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**Datasheet for the decision
of 17 July 2024**

Case Number: J 0003/24 - 3.1.01

Application Number: 22155454.6

Publication Number: 4039997

IPC: F16C27/02, F16C17/03

Language of the proceedings: EN

Title of invention:

TILTING PAD BEARING, ASSEMBLY OF A CONSTRUCTION ELEMENT AND SUCH A BEARING, AND A METHOD FOR PROVIDING A JOURNAL OPENING HAVING A DESIRED CROSS-SECTION

Applicant:

Nabuurs, Martinus Johannes Hendricus Wilhelmus

Headword:

Reimbursement of appeal fee

Relevant legal provisions:

EPC Art. 121, 122

EPC R. 103(1)(a), 103(6), 112, 135, 136(3)

Keyword:

Reimbursement of appeal fee - equitable by reason of a
substantial procedural violation (no)
Principle of legitimate expectation - expectation relied on by
appellant not legitimate
Re-establishment of rights - no separate decision after
request of further processing has already been rejected

Decisions cited:

G 0002/97, G 0003/03, R 0004/09, J 0002/87, J 0003/87,
J 0027/92, J 0018/96, J 0004/09, J 0009/10, J 0004/23,
T 0427/03, T 1891/07, T 1680/11, T 1994/11, T 0674/12,
T 2092/13



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 0003/24 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 17 July 2024

Appellant: Nabuurs, Martinus Johannes Hendricus Wilhelmus
(Applicant) Irenestraat 12
5825 CB Overloon (NL)

Representative: Verhees, Godefridus Josephus Maria
Brabants Octrooibureau B.V.
De Pinckart 54
5674 CC Nuenen (NL)

Decision under appeal: **Decision of the Receiving Section of
27 September 2023, rectified with decision of
interlocutory revision of 27 March 2024, but
request for reimbursement of the appeal fee not
allowed**

Composition of the Board:

Chairman I. Beckedorf
Members: S. Ruhwinkel
F. Blumer

Summary of Facts and Submissions

- I. The appellant (applicant) requested reimbursement of the appeal fee relating to his appeal against the decision of the Receiving Section of 27 September 2023 rejecting his request for further processing and deeming his application to be withdrawn. The Receiving Section granted interlocutory revision with its decision of rectification dated 27 March 2024. The appellant's request for reimbursement of the appeal fee was considered not allowable and was therefore remitted to the Legal Board of Appeal (see Rule 103(6) EPC).

- II. The present application EP 22 155 454.6 was filed on 7 February 2022. The examination and designation fees were due on 10 February 2023 (Friday). These fees were paid on Monday 13 February 2023. By letter of 12 February 2023, the appellant's representative requested that the payment be considered as being on time, as he had assumed that he had given an automatic debit order at the time of taking over representation from the previous representative, but on checking the deposit account on 12 February 2023 it turned out that this was not the case.

- III. On 21 February 2023, a notification of loss of rights pursuant to Rule 112(1) EPC was sent undated, and was sent again on 7 March 2023, informing the appellant that the application was deemed to be withdrawn because the examination fee and the designation fee had been paid after expiry of the prescribed period for payment. The notification indicated as available means of redress a request for a decision under Rule 112(2) EPC, a request for further processing under Article 121 EPC

and a request to consider the fee to have been paid in due time under Article 7(3), (4) Rules relating to Fees (RFees), each with a two-month time limit for filing.

- IV. On 1 June 2023, the appellant submitted an enquiry regarding his request of 12 February 2023.
- V. By a communication of 22 June 2023, the appellant was informed that no valid request for further processing had been filed as the relevant fee had not been paid in due time. Further, it was noted that the reply to the letter of 12 February 2023 was given with the notification of loss of rights of 7 March 2023. The communication indicated as available means of redress a request for re-establishment of rights under Article 122 EPC and a request under Article 7(3) and (4) RFees.
- VI. By letter of 29 June 2023, the appellant reiterated his request that the payment of the fees be considered as having been made in time. He explained that he had not interpreted the notification of loss of rights as a reaction to his request filed on 12 February 2023, but as an automatically generated letter. As an auxiliary request he claimed further processing and requested that the required fees be debited from his deposit account.
- VII. By a communication of 14 July 2023, the appellant was again informed that the payment received on 13 February 2023 was outside the time limit and that no valid request for further processing had been filed. The noting of loss of rights pursuant to Rule 112(1) EPC was therefore maintained. Since debit orders had to be filed in an electronically processable format, the

letter of 29 June 2023 could not be regarded as a valid request to debit the fee for further processing.

