

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [X] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [-] No distribution

**Datasheet for the decision
of 4 February 2019**

Case Number: R 0007/18

Appeal Number: T 1998/15 - 3.2.03

Application Number: 09701716.4

Publication Number: 2140072

IPC: E03F5/04

Language of the proceedings: EN

Title of invention:
DRAIN WITH ADJUSTING FRAME

Patent Proprietor:
Easy Sanitary Solutions B.V.

Opponents:
Group Nivelles NV
Kessel AG

Headword:
-

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

Keyword:

"Objection under Rule 106 EPC raised - (no)"

"Petition for review - clearly inadmissible"

Decisions cited:

R 0001/08, R 0004/08, R 0014/09, R 0016/09, R 0006/12,
R 0005/14, R 0012/14, R 0002/16

Catchword:

-



Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours

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: R 0007/18

D E C I S I O N
of the Enlarged Board of Appeal
of 4 February 2019

Petitioner: Easy Sanitary Solutions B.V.
(Patent Proprietor) Braakstraat 17-19
7581 EZ Losser (NL)

Representative: Nederlandsch Octrooibureau
P.O. Box 29720
2502 LS The Hague (NL)

Other party: Group Nivelles NV
(Opponent 1) Ambachtsweg 14
3890 Gingelom (BE)

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

Other party: Kessel AG
(Opponent 2) Bahnhofstrasse 31
85101 Lenting (DE)

Representative: Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
80802 München (DE)

Decision under review: **Decision of the Technical Board of Appeal 3.2.03
of the European Patent Office of
14 September 2017.**

Composition of the Board:

Chairman C. Josefsson
Members: F. Blumer
 A. Lindner

Summary of Facts and Submissions

- I. The petition for review was filed against the decision T 1998/15 of 14 September 2017 of Board of Appeal 3.2.03 revoking European patent no. 2 140 072, which decision was notified on 12 February 2018. The petition was filed on 23 April 2018 by the patent proprietor (hereinafter petitioner), and the corresponding fee was paid on the same day.
- II. The petitioner requested *"to admit the present petition and remit the case to the Board with instruction for them in turn to allow the case to be heard before the Opposition Division on matters of inventive step"*. The petitioner further requested oral proceedings should the Enlarged Board not agree with the petitioner.
- III. The petition is based on Article 112a(2)(c) EPC (fundamental violation of Article 113 EPC). The petitioner also stated that additional fundamental procedural defects occurred at the oral proceedings, contrary to Article 112a(2)(d) EPC.
- IV. In a communication accompanying the summons to oral proceedings, the Enlarged Board gave its preliminary view that the petition was to be rejected as clearly inadmissible and clearly unallowable.
- V. In response, the petitioner provided further arguments on the admissibility and the allowability of the petition in a letter dated 4 January 2019. The petitioner further announced that Mr Clarkson would attend the oral proceedings before the Enlarged Board as the petitioner's representative.

- VI. In its letter of 4 January 2019, the petitioner also requested that the minutes of the oral proceedings before the Board of Appeal 3.2.03 be corrected. Since only Board 3.2.03 is competent for such corrections, Board 3.2.03 received a copy of said letter. In its communication of 30 January 2019, Board 3.2.03 explained that there was no recollection that the discussion held before the Board proceeded as alleged in the petitioner's letter of 4 January 2019. Consequently, Board 3.2.03 did not see fit to correct the minutes as requested by the petitioner.
- VII. Oral Proceedings before the Enlarged Board of Appeal were scheduled to start at 10:30 on 4 February 2019. After no representative of the petitioner was present at 10:30 and taking into account that travel conditions might be difficult due to bad weather, the registrar of the Enlarged Board undertook enquiries with the office of the petitioner's representative. The start of the oral proceedings was delayed to allow said enquiries.
- VIII. The Enlarged Board then took note of a telefax letter sent by an employee of Mr Clarkson's office, which contained the information that Mr Clarkson would not attend the hearing taking place on 4 February 2019 at 10:30 am due to cancelled flights. The telefax letter did not contain any request for postponement of the oral proceedings. The information given in the telefax letter was also obtained in two telephone conversations between the registrar of the Enlarged Board and two employees of the representative's office, Ms Kennepohl and Mr de Haas. The Enlarged Board then decided that the oral proceedings would take place in the absence of the petitioner's representative and started the oral proceedings at 12:30.

IX. The decision was announced at the end of the oral proceedings.

Reasons for the Decision

1. The petitioner's objections

1.1 The petitioner's objections primarily concern alleged violations of its right to be heard in connection with the discussion of its request that the case be remitted to the opposition division for the consideration of inventive step. In particular, the petitioner claims that it had not been heard on certain reasons given orally by the Chairman during oral proceedings and/or in the written decision for not allowing its request for remittal:

- (a) The fact that the opposition division had already given preliminary views on documents D1 and D4 appeared to be, from point 4.3 of the decision under review, the main point on which the Board of Appeal based its decision not to remit. This was not discussed in this context (point 33 of the petition).
- (b) On the need for procedural economy, given in the decision under review as a reason for not remitting the case, the petitioner had also not been heard (point 32 of the petition).
- (c) The Chairman of the Board of Appeal, when giving the decision not to remit, commenced his announcement with a reference to the request for

accelerated processing. The question of accelerated processing had never been a subject of discussion and could therefore not form a basis for the decision not to remit (points 18, 27 of the petition).

