Marks and Register Department of the Office notified Gill Jennings & Every LLP, the registered representatives at the Office in relation to registered Community design (henceforth '**RCD**') No 000067061-0001 at that time, of the need to renew the RCD according to Article 13 of Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community Designs (henceforth the '**CDR**') and Article 21 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ EC No L 341 of 17.12.2002, p. 28), amended by Commission Regulation (EC) No 876/2007 on 24 July 2007 amending Regulation (EC) No 2245/2002 implementing Council Regulation (EC) No 6/2002 on Community designs following the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs (OJ EC No L 193 of 25.7.2007, p. 13) (henceforth the '**CDIR**').
The notification indicated, *inter alia*, the following:

'The renewal application should be submitted and the fees paid by 01/09/2008.

If the renewal request is not submitted in time, you have a further period of six months, ending on 02/03/2009, 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.'
- 3 Apart from a request to amend the contact details of its representatives, no further instructions were received by the appellant.
- 4 On 9 June 2009, the Office sent a notification dated 8 June 2009 to Gill Jennings & Every LLP informing them of the expiry of the RCD as from 7 August 2008. The proprietor was invited to submit observations within two months.
- 5 On 7 August 2009, Walker & Co. (henceforth '**Walker**'), the new representatives of the appellant, filed an application for a renewal of the RCD together with a request for *restitutio in integrum* to re-establish the proprietor's rights via fax.

The original application for a renewal of the RCD and the request for *restitutio in integrum* arrived at the Office via normal mail on 11 August 2009.

- 6 By decision of 24 August 2009 (henceforth the '**contested decision**'), sent via normal mail, the examiner rejected the request for *restitutio in integrum* since she considered the request for *restitutio in integrum* as inadmissible due to its late submission (Article 67 (2) CDR):
 - Article 67 (2) CDR requires that a request for *restitutio in integrum* be submitted within two months from the removal of the cause of non-compliance with the time-limit and within the year immediately following the expiry of the unobserved time-limit.
 - In the present case, the cause of non-compliance can be considered as removed on 9 June 2009, the date on which the Office sent to the proprietor's representative (as filed with the Office) the notification informing of the expiry and subsequent cancellation of the RCD.
 - The two-month period to request *restitutio* started the day after, on 10 June 2009, and expired on 10 August 2009.
 - On 11 August 2009, the appellant filed a request for *restitutio in integrum*, i.e. after the two month period from the removal of the cause of non-compliance with the time-limit.
- 7 On 2 October 2009, the appellant informed the examiner that the request for *restitutio in integrum* had already been filed via fax on 7 August 2009 and thus within the two months' time-limit.
- 8 On 26 October 2009, the appellant filed an appeal against the contested decision.
- 9 On 11 November 2009, the Trade Marks and Register Department of the Office sent a notification to the appellant, which states, *inter alia*, the following:

'Please consider our decision dated 24/08/2009 as cancelled. Please accept our apologies for the inconvenience caused.

We shall revise our decision based on your application completely received by fax in the OHIM on 07/08/2009.'
- 10 On 14 January 2010, a statement of grounds of appeal dated 13 January 2010 was filed.

- 11 By letter dated 8 February 2010, the Registry of the Boards of Appeal informed the appellant that it would appear that the written statement of grounds filed in the appellant's communication dated 13 January 2010 and received by fax on 14 January 2010 was not received in due time, i.e. on or before 4 January 2010, and invited the appellant to submit comments regarding that deficiency within a period of one month.
- 12 By letter dated 12 March 2010 and received at the Office on 15 March 2010 the appellant replied to the deficiency letter dated 8 February 2010.

Reasons

- 13 The contested decision can be subject to an appeal in accordance with Article 55(1) CDR.
- 14 Article 58 CDR, entitled interlocutory revision, provides in material part:
 - '1.If the department whose decision is contested considers the appeal to be admissible and well founded, it shall rectify its decision. [..]
 2. If the decision is not rectified within one month after the receipt of the statement of grounds the appeal shall be remitted to the Board of appeal, without delay and without comment to the merit.'
- 15 By its letter dated 11 November 2009, approximately two and a half weeks after the appeal had been lodged, the Trade Marks and Register Department clearly and unequivocally confirmed to the appellant that the contested decision was to be already considered as *cancelled* (sic) and would be revised based on its application received by fax on 7 August 2009.
- 16 According to the Board, the statement by the Trade Marks and Register Department that the contested decision was to be already considered as '*cancelled*' (sic), can be construed as nothing else but a confirmation that interlocutory revision had already been granted, pursuant to Article 58 CDR.
- 17 Since interlocutory revision has been granted, the appeal must be closed and the case must be remitted to the Trade Marks and Register Department for further prosecution.

Costs

- 18 Pursuant to Article 37, second sentence, reimbursement of the appeal fee shall in the event of an interlocutory revision, as in the case at hand, be ordered by the Trade Marks and Register Department as the department whose decision has been impugned.

Order

On those grounds,

THE BOARD

hereby:

- 1. Declares the appeal closed;**
- 2. Remits the case to the Trade Marks and Register Department for prosecution of the case and reimbursement of the appeal fee.**