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**Datasheet for the decision
of the Enlarged Board of Appeal
of 4 March 2015**

Case Number: R 0005/14
Appeal Number: T 0008/13 - 3.2.06
Application Number: 08425443.2
Publication Number: 2138625
IPC: D06F 39/08, A47L 15/42
Language of the proceedings: EN

Title of invention:

Apparatus for circulating flows of washing and rinsing liquids
in a laundry washing machine

Patent Proprietor:

Candy S.p.A.

Opponent:

Martinez, Georges

Headword:

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Relevant legal provisions:

EPC Art. 112a
EPC R. 106

Keyword:

-to the extent that the petition for review is not clearly
inadmissible it is clearly unallowable.

Decisions cited:

G 0008/91, G 0009/91, R 0001/08

Catchword:

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Case Number: R 0005/14

DECISION
of the Enlarged Board of Appeal
of 4 March 2015

Petitioner: Martinez, Georges
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Decision under review: Decision of the Technical Board of Appeal
3.2.06 of the European Patent Office of
10 December 2013.

Composition of the Board:

Chairman: W. van der Eijk
Members: M.-B. Tardo-Dino
P. Gryczka

Summary of Facts and Submissions

I. This petition for review was filed on 19 February 2014, against the decision in case T 0008/13 announced by Technical Board of Appeal 3.2.06 at the end of the oral proceedings held on 10 December 2013. The written decision was notified to the parties on 29 April 2014.

II. In that decision the Board dismissed the opponent's appeal against the opposition division's decision rejecting the opposition he had filed against European patent No. 2 138 625 entitled "*Apparatus for circulating flows of washing and rinsing liquids in a laundry washing machine*". The petitioner for review was the appellant (opponent) in the appeal proceedings.

The fee for the petition for review was paid on 17 February 2014.

III. Submissions filed by the petitioner

Besides the petition for review, received by fax on 19 February 2014 and confirmed on 25 February and 2 April 2014, various submissions were subsequently received by the registrar of the Enlarged Board of Appeal on 20, 21, 22, 24, 25, 27 and 28 February, 3 and 6 March and 2 and 7 April 2014. For present purposes it suffices to mention that most of these documents, numbered R1, R2, R4, R5 and R6, had been filed during the appeal proceedings before the Technical Board. In a letter dated 27 February 2014 and received on 6 March 2014 the petitioner also asked that the title of the patent be mentioned in the review proceedings, and indicated that those proceedings could begin.

IV. On 23 January 2014 the petitioner had filed before the Technical Board a request for correction of the minutes of the oral proceedings. He had asked for them to be supplemented, as he felt that they did not reflect all the objections, arguments and requests submitted at the oral proceedings; he also argued that since the rapporteur had not signed the minutes, it appeared that the minute writer had replaced the rapporteur without the petitioner being informed of the reasons for that. By decision notified on 16 April 2014 the Board refused this request.

V. The petition for review

The petition is based on Article 112a(2)(c) and (d) EPC because, according to the petitioner, the Board refused his request to set aside the opposition division's decision and revoke the patent. From the grounds as formulated, the Enlarged Board understands that the petitioner's grievances are as follows:

(a) Infringement of his right to be heard
(Article 112a(c) EPC)

(i) The decision included grounds on which the three parties (opposition division, patentee and opponent(sic)) had not been heard: On the one hand the Board did not hear the opposition division as a party (sic); on the other hand, it failed to take account of the petitioner's criticisms regarding the opposition division's decision (points *1) and *2) of the petition).

- (ii) The Board took its decision despite the petitioner's objections to the text of the patent as maintained, thereby infringing Article 113(2) EPC (point *10) of the petition).

- (iii) The Board did not accept his arguments concerning novelty and inventive step as set out in points *3), *6), *7) and *9) of the petition. Nor had it heard, in the sense of taken into account, his interpretation according to Article 69 EPC of the pumping elements disclosed in D4.

- (b) A further fundamental procedural defect under Rule 104(b) EPC occurred, since the Board refused two relevant requests (points d) page 3/10 and *11) referring to points *4), and *5) in the petition). The Enlarged Board understands those two requests to be the following:
 - (i) The request to hear a university professor. The Board did not take into account the objection raised by the petitioner under Rule 106 EPC against taking a decision immediately after the oral proceedings. Also, the circumstances surrounding the refusal to take this objection into account had not been recorded in the minutes, which was in breach of Rule 124 EPC.

 - (ii) Nor had the Board acted on the petitioner's request that it transmit to the patent

proprietor the submissions he had filed by fax, nine days before the oral proceedings, in response to the Technical Board's communication. It had whereby deprived the patent proprietor of its right to be heard.