1.2 The refusal of a remittal cannot *per se* be a ground for allowing a petition. Only if a party has not been sufficiently heard on the issue of remittal, the refusal of a remittal can lead to a ground for a petition under Article 112a(2)(c) in connection with Article 113 EPC (see, e.g., R 2/16 of 28 October 2016, reasons point 3). This seems to be acknowledged by the petitioner who focuses on the procedure which led to the decision not to remit the case to the opposition division (points 24/25 of the petition).

1.3 In the petition (page 1), it was further argued that additional fundamental procedural defects than a violation of Article 113 EPC occurred at the oral proceedings before the Board of Appeal. In this context, the Enlarged Board notes that Rule 104 EPC contains an exhaustive list of other fundamental procedural defects on which a petition may be based under Article 112a(2)(d) EPC (R 1/08 of 15 July 2008, reasons point 2.1; R 16/09 of 19 May 2010, reasons point 2.3.5). The petitioner does not rely on any of the specific procedural defects listed in Rule 104 EPC (failure to arrange for requested oral proceedings and failure to decide on a relevant request). The Enlarged Board therefore does not see a need to consider Article 112a(2)(d) EPC.

2. Admissibility of the petition

- 2.1 The petition was filed and the corresponding fee was paid within the applicable time limit of Article 112a(4) EPC (see above point I). The formal requirements of Rule 107(1) and (2) EPC have been complied with, and the petitioner is adversely affected by the decision under review.
- 2.2 As a further requirement for admissibility, the Enlarged Board has to assess whether the obligation to raise an objection under Rule 106 EPC has been complied with. Under said provision, a petition for review is admissible only where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal. In the petitioner's view, this condition is fulfilled because the petitioner, during oral proceedings, immediately challenged the fact that its request for accelerated processing had not been discussed or otherwise presented as a basis for the decision not to remit when the Chairman referred to this acceleration request during the announcement of this decision (point 2 of the petition).
- 2.3 This intervention of the petitioner, however, cannot qualify as an objection under Rule 106 EPC in the Enlarged Board's view. The pertinent case law requires that an objection under Rule 106 EPC must be expressed in such a form that the board of appeal is able to recognize immediately and without doubt that such an objection - *i.e.* one which is additional to and distinct from other statements, in particular statements arguing or even protesting against the conduct of the proceedings or against an individual procedural finding - is intended (R 12/14 of 7 October 2016, reasons point 8). An objection under Rule 106 EPC is a strong means of a party, allowing it to trigger a

re-evaluation of the board's conduct of the proceedings. It should immediately be recognisable as such by the board and it should also be reflected in the minutes of the oral proceedings. Even if the fact that a party's intervention is not reflected in the minutes of the oral proceedings is not indicative of whether such intervention was made or not, the lack of any reference to such intervention in the minutes is a strong sign showing that the intervention was not understood as an objection under Rule 106 EPC (see R 5/14 of 4 March 2015, reasons point 1.3.1; R 14/09 of 22 December 2009, reasons point 4; R 4/08 of 20 March 2009, reasons point 2.3).

2.4 When the petitioner mentioned that its request for accelerated processing had not been discussed in the context of the requested remittal, this intervention concerning a specific argument was, according to the petitioner, answered by the Chairman by assuring the parties that this was not the only reason. According to the petitioner, the Chairman also indicated that further evaluation was straightforward (point 18 of the petition). Apparently there was no follow-up from the petitioner after this explanation of the Chairman. Had the petitioner felt that it had not been sufficiently heard on the reasons for the non-remittal or on any other issue related to the remittal, another intervention, clearly recognisable as an objection under Rule 106 EPC, should then have been made by the petitioner.

2.5 In its letter of 4 January 2019 (point 6), the petitioner argued that a further discussion on the remittal took place but that the decision had already been taken so that there was nothing the petitioner could do at that stage. The Enlarged Board does not

accept that nothing could be done at that stage. The objection under Rule 106 EPC could have been raised during these further discussions or even later during oral proceedings before the final decision was announced (see R 6/12 of 18 January 2013, reasons point 1.3.3; R 12/14 of 7 October 2016, reasons point 12).

- 2.6 For the above reasons, the Enlarged Board concludes that Rule 106 EPC has not been complied with and that the petition has to be rejected as clearly inadmissible.
3. Since the petition has to be rejected as being clearly inadmissible, its allowability does not need to be assessed.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

C. Josefsson

Decision electronically authenticated