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**Datasheet for the decision
of the Enlarged Board of Appeal
of 23 September 2016**

Case Number: R 0011/14

Appeal Number: T 1767/12 - 3.2.05

Application Number: 06742464.8

Publication Number: 1896755

IPC: F16K5/10

Language of the proceedings: EN

Title of invention:
A control valve

Patent Proprietor:
FRESE A/S

Opponent:
FlowCon International ApS

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(2)(c), 112a(2)(d), 113(1)
EPC R. 104(a), 104(b), 106

Keyword:
Petition for review (not allowable)
Violation of Art. 112a(2)(c) and (d) EPC (No)

Decisions cited:
R 0006/11, R 0001/14

Catchword:
-



Case Number: R 0011/14

D E C I S I O N
of the Enlarged Board of Appeal
of 23 September 2016

Petitioner: FlowCon International ApS
(Opponent) Trafikcenter Allé 17
4200 Slagelse (DK)

Representative: Nordic Patent Service A/S
Bredgade 30
1260 Copenhagen K (DK)

Other party: FRESE A/S
(Patent Proprietor) Sorovej 8
4200 Slagelse (DK)

Representative: Trier, Mikkel Roed
Awapatent A/S
Rigensgade 11
1316 Copenhagen K (DK)

Decision under review: Decision of the Technical Board of Appeal
3.2.05 of the European Patent Office of
18 February 2014.

Composition of the Board:

Chairman: W. van der Eijk
Members: D. Rogers
A. de Vries

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 1767/12 of the Technical Board of Appeal 3.2.05 of 18 February 2014 to dismiss the Petitioner's appeal against the decision of the Opposition Division to reject its opposition against European patent No. 1896755.
- II. For ease of reference the Petitioner will also be referred to as the "opponent-appellant" or "Appellant".
- III. The petition is based on the ground in Article 112a(2)(c) EPC, that is that a fundamental violation of Article 113(1) EPC, (right to be heard), occurred in appeal proceedings. Further the Petitioner relied upon the grounds of Article 112a(2)(d) EPC in combination with Rule 104(a) EPC, (that the Board failed to arrange for the holding of oral proceedings as requested), and Rule 104(b) EPC, (that the Board decided on the appeal without deciding on a request relevant to that decision).

Summary of proceedings before the Board of Appeal

- IV. On 24 September 2013 the respondent-proprietor requested "acceleration of the opposition appeal". In a letter dated 8 October 2013 the opponent-appellant (the Petitioner in the present case) argued that no valid request for acceleration of proceedings had been filed by the respondent-proprietor. The Appellant went on to argue that oral proceedings before the Board of Appeal should not take place until the decision of the Danish Maritime and Mercantile Court, (hereafter, "the Danish Court"), was available to the Board, the decision of

this court being expected in May 2014. Such a decision would be useful for the Board as, although such litigation concerned a Danish national patent with different claims from those of the granted European patent, both these patents had the same Danish priority application. The Danish Court would be called upon to consider whether the invention disclosed in this priority application was new, inventive and sufficiently disclosed.

- V. On 6 December 2013 the Board summoned the parties to oral proceedings to be held on 18 February 2014. The attached communication addressed *inter alia* the issue of sufficiency of disclosure. The Board expressed the view that the requirements of sufficiency were satisfied and requested that the Appellant confirm whether or not it maintained this ground of opposition.
- VI. At point 2 of the Communication the Board set out the requests of the parties. These did not include any request by the Appellant that the oral proceedings neither be scheduled nor held until the Danish Court had issued its decision in relation to the priority application, nor any request by the Appellant to present supplementary information on the priority application once the Danish Court had issued its decision. In addition there was no mention of any request by the respondent-proprietor for accelerated proceedings.
- VII. In its response to the Communication the respondent-proprietor made no reference to any request for accelerated proceedings.

VIII. In response to the Communication the Appellant filed substantive comments regarding sufficiency, added matter, extension of protection and inventive step and maintained its ground of opposition under Article 100(b) EPC 1973. The Appellant made no reference to any request that the oral proceedings neither be scheduled nor held until the Danish Court had issued its decision in relation to the priority application, nor to any request to present supplementary information on the priority application once the Danish Court had issued its decision.

IX. At the oral proceedings before the Board on 18 February 2014, the Appellant requested that the decision under appeal be set aside and that the European patent be revoked.

X. At the end of the oral proceedings the Chairman asked the parties if they had any further comments or requests. The only such comment and request was made by the Appellant who asked that in the written decision the issue of intermediate pressure of the valve be addressed.