- (c) The Board having refused to allow sound recording of the oral proceedings, the petitioner contends that it was not possible to verify whether the Board actually heard his various arguments.
- (d) Lastly, the petitioner asserts that the minutes which contain the decision did not comply with the formal requirements of Rule 102 EPC concerning inter alia, the signature and the reasons. Also, the Board of Appeal did not correct the minutes of the oral proceedings as requested by the petitioner (point *13) of the petition). In this respect the Enlarged Board notes that the Board's decision refusing the request for correction was notified to the petitioner on 16 April 2014, i.e. after he had filed the petition for review.

VI. The petitioner has not made specific requests, but the Enlarged Board gathers that he requests that the decision challenged in his petition for review be set aside, and that the proceedings be reopened before the Technical Board of Appeal.

VII. The petitioner has not requested oral proceedings. The Enlarged Board is deciding on the petition in accordance with Rule 109(3) EPC.

Reasons for the decision

1. Admissibility of the petition for review
 - 1.1 Filing a petition for review and paying the prescribed fee before the written decision has been notified does not make it inadmissible as regards the two-month time limit under Article 112a(4) EPC.
 - 1.2 The complaints regarding non-compliance with Rule 102 EPC (i.e. formal irregularities in the decision), made before the Board had actually notified its written decision, are devoid of purpose because the decision in fact contains the information allegedly lacking.
 - 1.3 Rule 106 EPC
 - 1.3.1 The petitioner alleges that he raised an objection under Rule 106 EPC but the Board of Appeal did not take it into account. He complains that since the minutes were incomplete and the Board refused to allow the debate to be recorded he is unable to prove his assertions.
However the Enlarged Board notes firstly that there was no mention of such an objection in the minutes of the oral proceedings.
Then, in his request for correction of the minutes filed on 23 January 2014, the petitioner contended in a general way that the minutes were incomplete and should contain all his requests and objections, especially those made during the oral proceedings, but without specifying, what, in the substance those requests and objections were. At that time, he did not complain that

the Board had omitted to mention an objection under Rule 106 EPC.

However, an objection under Rule 106 EPC is a procedural act and as such must be raised clearly and unambiguously, so that the Board of Appeal can accept or dismiss it. Therefore the Enlarged Board can only conclude from the fact that both the minutes of the oral proceedings and the petitioner's request for correction of these minutes are silent on the matter that the petitioner did not raise any objection under Rule 106 EPC during the oral proceedings regarding the deficiencies he believed had occurred.

- 1.3.2 Refusal of the request that a university professor be heard (points *4) and *11) of the petition).

The petitioner was aware of the refusal of this request during the oral proceedings. He should have raised an objection under Rule 106 EPC, which he did not (see point 1.3.1 above). To the extent that the petition is based on the refusal of this request it is clearly inadmissible.

As to the second request allegedly omitted by the Board, see point 1.4.1 below.

- 1.4 Inadmissibility of alleged deficiencies which are not grounds mentioned in the EPC.

Alleged deficiencies which do not concern any EPC provision cannot be grounds for a petition for review under Article 112a (2) or Rule 104 EPC.

- 1.4.1 The petitioner complains that the Board did not act on his request that it communicate to the patent

proprietor the submissions he had filed 9 days before the oral proceedings (point *5) of the petition). Assuming that was the case, the Enlarged Board does not see any adverse effects for the petitioner, who cannot put himself in the position of the patent proprietor. It is a fundamental principle of law and stipulated in Article 112a EPC, that the petitioner can put forward only his own grievances; he is not entitled to allege any violations of the right to be heard in respect of any other party.

Accordingly, the petition in so far as based on this ground is also clearly inadmissible.

Even assuming that this ground was one of the grounds listed in Article 112a EPC or was one of fundamental defects listed in Rule 104 EPC (which is not the case, as seen above), this petition would in any event have been clearly inadmissible because during the oral proceedings (a) the petitioner was aware of the alleged deficiencies but (b) no objection under Rule 106 EPC was raised (see point 1.3.1 above).

- 1.4.2 As to the petitioner's arguments and pleadings about the opposition division's party status (points *1) and *2), of the petition), the Enlarged Board can only refer him to the EPC. Under the system of jurisdiction set up by the EPC, appeals against decisions taken by the EPO departments of first instance are heard by the Boards of Appeal, and the EPC makes no provision for the Office to be represented at the appeal stage - unlike some national administrative procedural systems where the administration is indeed represented. The appeal procedure under the EPC is conducted solely

between the parties (for an analysis of this procedure, see G 8/91, Reasons 7, and G 9/91, Reasons 18).

