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**Datasheet for the decision
of 20 March 2019**

Case Number: J 0004/18 - 3.1.01

Application Number: 15785199.9

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IPC: B62K25/04, B62M3/00, B62K19/00

Language of the proceedings: EN

Title of invention:
BICYCLE

Applicant:
Goes, Johannes Marie Quirinus
Tribotté, Pascal

Headword:

Relevant legal provisions:
EPC Art. 14(4)
EPC R. 6(3), 113(1)

Keyword:
Incorrect form of decision under appeal - missing names of
employees
Refund of 30% of examination fee (yes)

Decisions cited:

J 0016/17



Juristische Beschwerdekammer
Legal Board of Appeal
Chambre de recours juridique

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: J 0004/18 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 20 March 2019

Appellant: Goes, Johannes Marie Quirinus
(Applicant 1) Buitenplaats 134
8211 AM Lelystad (NL)

Appellant: Tribotté, Pascal
(Applicant 2) 64d rue de Montreuil
78000 Versailles (FR)

Representative: Griebeling, Onno
Octrooibureau Griebeling BV
Sportweg 10
5037 AC Tilburg (NL)

Decision under appeal: **Decision of the examining division of the European Patent Office of 21 November 2017 rejecting the request for a refund of 30% of the examination fee under Rule 6(3) EPC in conjunction with Article 14(1) of the Rules relating to Fees**

Composition of the Board:

Chairman W. Sekretaruk
Members: W. Van der Eijk
C. Schmidt

Summary of Facts and Submissions

I. On 29 January 2018 the appellants (applicants) lodged an appeal against the decision of the examining division dated 21 November 2017 to refuse their request for a refund of 30% of the examination fee. They paid the appeal fee on the same day.

II. The appellants contest the decision of the examining division rejecting their request for a refund of 30% of the examination fee with respect to their European patent application EP 15 785 199. The request was based on Rule 6(3) EPC and Article 14(1) of the Rules relating to fees.

III. The decision and reasoning of the examining division - as far as relevant for the present appeal - can be summarized as follows. The application was filed by two natural persons, one of them having his residence in the Netherlands and the other in France. Upon entry into the European phase the applicants paid the examination fee and requested a refund of 30%. They indicated that one of the applicants was entitled under Article 14(4) EPC to use the Dutch language, and the applicants had made use of this possibility when filing the request for examination. They argued that under Rule 6(3) EPC they were therefore entitled to a fee refund. They argued further that since both applicants were natural persons, they also complied with Rule 6(4) and (7) EPC.

In two communications the examining division informed the applicants of its view that Rule 6(7) EPC had to be read in relation to Rule 6(3) and (4) and Article 14(4) EPC. It resulted therefrom that in case of multiple applicants, all applicants must fulfil the requirements of Article 14(4) EPC in order to be entitled to a fee reduction. As one of the applicants had his residence in France, he did not fulfil those requirements.

The applicants reacted to both communications by arguing that Article 6(7) does not require all applicants to fulfil the requirements of Article 14(4) EPC, but only requires that all applicants must fulfil the requirements of Rule 6(4), which means in their case that both applicants must be natural persons.

The examining division finally decided to reject the request for reduction of the examination fee, based on the ground that one of the applicants did not fulfil the requirements of Article 14(4) EPC.

IV. In the appeal the appellants contest the reasoning of the examining division on two grounds. Firstly, they argue that the language regime of the EPC must be interpreted in a liberal and applicant friendly manner, referring to the legislative history of Article 14 and Rule 6 EPC and commentaries thereto. Secondly, they challenge the interpretation by the examining division of Article 6(7) of the Rules relating to fees. They further submit that the interpretation chosen only serves to bring financial advantages to the EPO to the detriment of vulnerable parties, like natural persons, for whom the costs of filing an appeal are disproportionate to the possible benefits in case they are successful, and therefore constitutes a substantial procedural violation.

V. The appellants request that the decision under appeal be set aside and that 30% of the appeal fee be refunded. They further request reimbursement of the appeal fee, in view of a substantial procedural violation. As an auxiliary measure they request oral proceedings, in case the Board intends to refuse the requests.

VI. In a communication, dated 19 October 2018, the Board gave its provisional view on the requests of the appellants. It firstly noted that a procedural violation seems to have occurred, as the written decision of the examining division was

anonymous and, contrary to Rule 113(1) EPC, did not state the names of the employees of the Office that had taken the decision. It indicated further that it tended to agree with the applicant that the decision under appeal was wrong and based on an incorrect interpretation of the relevant provisions. However, it did not intend to order the reimbursement of the appeal fee, as the alleged substantial procedural violation was not proven.