XI. The decision of the Board in case T 1767/12 was to dismiss the appeal.

*Summary of Arguments in Petition for review
Article 112a(2)(d) and Rule 104(a) and (b) EPC*

XII. In its petition the Petitioner argues that its request that the oral proceedings neither be scheduled nor held until the Danish Court had issued its decision in relation to the priority application, and its request

to present supplementary information on the priority application once the Danish Court had issued its decision, were not addressed and the Board went ahead and held oral proceedings on 18 February 2014.

Article 112a(2)(c) and Article 113 EPC

XIII. In addition, the Petitioner argues that the fourth paragraph of point 2 of the Reasons of the Board in decision T 1767/12 contains two arguments relating to sufficiency that the Petitioner had never been confronted with before. This constitutes a violation of Article 113 EPC, (right to be heard). These arguments are summarised on page 4 of the Petition for Review as being:

Argument 1

That the pressure drop across the adjusting slots was minor.

Argument 2

That the liquid pressures acting on each side of the rolling diaphragm are not critical.

XIV. The Petitioner further argues under violation of right to be heard that the decision of the Board in T 1767/12 does not address the Petitioner's argument that the requirements of Article 83 EPC are not fulfilled as claim 1 of the patent as granted (the respondent-proprietor's main request) defines a valve different from the valve that is disclosed in the embodiments in the description.

XV. In a communication dated 22 April 2016, annexed to the summons to oral proceedings, the Enlarged Board

informed the Petitioner of its provisional opinion that the petition was admissible.

XVI. As regards the allowability of the petition, the Enlarged Board expressed the following provisional views:

Article 112a(2)(d) and Rule - Failure to arrange oral proceedings and request to present supplementary information on priority

Oral proceedings before the Board were arranged and took place. The "failure to arrange oral proceedings" request was concerned with the Petitioner's view that oral proceedings should have taken place later. The Enlarged Board noted that when the parties' requests were read out before the closing of the debate at the oral proceedings before the Board, a request to delay the oral proceedings was not mentioned. If the requests read out by the Board do not correspond to a party's intentions, then that party has a duty to intervene at that point. The Enlarged Board drew the Petitioner's attention to Rule 106 EPC. The Petitioner was clearly in a position during oral proceedings before the Board to object to the holding of such oral proceedings and to the non-consideration of its request to present supplementary information on priority. It did not do so. The Enlarged Board also drew the Petitioner's attention to decision R 1/14 of 21 January 2015, Reasons points 2 and 3, regarding the operation of Rule 106 EPC. The Enlarged Board considered that these requests of the Petitioner seemed to be inadmissible and/or unallowable.

Article 112a(2)(c) and Article 113 EPC

The Petitioner's right to be heard in respect of whether the requirements of Article 83 EPC were fulfilled by the claims of the Main Request was respected.

XVII. The requests of the Petitioner are:

- 1) That the decision under review, T 1767/12, be set aside;
- 2) That the proceedings be reopened;
- 3) That the members of the Board of Appeal who participated in the decision under review be replaced;
- 4) That the fee for the petition for review be reimbursed.
- 5) That should the Enlarged Board of Appeal have reason to doubt the facts on which the petition is based as presented by the Petitioner, it is further requested:

to procure declarations by the members of Board 3.2.05 who have taken part in the oral proceedings on the events in these oral proceedings, or

to hear them in the requested oral proceedings before the Enlarged Board of Appeal, and

to hear Mr. B.G.G. van Walstijn and Mr. T.R. Baekmark, who were present for the Petitioner in the oral proceedings.

Reasons for the Decision

1. The Petition has been filed on time, is in the correct form and the fee has been paid on time. The provisions of Article 112a(4) and Rule 107 EPC have thus been complied with.
2. The Petitioner argues his case under three heads: right to be heard, request not decided upon, and failure to arrange oral proceedings.
3. The Petitioner's case under failure to arrange oral proceedings is in fact a case under requests not decided upon. This is because the Petitioner argues that its explicit request, set out in its letter of 8 October 2013, that oral proceedings before the Board not take place before the Danish Court had issued its decision, was ignored by the Board.
4. Under the head of "requests not decided upon", there is also the Petitioner's case that its request to present to the Board supplementary information on the priority application once the Danish Court had issued its decision was not addressed.
5. Rule 106 EPC provides that a petition under Article 112a, paragraphs 2(a) to (d) is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.