- VIII. On 10 August 2023, the appellant filed further comments.
- IX. On 27 September 2023, the Receiving Section decided under Article 121(2) and Rule 135(3) EPC that the request for further processing was rejected and the application was deemed to be withdrawn.
- X. On 31 October 2023, the appellant filed a request for the application to be restored based on the principle of good faith, for the fee paid for the request for re-establishment to be refunded and for a reply to the request filed on 13 February 2023 to be given. As an auxiliary request, he applied for re-establishment of the right to file a request for further processing.
- XI. By a communication of 8 November 2023, the appellant was informed that the decision of 27 September 2023 was final and that the requests filed on 31 October 2023 could not be considered valid at that point in the procedure.
- XII. By letter of 9 November 2023, the appellant reiterated his requests of 31 October 2023.
- XIII. By letter of 13 November 2023, the appellant filed further comments.
- XIV. On 22 November 2023, the Receiving Section informed the appellant by phone that the request for re-establishment of rights filed on 31 October 2023 was not complete as the corresponding fees had not been paid. The fees were subsequently paid.

- XV. By letter of 24 November 2023, the appellant filed further comments.
- XVI. On 27 November 2023, the appellant submitted a notice of appeal against the decision of 27 September 2023.
- XVII. By letter of 15 December 2023, the appellant requested clarification of the status of the appeal proceedings and of the proceedings relating to the request for re-establishment of rights.
- XVIII. By a communication of 21 December 2023, the appellant was informed that a written statement setting out the grounds of appeal had to be filed within the time limit of Article 108 EPC.
- XIX. By letters of 2 and 15 January 2024, the appellant enquired about the status of his request for re-establishment of rights.
- XX. On 18 January 2024, the appellant was contacted by phone to clarify that the appeal against the decision of 27 September 2023 constituted the main request on file and that the grounds of appeal had to be filed within the time limit to allow processing of the appeal.
- XXI. On 26 January 2024, the appellant filed his grounds of appeal and requested:
- Main request:
 - that the contested decision of the Receiving Section be set aside for lack of legal basis.

- First auxiliary request:
that the contested decision of the Receiving Section be set aside because the Receiving Section had not acted according to the principle of good faith.

- Second auxiliary request:
that the case be referred back to the department of first instance and the Receiving Section be ordered to reply to the representative's letter of 12 February 2023.

- Reimbursement of the appeal fee.

XXII. With its decision of interlocutory revision of 27 March 2024, the Receiving Section ordered that the decision under appeal be set aside and the proceedings be continued. The request for reimbursement of the appeal fee was refused and forwarded to the Board for a decision.

XXIII. The appellant justified his request for reimbursement of the appeal fee as follows:

The contested decision lacked any legal basis, since the appellant had filed neither a request for further processing nor a request for a decision. This constituted a substantial procedural violation.

The Receiving Section had not replied to his letter of 12 February 2023. The Receiving Section stated that a notification was a reply to that letter, which was not the case. This was a further substantial procedural violation.

The Receiving Section had considered his request for re-establishment not valid. This also led to a substantial procedural violation.

Reasons for the Decision

1. The present decision is issued in written proceedings in accordance with Articles 12(8) RPBA, 113 and 116 EPC. The appellant requested oral proceedings only in the event that the main request or one of the auxiliary requests was rejected (see grounds of appeal, page 7, 3rd paragraph), but not with regard to the subsequent request for reimbursement of the appeal fee, which is the only request still pending here. The Board does not consider it expedient to hold oral proceedings of its own motion, as the case is ready for decision on the basis of the appellant's written submissions and the other documents on file.
2. The Legal Board of Appeal is competent for the decision on the request for reimbursement of the appeal fee, which forms the sole subject-matter of the present appeal procedure.

According to Rule 103(6) EPC, the department whose decision is impugned shall order the reimbursement of the appeal fee if it revises its decision and considers reimbursement equitable by reason of a substantial procedural violation; in all other cases, hence also in the present case, the matter of reimbursement shall be decided by the Board of Appeal (Rule 103(6) EPC, second sentence).

The Legal Board of Appeal, as the Board which would have been competent under Article 21(2) EPC to deal with the substantive issues of the appeal if no interlocutory revision had been granted, is also competent to decide on the request for reimbursement (see G 3/03, Reasons 5.).

3. According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed in full in the event of interlocutory revision if such reimbursement is equitable by reason of a substantial procedural violation.

The Board does not consider these requirements to be met in the present case.

- 3.1. The appellant asserted that a substantial procedural violation arose from the fact that he had submitted neither a request for further processing under Article 121 EPC nor a request for a decision under Rule 112(2) EPC and that the decision under appeal therefore lacked any legal basis.

However, by letter of 29 June 2023, the appellant not only repeated his request for the late payment of fees to be regarded as having been made in time, but also as an auxiliary measure submitted a request for further processing (without paying the respective fee in due time, as notified in the subsequent communication of 14 July 2023).