VII. With their letter of 5 December 2018 the appellants presented further arguments why a reimbursement of the appeal fee is appropriate. They withdrew their request for oral proceedings, in case the Board would decide in their favour as to the request to refund 30% of the examination fee.

VIII. In line with this reaction the Board has continued the procedure in writing.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106-108 and Rule 99 EPC and is therefore admissible.

2. The appeal is allowable. 30% of the examination fee is to be refunded.

3. Entitlement to 30% reduction of the examination fee

3.1 Relevant provisions

This case revolves around the interpretation of the relevant provisions of the EPC, namely Rule 6 EPC in relation to Article 14(4) EPC.

Rule 6(3) EPC has ruled, from the entry into force of the EPC, that a person referred to in Article 14(4) EPC is, under certain circumstances, entitled to a reduction of inter alia

the examination fee. The rationale of this provision is to provide a form of compensation to those applicants who originate from a Contracting State having an official language different from one of the official languages of the EPO, for the costs of translating the documents they file with the EPO. With a decision of 13 December 2013 (CA/D 19/13, published in OJ EPO 2014,A4) the Administrative Council has amended Rule 6 EPC by limiting the possible fee reduction to the filing and examination fee and by inserting 3 new paragraphs, 4-7.

New paragraph 4 limits the entitlement to a reduction under paragraph 3 to certain categories of applicants, namely small and medium-sized enterprises, natural persons or non-profit organisations, universities or public research organisations. Paragraphs 5 and 6 are not relevant for the present decision. Paragraph 7 states that in case of multiple applicants, each applicant shall be an entity or a natural person within the meaning of paragraph 4.

The question to be decided is whether paragraph 7 means that in case of multiple applicants all of them must -as in the present case- be natural persons (a) or that all must be natural persons and must additionally fulfil the requirements of Article 14(4) EPC (b), that is: have their residence or place of business in a Contracting State having an official language different from English, French or German.

As both applicants were natural persons, they fulfilled interpretation (a). As one of the applicants had his residence in France, they did not fulfil interpretation (b).

3.2 Interpretation of Rule 6 EPC by the examining division and the appellants

According to the examining division it follows from the reference in Rule 6(7) EPC to Rule 6(4) EPC, which refers back to Rule 6(3) EPC, which in turn makes a reference to Article 14(4) EPC, that in case of multiple applicants each applicant must fulfil the requirements of Article 14(4). That is

interpretation (b), as described above. The appellants contest this interpretation of Rule 6. In their view it follows from Rule 6(7) that in case of multiple applicants all applicants must only fulfil the requirements of Rule 6(4), meaning they have to be natural persons. The requirement that both applicants must also have their residence in a Contracting State with a non-EPO language cannot be derived from the wording of Rule 6 EPC and would also not be in line with the purpose of the EPC provisions concerning the language regime.

3.3 Evaluation by the Board

Rule 6(7) EPC was introduced together with Rule 6(4) EPC, defining categories of applicants that are entitled to the fee reduction of Rule 6(3) EPC. Its wording is clearly directed to applicants within the meaning of Rule 6(4) EPC. The function of Rule 6(7) EPC in the totality of the amendments made to Rule 6 EPC is to prevent non-entitled applicants (like bigger enterprises) to circumvent the new limitations by co-filing their applications with an entitled applicant, like a natural person or a small enterprise. Nothing in the wording or in the legislative history suggests that something more far-reaching was intended. The argument that because Rule 6(4) EPC refers to Rule 6(3) EPC which in turn refers to Article 14(4) EPC, must mean that Rule 6(7) EPC also rules that all applicants must fulfil the requirements of Article 14(4), is not convincing. This argument firstly is based on an erroneous interpretation of Rule 6(4). The only thing Rule 6(4) does is to define certain categories of applicants for whom the reduction is available. It does not express any other limiting condition to the fee reduction entitlement as defined in Rule 6(3) EPC. A reference in Rule 6(7) EPC to Rule 6(4) EPC can therefore not refer to anything else then the categories for whom the fee reduction is available. In other words, Rule 6(7) cannot by referring to Rule 6(4) EPC change the conditions for entitlement in Rule 6(3) EPC.

Secondly, the interpretation of the examining division does not fit well with the structure of the legal provisions of the language regime. Article 14(4) EPC is not concerned with fee reduction entitlement but with the entitlement to file documents with the EPO in a non-EPO language. The examining division has - rightfully - not challenged that the applicants were entitled under Article 14(4) EPC to file in a non-EPO language, as one of them was residing in a Contracting State with a non-EPO language. Rule 6(3) EPC provides that a person referred to in Article 14(4) EPC who has filed a document in a non-EPO language, is entitled to a fee reduction. It is not reasonable to assume that the legislator, without an express statement to this effect, would have wished to create a system whereby an applicant who is entitled under Article 14(4) EPC to file in a non-EPO language would nevertheless not be entitled to a fee reduction, even though he and his co-applicant both belonged to a category of applicants for whom this reduction is available.