Requests not decided upon - arranging of oral proceedings and presenting supplementary information on priority

6. The above consideration of Rule 106 EPC is of relevance to what can be described as the "timing of oral proceedings" and "supplementary information on priority" arguments of the Petitioner. The Petitioner had the opportunity to point out that its requests on these issues had not been mentioned in the Communication annexed to the summons to oral proceedings before the Board. Indeed the fact that the Board had set oral proceedings at a date before the date upon which the Danish Court was expected to announce its judgment is a fact that should have acted as an additional prompt to the Petitioner to raise an objection to the holding of these oral proceedings. The Petitioner made no mention at the oral proceedings themselves to either its objection to the holding of the oral proceedings, or to its request to present supplementary information on priority.

7. The Petitioner has put forward no arguments to justify why it did not raise an objection to the non-consideration of its request to present supplementary information on priority. In its written submissions the Petitioner made a reference to the Vice President DG3's Notice of 16 July 2007 (see Special Edition No. 3 OJ 2007 H.1.). This notice concerns the circumstances in which it may be justifiable to change the date of oral proceedings before the board. Paragraph 2.1 of this Notice sets out some non-limiting examples of such circumstances. The Petitioner points out that changing the date of oral proceedings in order to have the

benefit of a national court decision on some of the issues of a case is not one of the examples set out in the Notice as justifying a change of date of oral proceedings. The Petitioner seems to imply that as its request would not have been allowed, no purpose would have been served by pointing out to the Board that it had not been addressed. Such considerations concern the Petitioner's assessment of the terms of the Notice, not why it was not in a position to formulate an objection during the oral proceedings under Rule 106 EPC. The petition, in so far as it concerns requests not decided upon, is therefore clearly inadmissible as the Petitioner failed to fulfil the requirements of Rule 106 EPC.

Right to be heard

8. The Petitioner also advances a further case on a fundamental violation of the right to be heard. This case has two heads, first that certain arguments of the Petitioner were not addressed, and second that the Board's decision was based on arguments that the Petitioner had not had the opportunity to address.

Right to be heard - Petitioner's argument not addressed

9. This concerns the Petitioner's case under insufficiency. The argument in question can be summarised as being that claim 1 of the main request, the patent as granted, defines a valve that is different from the valve that is disclosed in the embodiments in the detailed description. More precisely, this objection concerns whether the constant differential pressure is maintained between the inlet and outlet of the

adjusting valve, or the inlet and outlet of the complete housing. The Opposition Division found the first interpretation to be correct. The division reached this conclusion because it found that the skilled person would understand the text of the patent as containing a mistake on this point. This point was further addressed by both parties' written submissions before the Board of Appeal. In its communication (see section 5), the Board devoted 4 out of 11 pages to sufficiency and stated that it saw no error and no contradiction between claim 1 and the patent specification (page 5, top). Thus the Enlarged Board concludes that the Petitioner's arguments were directly addressed by the respondent-proprietor in its reply and the Board in its communication. In its decision the Board summarises the Petitioner's and respondent-proprietor's arguments on this point at paragraphs VI and VII. At paragraph 2.1 of its decision, the Board gives its conclusions on these arguments. The Enlarged Board therefore concludes that the Board did address the Petitioner's arguments on insufficiency. The petition is therefore unallowable on this point.

Right to be heard - decision based on new arguments

10. The Petitioner summarises these new arguments of the Board as:

Argument 1

That the pressure drop across the adjusting slots was minor.

Argument 2

That the liquid pressures acting on each side of the rolling diaphragm are not critical.

11. Although the Petitioner characterises these as arguments, they are in fact the Board's conclusions as to the knowledge of the skilled person. These conclusions are intimately related to the parties' arguments on sufficiency and were essential for the Board to be in a position to come to a view on the compliance of the patent claims with Article 83 EPC. These conclusions are also a response to the Petitioner's request at the end of the oral proceedings before the Board, and recorded in the minutes of those oral proceedings, that the written decision of the Board address the "...issue on the intermediate pressure of the valve...". This request of the Petitioner is further evidence that these issues were discussed at the oral proceedings.

12. That the Petitioner may not agree with the Board's conclusions on these points means neither that the Petitioner was not heard nor that the Petitioner was entitled to know in advance the Board's conclusions on these points. It appears on the face of point VI of the decision that the Petitioner was in fact heard on the issue of the knowledge of the skilled person, and that the Board, as would be expected, then gave in its written decision its conclusions on this issue. The fact that the Board may not, prior to its written decision, have expressed its own views on the arguments raised by the parties cannot be a ground for complaint since the Board is under no obligation to inform the parties in advance of its decision what the reasons for that decision will be (see for example R 6/11 of 4 November 2011, reasons, point 8.3 and the decisions cited therein).

13. The petition does not show that any violation of the right to be heard occurred and consequently it is clearly unallowable on this point.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable to the extent that it is not clearly inadmissible.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk