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**Datasheet for the decision
of 18 February 2013**

Case Number: J 0015/12 - 3.1.01

Application Number: 10167374.7

Publication Number: 2439380

IPC: F01D 11/12

Language of the proceedings: EN

Title of invention:

Device and Method for controlling rotor blade tip leakage

Patentee:

Rolls-Royce plc

Headword:

Missing drawings

Relevant legal provisions:

EPC R. 40(1), 56

Keyword:

"Drawing to be added to application documents - yes"

Decisions cited:

J 0027/10

Catchword:

-



Case Number: J 0015/12 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 18 February 2013

Appellant:
(Applicant)

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Representative:

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Decision under appeal:

**Decision of the Receiving Section of the
European Patent Office posted 23 February 2012
concerning European patent application
No. 10167374.7.**

Composition of the Board:

Chairman: B. Guenzel
Members: W. Sekretaruk
T. Karamanli

Summary of Facts and Submissions

I. This is an appeal against the decision of the Receiving Section posted on 23 February 2012 to refuse the applicant's request for replacement of drawings 1A and 1B filed on 25 June 2010 in their entirety by drawings 1 to 4 filed on 29 June 2010 under Rule 56(3) EPC.

II. European patent application No. 10167374.7 was filed on 25 June 2010 claiming priority of patent application GB 0911500.7. The request for grant of a European patent was accompanied by 15 claims, 13 description pages and one sheet of drawings labelled "Fig 1A." and "Fig 1B.". In the description reference is made to Figures 1, 2, 3 and 4, respectively (see description pages 7 to 10). On 29 June 2010 the applicant filed two sheets of drawings consisting of Figures 1, 2, 3 and 4 and stated that the drawings filed with the application were incorrect and did not correspond to the specification. On 5 August 2010 the applicant filed a letter stating the following:

"Dear Sirs

EUROPEAN PATENT APPLICATION NO 10167374.7

CORRESPONDING TO GB 0911500. 7

Please find herewith the certified priority document, Designation of Inventor and replacement "formal" drawings for filing on the above application"

To this letter were attached inter alia drawing sheets 1/2 and 2/2 consisting of Figures 1, 2, 3 and 4 and the priority document, which also contained these two sheets of drawings consisting of Figures 1, 2, 3 and 4.

III. The Receiving Section was of the opinion that Rule 56 EPC allows the filing of missing drawings, but not their replacement, without losing the earlier filing date. Figs. 2, 3 and 4 were obviously missing drawings, whereas Fig. 1 was not an obviously missing drawing, since it was present in the application documents as filed on the date of filing. As a consequence, the Receiving Section refused to accept Fig. 1 as a missing drawing within the meaning of Rule 56 EPC. It also decided that for the publication of the European patent application according to Article 93 EPC, the documents as originally filed will be used together with Figures 2, 3 and 4 filed on 29 June 2010/5 August 2010 (= date of receipt of formal drawings).

IV. An appeal was filed on 20 April 2012 and the appeal fee was received on the same date. The appellant requests in its appeal that Figure 1 be treated as a missing drawing in accordance with Rule 56(2) or (3) EPC. In its grounds of appeal, which were received on 2 July 2012, the appellant submits that the application as filed did not contain a "Fig.1". Figs. 1A and Fig. 1B were not referred to at any point in the application, with the consequence that the only drawing referred to in this respect was the missing Fig. 1. The grounds of appeal contain the following request:

"We thus request that (i) the decision dated 23.03.12 be rejected, and that Figure 1 filed on 29.06.2010 be included in the application, along with Figures 2, 3 and 4 filed on 25.06.2010, and (ii) the original filing date be retained. In the event the board are minded to refuse these requests we request further that the date

of application be re-dated to 29.06.2010 and including at least Figures 1, 2, 3 and 4."

Reasons for the Decision

1. The appeal is admissible and also allowable.
2. Rule 56 EPC reads in relevant parts:

"(1) If the examination under Article 90, paragraph 1, reveals that parts of the description, or drawings referred to in the description or in the claims, appear to be missing, the European Patent Office shall invite the applicant to file the missing parts within two months. ...

(2) If missing parts of the description or missing drawings are filed later than the date of filing, but within two months of the date of filing or, if a communication is issued under paragraph 1, within two months of that communication, the application shall be re-dated to the date on which the missing parts of the description or missing drawings were filed. The European Patent Office shall inform the applicant accordingly.

(3) If the missing parts of the description or missing drawings are filed within the period under paragraph 2, and the application claims priority of an earlier application, the date of filing shall, provided that the missing parts of the description or the missing drawings are completely contained in the earlier application, remain the date on which the requirements

laid down in Rule 40, paragraph 1, were fulfilled, where the applicant so requests and files, within the period under paragraph 2:

(a) a copy of the earlier application, unless such copy is available to the European Patent Office under Rule 53, paragraph 2; ..."

3. In the present case in the description as filed reference is made to Figures 1, 2, 3 and 4 (see above II.). However, no drawing labelled "Fig.1" was part of the application received on 25 June 2010. Drawing Fig. 1 together with drawings Figs. 2, 3 and 4 were filed by the applicant under Rule 56(2) EPC of its own volition and were received on 29 June 2010, and a copy of the earlier application, which contained Figs. 1, 2 3 and 4, was received on 5 August 2010; both dates are within the time limit of two months from the filing date (25 June 2010). Consequently, pursuant to Rule 56(3) EPC the date of filing remains 25 June 2010, i.e. the date on which the requirements of Rule 40(1) EPC were fulfilled. The incomplete application documents filed originally are to be completed by the missing parts, which must be added to the text of the application filed originally.

4. The Receiving Section correctly states that Rule 56 EPC does not allow any replacement of drawings. An interpretation of Rule 56 EPC that some, or all, of the application documents that were originally filed in order to obtain a filing date could be amended, replaced or deleted would indeed be incorrect (see decision J 27/10 of 9 December 2011, points 8 to 18 of the Reasons).

However, the filing of drawing Fig. 1 does not replace any Fig. 1 filed earlier in a legal sense.

Rule 56(1), first sentence, EPC refers to drawings referred to in the description or in the claims, which appear to be missing. Hence, where a drawing referred to in the description is missing in the application documents as filed. Rule 56 EPC is applicable and the said drawing can be filed later in accordance with the procedure laid down in Rule 56 EPC.

As set out above, no drawing labelled "Fig.1" was part of the application received on 25 June 2010. The drawings "Fig.1A" and "Fig.1B" are not a "Fig. 1" as stated in the decision under appeal and therefore the later filing of "Fig. 1" is not a replacement of the aforementioned figures but constitutes the filing of a figure referred to in the description but missing from the application documents as filed.

5. The Board therefore concludes that Fig. 1 has to be treated as a missing drawing in accordance with Rules 56(3) and (2) EPC. Fig. 1 must be added to the application documents already filed, with no ensuing change of the original filing date of 25 June 2010. Consequently, the European Patent Office will also have to provide for a publication of drawing Fig. 1.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairwoman:

C. Eickhoff

B. Guenzel