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Datasheet for the decision of 22 March 2017

Case Number: J 0011/16 - 3.1.01

Application Number: 10743328.6

Publication Number: 2398356

IPC: A47C27/18, A47C7/14, A47C27/08, A47C4/54, B60N2/70

Language of the proceedings: EN

Title of invention:
PNEUMATIC SEAT CUSHION SYSTEM

Patent Proprietor:
Comfort Concepts Pty Limited

Headword:

Relevant legal provisions:
EPC R. 70(2), 139, 103(1)(a)

Keyword:
Retraction of withdrawal (no)

Decisions cited:
J 0006/86, J 0011/87, J 0019/03, J 0002/15

Catchword:

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Office européen des brevets

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Case Number: J 0011/16 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 22 March 2017

Appellant: (Applicant)	Comfort Concepts Pty Limited Level 6 60 Pitt Street Sydney, NSW 2000 (AU)
Representative:	Wilson, Gary HGF Limited Delta House 50 West Nile Street Glasgow G1 2NP (GB)
Decision under appeal:	**Decision of the Receiving Section of the European Patent Office of 4 January 2016 rejecting the request aiming at the retraction of the letter of withdrawal of the European patent application No. 10743328.6.**

Composition of the Board:

Chairwoman	C. Vallet
Members:	R. Cramer
	O. Loizou

Summary of Facts and Submissions

I. The appeal was filed against the decision of the Receiving Section of 4 January 2016, rejecting the appellant's request aiming at the retraction of the letter of withdrawal of the European patent application 10 743 328.6.

II. On 2 February 2015, the representative of the appellant filed a letter, citing European Patent Application No 10743328.6, the title of the invention to which this application relates, "Pneumatic Seat Cushion System", and the registered applicant "Comfort Concepts Pty Limited". The letter states "The applicant wishes to withdraw the above application leaving no rights outstanding. We would welcome any fees which may be refundable."

III. On 9 February 2015 the Receiving Section confirmed receipt of the letter of 2 February 2015, and stated that the proceedings were terminated as from 2 February 2015. The refund of the examination fee had been ordered and was effected on 11 February 2015.

IV. On 19 February 2015 the representative of the appellant wrote to the EPO, stating that the letter of 2 February 2015 was sent in error and filed evidence to prove that the true intention of the appellant was not to withdraw the patent application but to proceed with it.

V. In a communication of the Receiving Section of 27 February 2015 the appellant was informed that the withdrawal of the application had been entered in the European Patent Register on 6 February 2015 and could not be corrected or retracted, citing the relevant case

law. A formal decision was issued on 4 January 2016, wherein the Receiving Section stated that it saw no specific circumstances which would justify deviating from the established case law.

VI. An appeal against this decision was timely filed. The appellant argued that:

- the request to withdraw the application was sent erroneously as the applicant wished to proceed with the application;
- the fact that a case is marked as withdrawn in the European Patent Register does not always mean that the application cannot be revived, e.g. by requesting re-establishment of rights or by way of correction if the information is incorrect due to a mistake on the part of the EPO, and should therefore not be a decisive criterion;
- not providing a "cooling-off" period, giving the applicant a possibility to react when he realises a letter of withdrawal was sent in error, in analogy to the possibility to request re-establishment of rights under Article 122 EPC, is an abuse of process;
- the statement in the letter of 2 February 2015 was not a clear and unequivocal withdrawal of the application.

VII. On 12 September 2016 the Board issued a communication under Article 17(2) RPBA in which it expressed its provisional opinion on the merits of the appeal.

VIII. The appellant expanded on its arguments in its letters of 11 November 2016, 21 February 2017 and 28 February 2017.

IX. Oral proceedings were held on 22 March 2017 in the presence of the appellant. The appellant requested that the decision under appeal be set aside and the retraction of the withdrawal be allowed. Furthermore it requested a refund of the appeal fee.
The appellant during oral proceedings stated that it did no longer pursue the allegation put forward with letter dated 21 February 2017 (paras 9-22) that the EPO committed a procedural violation by not providing a remedy for cases where an application was withdrawn by mistake. Furthermore, it argued its appeal was not aimed at overturning the existing case law but at applying it correctly. A correct application meant that if there existed the slightest doubt whether a declaration made by a party corresponded to its true intentions, the EPO should seek clarification before acting upon the declaration. Because the EPO did not do so in the present case although it should have had doubts, it committed a substantial procedural violation that justified a refund of the appeal fee.