Concerning the appellant's request that the late payment of fees be considered to be in due time, it is noted that Rule 136(3) EPC excludes re-establishment of rights for any period for which further processing of the patent application under Article 121 EPC is available. According to Article 7(3) and (4) RFees, the

fee is considered to have been paid in due time if evidence is provided that the payment was effected in an EPO contracting state within the prescribed period, which, however, the appellant does not assert here. Apart from that, there is the option to apply for a decision under Rule 112(2) EPC if the party affected by a notification of loss of rights considers that the finding of the European Patent Office is inaccurate. These statutory remedies were also indicated in the underlying notification of loss of rights of 7 March 2023.

In the appealed decision, the Receiving Section pointed out that the examination fee and the designation fee had been paid outside the time limit and that the application was therefore deemed to be withdrawn, thus implicitly refusing the appellant's request for the late payment to be considered as having been made on time (see decision, Reasons sect. 2.). Contrary to the appellant's assertion in his statement of grounds of appeal (see page 3, last paragraph), the decision also stated that the notification of loss of rights pursuant to Rule 112(1) EPC responded to the appellant's letter of 12 February 2023 (see Decision, Reasons, sect. 2: *"The Receiving Section could have referred to the previous applicant's letter, but anyway the notification made clearly reference to the late payments and in accordance with Rule 112 EPC, informed the applicant the application was deemed withdrawn. Therefore the Receiving Section considered that the applicant has been sufficiently informed in connection with the request dated 12.02.2023, where no written request for a valid further processing was present."*).

Thus the Board observes that the Receiving Section refused the appellant's request for further processing

(see letter of 29 June 2023) on the correct legal basis of Article 121(2) EPC and Rule 135 EPC, considering that the fees due had not been paid in time and that no valid request for further processing had been filed.

- 3.2. The appellant further argued that the fact that the Receiving Section had not replied to his letter of 12 February 2023 and had wrongly stated that a reply had been given with the notifications of 21 February / 7 March 2023 constituted a substantial procedural violation.

This argument does not justify reimbursement of the appeal fee under the present circumstances either.

- 3.2.1. The appellant submitted that the notification of loss of rights was disregarded by his representative because he considered it to have been generated automatically, since the notification did not refer to his request submitted by letter of 12 February 2023. The appellant further stated that his representative had inserted a reminder term of 1 June 2023 in his administration system to check whether he had received a reply to this request and that he had therefore filed a request for reaction on 1 June 2023 (thus outside the time limit of two months under Rules 135(1) and 112(2) EPC triggered by the notification of loss of rights).
- 3.2.2. According to the established case law of the Boards of Appeal, the principle of the protection of legitimate expectations (also referred to as the principle of good faith) requires that communications addressed to applicants must be clear and unambiguous, i.e. drafted in such a way as to rule out misunderstandings on the part of a reasonable addressee. An applicant must not

suffer a disadvantage as a result of having relied on a misleading communication (see G 2/97, Reasons 1., 4.1 and 5.1; J 2/87, Reasons 9.; J 3/87, Reasons 7.; J 4/23, Reasons 2.; T 2092/13, Reasons 2.4.; Case Law of the Boards of Appeal, 10th edition, July 2022, III.A.3.1.). If a communication is not as clear and unambiguous as it should be and misleads a reasonable recipient, this may constitute a substantial procedural violation and entitle the appellant to reimbursement of the appeal fee (see J 3/87, Reasons 8.; Case Law of the Boards of Appeal, *ibid.*, V.A. 11.6.17a).

- 3.2.3. On the other hand, both the EPO and users of the European patent system who are parties to proceedings before it are obliged to act in good faith. The principle of the protection of legitimate expectations does not give *carte blanche* to the person relying on it (see J 4/23, Reasons 2. and 4.). For their part, it is the responsibility of users of the European patent system to take all necessary procedural actions to avoid a loss of rights (see G 2/97, Reasons 4.2; R 4/09, Reasons 2.3.2). It is also inherent in the principle of the protection of legitimate expectations that a person can only successfully invoke an expectation on which they could, on an objective basis, legitimately rely. The erroneous information from the EPO must objectively justify their conduct (see J 4/23, Reasons 2. and 4.; G 2/97, Reasons 4.1). Thus it must be established that, on an objective basis and in the circumstances of the case, it was reasonable for the appellant to have been misled by the information on which they relied (see J 4/23, Reasons 2.; J 27/92, Reasons 3.2.; G 2/97, Reasons 4.1.; Case Law of the Boards of Appeal, *ibid.*, III.A. 2.3.).

3.2.4. In the present case, it must be conceded to the appellant that the notification of loss of rights of 21 February / 7 March 2023 according to Rule 112 EPC made reference to the late payment but did not expressly address the appellant's request of 12 February 2023 for the late payment to be considered as having been made on time. From an objective point of view, it was therefore not clearly apparent whether the Receiving Section had taken this request into account in its communication.