For the reasons above the Board concludes that the decision to reject the request for a refund of 30% of the examination fee must be set aside. On a proper interpretation of Rule 6(3), (4) and (7) EPC the appellants are entitled to the requested fee refund.

4. Reimbursement of the appeal fee

4.1 Reimbursement requested by the appellants

The appellants request reimbursement of the appeal fee as in their view a substantial procedural violation has occurred. The appellants agree to the preliminary view of the Board, that an error of judgment in the interpretation of the law does not in itself amount to a procedural violation. However, the appellants argue that: "By selecting a non-first-sight and hence non-logical interpretation that is disadvantageous to all "small" parties, and by persisting in this interpretation

against the arguments submitted by the applicants, the Office has shown that it has not approached this provision (Rule 6, clarification by the Board) with a mind open for an interpretation as liberal as possible. In other words, the Office has not applied correct interpretation principles" (see letter of 5 December 2018, page 2). This quote must be seen against the background of the argument presented by the applicants in first instance proceedings that the provisions concerning the language regime should be interpreted in a liberal and applicant friendly manner. In summary, the appellants claim that the examining division had overstepped its freedom of interpretation and thus the erroneous interpretation was also a procedural violation.

The Board does not agree. The arguments of the appellants still boil down to the accusation of a serious error of judgment on the substance. The Board wishes to point out that also on the question how to interpret legal provisions and how to apply interpretation principles in a concrete case, there can be diverging views. The Board cannot see that the examining division by not picking up the arguments of the appellants why the division should interpret the provisions in their favour, committed a procedural violation. It certainly did not fail to apply a clearly defined procedural rule under the EPC, as is required for establishing a procedural violation (see CLBA, 8th edition, § 8.4.1 and 8.4.5 and case law cited therein).

4.2 Reimbursement for non compliance with Rule 113 EPC

Furthermore, the appeal fee is also not to be reimbursed on the ground that the appealed decision, as the Board has noted in its communication of 19 November 2018, does not state the names of and is not signed by the responsible employees.

4.2.1 According to Rule 113(1) EPC, "any decisions, summonses, notices and communications from the European Patent Office

shall be signed by, and state the name of, the employee responsible". Two exceptions to this general rule are stipulated in Rule 113(2) EPC: Firstly, where the employee responsible produces a document referred to in paragraph 1 using a computer, a seal may replace the signature. Secondly, where the document is produced automatically by a computer, the employee's name may also be dispensed with.

4.2.2 The Board agrees with the analysis made in a comparable case in decision J16/17, where it is stated under 2.3 of the reasons: "It follows that for any of the above mentioned documents that is drawn up individually, at least the name(s) of the person(s) who did so must be given. This requirement is not just a mere formality but an essential procedural step in the decision-taking process. The name and signature serve to identify the decision's authors and express that they unconditionally assume responsibility for its content. The requirement laid down in Rule 113(1) EPC is aimed at preventing arbitrariness and abuse and ensuring that it can be verified that the competent body has taken the decision. It therefore constitutes an embodiment of the rule of law. As a consequence, a violation of the requirement pursuant to Rule 113(1) EPC amounts to a substantial procedural violation and renders the decision erroneous (see T 2076/11, Reasons 4 and 5; T1093/05, OJ EPO 2008, 430, Reasons 6)."

4.2.3 As the decision at hand was individually reasoned and was not created automatically by a computer, the exceptions under Rule 113(2) EPC do not apply. However the decision under appeal did not bear the names of the members of the examining division. At the end of the decision only the phrase "For the Examining Division" appears, followed by an anonymous EPO-stamp. The decision therefore does not bear the names of the employees that have taken the decision nor their signature and thus does not comply with the requirement of Rule 113(1) EPC.

This omission must be classed as a substantial procedural violation, for the reasons cited above.

4.2.4 However, the Board is of the view that a reimbursement would in this case not be equitable, as the appeal is not caused by it. As a matter of fact the issue was not raised by the appellants in their appeal, but by the Board. There is no causal link between the refusal to refund part of the examination fee and the non-compliance with Rule 113(1) EPC.

4.3 For these reasons the request to reimburse the appeal fee must be rejected.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. 30% of the examination fee is refunded.
3. The request for reimbursement of the appeal fee is rejected.

The Registrar:

The Chairman:



C. Eickhoff

W. Sekretaruk

Decision electronically authenticated