Based on this ground too, and for the same reason as above, the petition is again clearly inadmissible. Even assuming that this ground was one of the grounds listed in Article 112a EPC or was one of fundamental defects listed in Rule 104 EPC (which is not the case, as seen above), this petition would in any event have been clearly inadmissible because during the oral proceedings (a) the petitioner was aware of the alleged deficiencies but (b) no objection under Rule 106 EPC was raised (see point 1.3.1 above).

Similarly, regarding point *10) of the petition the Enlarged Board would refer the petitioner to Article 113(2) EPC which makes it clear that it is the applicant or proprietor who must agree to the text of the patent, and not - logically enough - the opponent, even if he is the appellant in appeal proceedings. Accordingly to the extent that the petition is based on these grounds it is likewise clearly inadmissible. Even assuming that this ground was one of the grounds listed in Article 112a EPC or was one of fundamental defects listed in Rule 104 EPC (which is not the case, as seen above), this petition would in any event have been clearly inadmissible because during the oral proceedings (a) the petitioner was aware of the alleged deficiencies but (b) no objection under Rule 106 EPC was raised (see point 1.3.1 above).

2. **Allowability of the petition for review**

The grounds under *3), *6), *7) and *9) of the petition for review, i.e. that the Board of Appeal did not take

into account the petitioner's arguments and did not revoke the patent.

2.1 In fact, the petition for review had been drafted before the petitioner became aware of the reasons given in the written decision. As shown below, the reasons for the decision deprived the petition for review of any factual basis in so far as the petitioner was contending that his arguments were not taken into account. It remains from the way the petition was drafted that the petitioner takes the view that the Board of Appeal did not give his arguments a proper hearing, which requires the Enlarged Board to decide whether this general complaint is supported by some real violation of the right to be heard or whether it merely boils down to the fact that the Board of Appeal did not accept the petitioner's argumentation. Under these circumstances, the question is less whether the petitioner could raise an objection under Rule 106 EPC than whether the review required from the Enlarged Board falls within the scope of Article 112a EPC.

2.2 As to the substantiation of the petition, the Enlarged Board can see no evidence that the dismissal of the appeal results from any violations of the right to be heard or from other procedural defects within the meaning of Article 112a and Rule 104 EPC. Here the Enlarged Board would refer to the decision challenged in this petition for review. Under "Facts and submissions" (see point XII, which runs to six pages), the deciding Board set out all the arguments now reiterated in the petition, and addressed them at length under "Reasons for the decision".

So the Enlarged Board, without re-appraising the reasons (see point 3 below), notes that the case before the Technical Board turned on D4, which was considered to be the closest prior art (the decision also discusses US2, on which however the petitioner did not present arguments in his final submissions or at the oral proceedings). The discussions focused on the interpretation of D4 and of the claims relating to the second pumping element and to the arrangement of the tank.

The decision described the differences between D4 and the patent in suit, before addressing the petitioner's arguments, which the Board declined to follow mainly on the grounds that he was mistaken about the scope of protection conferred by his own patents, which according to him included possible embodiments not explicitly defined in their claims (e.g. of D4), thereby anticipating the patent in suit. The issue of functional equivalence was also discussed at length. From page 18 to page 22, the decision reviews the petitioner's arguments.

The reference made to gaps in the minutes to support the petitioner's argument that it was impossible to verify -in the absence of a recording of the oral proceedings - whether his arguments were indeed taken into account, or to establish the circumstances surrounding the Board's refusal of his request to hear a university professor, is immaterial: the Enlarged Board notes that all the petitioner's grounds mentioned in the petition received a written response, irrespective of their relevance or acuity. However, as shown by point 7.1 of the contested decision, some of them were completely ineffective or even alien to

patent law. In such circumstances, it may well be that the petitioner has not grasped the full import of the reasons given for the decision, but if so, that certainly does not mean that the Board has infringed his right to be heard.

3. The review procedure is an exceptional means of redress created by the legislator in the amended EPC 2000 with a view to rectifying intolerable procedural violations. It was never intended to operate as a third instance. These principles were established in the first decisions taken on petitions for review (see e.g. R 0001/08 of 15 July 2008, Reasons 2 and 3). The right to be heard does not mean that the Board must accept argumentation; it must merely consider it. Equally, it does not mean that the Board has to allow requests; it simply has to give reasons when refusing them. If the Board's response does not satisfy a party, that is not a procedural violation; it simply means that the Board took a different view of the facts. And that is not a matter for the Enlarged Board.

Therefore to the extent that the petition is based on grounds under *3), *6), *7) and *8) of the petition, it is clearly unallowable.

4. In view of the above, to the extent that the petition is not clearly inadmissible it must be rejected as clearly unallowable.

Order

For these reasons it is unanimously decided that:

To the extent that the petition for review is not clearly inadmissible it is rejected as clearly unallowable.

The Registrar

The Chairman

P. Martorana

W. van der Eijk