Reasons for the Decision

1. The appeal which fulfills the requirements laid down in Art.106-108 and Rule 99 EPC is admissible.

2. It is established case law that an applicant is bound by its procedural statements provided that the procedural statement was unambiguous and unconditional, and that he is not allowed to reverse these acts so that they can be considered as never having been filed (see e.g. J 19/03, Reasons Point 5). Therefore, a valid notice of withdrawal is binding on the applicant.

3. However, the case law has also acknowledged that a retraction of an erroneous statement of withdrawal is exceptionally possible by way of a request for correction of a mistake under Rule 139 EPC, if such request for correction is made before the public has been officially informed of the withdrawal, whereby it is irrelevant how much time has lapsed between the publication of the information and the request for correction. For an overview of the case law the Board refers to decision J 02/15 of 20 July 2015.

4. The issue in the present appeal is whether the statement made in the letter of 2 February 2015 was unambiguous or whether the EPO should have had doubts with respect to the true intention of the appellant. The appellant referred to decision J 11/87 (OJ EPO 1988, 367). In the application underlying that decision the representative of the applicant had written a letter to the EPO in which it had stated "my client has decided to abandon this European patent application". The board held that this expression could be interpreted in two different ways: either as a declaration of withdrawal or as a mere information that the applicant intended to take no further action. The board found that in view of the circumstances of the case the latter interpretation applied. The present appellant argued that the word "wishes" in the letter of 2 February 2015 should equally have cast doubts with respect to the appellant's true intentions, and should have been interpreted as the expression of an intent to withdraw the application in the future rather than an as an expression of immediate withdrawal.

5. The Board cannot follow this interpretation by the appellant. The expression of a wish vis-à-vis the EPO normally means that a party makes a declaration with

the intention to trigger an effect. In Rule 70(2) EPC the word "wishes" is e.g. used as the expression of an explicit request. In the application underlying the decision J 6/86, OJ EPO 1988, 124, the representative had written "Applicant wishes to abandon this application". The board found like in the decision J 11/87 that the word "abandon" in this statement might be equivocal, but in the light of the circumstances of the case the representative's statement was considered to be a completely unqualified and unambiguous notice of withdrawal. Moreover, in the English language "I wish to" followed by a verb means the same as "I want" (Cambridge Dictionary, www.dictionary.cambridge.org).

6. The Board can also not detect a reason to question whether the declaration in the letter of 2 February 2015 corresponded to the true intention of the appellant when looking at the stage of the proceedings during which it was filed. On 22 August 2014 a communication pursuant to Rules 70(2) and 70a(2) EPC was issued, inviting the applicant to indicate within six months whether it wished to proceed further with the application. The letter of 2 February 2015 was filed within this period. The statement that the applicant wished to withdraw the application rather than wished to proceed further with it was a valid reply to the communication that also involved a particular legal effect, namely the immediate refund of the examination fee. The fact that the second sentence of the letter of 2 February 2015 read "We would welcome any fees which may be refundable" implies that such refund was indeed what the appellant was interested in.

7. Therefore the Board comes to the conclusion that the finding of the Receiving Section that the letter of 2 February 2015 constituted a valid withdrawal of the application is justified, and that the appeal is therefore to be dismissed.

8. As for the appellant's request for a refund of the appeal fee, notwithstanding the fact that such request can only be considered when the appeal is allowed (Rule 103(1)(a) EPC), a prerequisite is the presence of a substantial procedural violation. Even if the Board had found that the Receiving Section had misinterpreted the letter of 2 February 2015, this would have meant that there was an error of judgement on the part of the Receiving Section. An error of judgement does not qualify as a substantial procedural violation (Case Law of the Boards of Appeal, 8th edition 2016, IV.E.8.4.5).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairwoman:

C. Eickhoff C. Vallet

Decision electronically authenticated