However, on an objective basis and under the present circumstances, it was not reasonable for the appellant to completely disregard this communication. Even if the appellant's representative had considered the notification as having been generated automatically without taking into account the request of 12 February 2023, it is expected that communications from the European Patent Office will be observed. The present notification pointed out the legal remedies available to overcome the loss of rights caused by the late payment of the examination and designation fees and, in particular, indicated the time limit for filing a request for further processing (Article 121 EPC, Rule 135(1) EPC). Such an official communication cannot simply be ignored and set aside. Rather, it was the appellant's own responsibility to enquire about the situation regarding his request of 12 February 2023 *before* expiry of the triggered time limits in order to ensure that he did not suffer any loss of rights. The fact that he only contacted the Receiving Section on 1 June 2023 must be attributed solely to the appellant. As indicated above (see sect. 3.2.3.), it is the responsibility of users of the European patent system to take all necessary

procedural actions to avoid a loss of rights. This applies all the more in the case at hand as the matter was initially set in motion by an error on the part of the appellant's representative, which resulted in the examination and designation fees due being paid too late.

- 3.2.5. However, even if a substantial procedural error is assumed - which cannot be recognised here for the reasons stated above - reimbursement of the appeal fee would at least not be equitable within the meaning of Rule 103(1)(a) EPC, since the behaviour of the appellant had contributed to the situation.

It is established case law that the conduct of the appellant may render reimbursement of the appeal fee not equitable even if a substantial procedural violation has occurred (see Case Law of the Boards of Appeal, *ibid.*, V.A.11.7.2.a). This is the case here. The appellant is to be regarded as having behaved inappropriately because he did not avail himself of the opportunity to take all necessary measures to avoid a loss of rights in the initial proceedings (see J 4/09, Reasons 4.; T 674/12, Reasons 3.1.3.; T 427/03, Reasons 3.). Instead, he completely ignored the noting of loss of rights. Moreover, the appellant himself had initially contributed to the unsuccessful proceedings before the Receiving Section by the late payment of the relevant fees (see J 18/96, Reasons 5.).

- 3.3. A substantial procedural violation justifying reimbursement of the appeal fee does not arise either from the fact that the Receiving Section had considered the appellant's request for re-establishment of the right to further processing not

valid and had not decided on it in separate proceedings.

- 3.3.1. The appellant filed his request for re-establishment of rights on 31 October 2023 and hence after the appealed decision of 27 September 2023 had been issued. With his letter of 31 October 2023, the appellant requested as main request that the application be restored based on the principle of good faith, that the fee paid for the request for re-establishment be refunded and that a reply to the request filed on 12 February 2023 be given. As an auxiliary request, in the event that the main request was not granted, he requested re-establishment of the right to file a request for further processing.
- 3.3.2. The Board notes that a separate decision on the appellant's requests of 31 October 2023 was not appropriate. The appealed decision of 27 September 2023 rejecting the request for further processing and deeming the application to be withdrawn was final and could only be set aside within the appeal procedure. In view of this, a separate decision on the subsequent request for re-establishment of rights could lead to a contradiction with the decision under appeal. Therefore these requests had to be assessed within the pending appeal proceedings.
- 3.3.3. The Receiving Section informed the appellant by a communication of 8 November 2023 that the decision of 27 September 2023 could be appealed within the prescribed time limit and that the main request together with the auxiliary request filed on 31 October 2023 could not be considered valid at that point in the procedure. On 18 January 2024, the appellant was furthermore informed by phone that the

appeal against the decision of 27 September 2023 constituted the main request on file and that the grounds of appeal had to be filed within the prescribed time limit to allow complete evaluation of the case.

This does not indicate a procedural error, but takes into account that the appellant's requests filed by letter of 31 October 2023 could not be decided on in isolation, as indicated above (sect. 3.3.2.).

- 3.3.4. Furthermore, in order to render the reimbursement of the appeal fee equitable, there must exist a causal link between the alleged procedural violation and the appealed decision that necessitated the filing of an appeal (see J 9/10, Reasons 3.1.; T 41/97, Reasons 7.; T 1891/07, Reasons 1.3.; T 1680/11, Reasons 3.3.; T 1994/11, Reasons 4.; Case Law of the Boards of Appeal, *ibid.*, V.A.11.7.1.). The handling by the Receiving Section of the appellant's request for re-establishment of 31 October 2023 was not the reason necessitating filing an appeal against the decision of 27 September 2023 that had already been issued. As indicated above (see sect. 3.3.2.), the decision of 27 September 2023 rejecting the request for further processing and deeming the application to be withdrawn could only be set aside by filing an appeal against it, irrespective of the treatment of the subsequent request for re-establishment.

Therefore the requirement of equity is not met here either.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated