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D E C I S I O N
of 30 January 2001

Case Number: T 1140/00 - 3.2.4

Application Number: 96118603.8

Publication Number: 0765599

IPC: A01K 1/015

Language of the proceedings: EN

Title of invention:
Toilet sand for animals

Applicant:
DAIKI CO., LTD

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 111(1)
EPC R. 71(2), 67

Keyword:
"Non-appearance of party at oral proceedings"
"Remittal to the first instance"
"Reimbursement of appeal fee"

Decisions cited:
-

Catchword:
Reimbursement of appeal fee despite non-appearance of party at oral proceedings.



Case Number: T 1140/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 30 January 2001

Appellant: DAIKI CO., LTD.
6-3, Ueno 3-chome
Taito-ku
Tokyo 110 (JP)

Representative: Casalonga, Axel
BUREAU D.A. CASALONGA - JOSSE
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D-80469 München (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 19 July 2000
refusing European patent application
No. 96 118 603.8 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
H. Preglau

Summary of Facts and Submissions

I. The examining division decided at oral proceedings on 11 July 2000 to refuse the European patent application No. 96 118 603.8 (publication No. 0 765 599) for contravention of Article 76(1) EPC. The written decision was dispatched on 19 July 2000.

On 1 September 2000 the appellant (applicant) filed an appeal against this decision and simultaneously paid the appeal fee. The statement of grounds of appeal was received on 15 September 2000.

II. The statement of grounds states that on the day before the oral proceedings the representative for the appellant had telephoned the first member of the examining division and mentioned that he would be taking a flight from Paris to Munich on the morning of the oral proceedings but that he might be delayed and so might arrive late for the oral proceedings.

Indeed the representative did not arrive at the time arranged for the oral proceedings. After waiting half an hour, the examining division relied on Rule 71(2) EPC to continue the proceedings without him and, after discussion, refused the application and closed the oral proceedings a quarter of an hour after opening them.

The appellant considers that the examining division was inflexible and that it should at least have contacted the representative's office to check whether he had left.

III. The version of claim 1 refused by the examining division reads:

"A toilet sand for animals impregnated with the required color-developing component, comprising bromothymol blue and a sterilizing agent dispersed in an organic solvent, said sterilizing agent selected from the group consisting of ethanol, isopropyl alcohol, and DL-pyrrolidone carboxylate."

IV. The statement of grounds also includes a new set of claims 1 to 4 with arguments why they satisfy the EPC, amended pages 1 to 17 (some of these pages have been completely struck through), and drawings sheets 1/8 to 8/8 (mostly struck through so that only the original Figure 5 remains).

The present claim 1 reads:

"Toilet sand for animals consisting of materials which are impregnated, printed or painted with an ink composed by bromothymol blue dispersed or dissolved in an organic solvent."

V. In the statement of grounds the appellant requests

- interlocutory revision (Article 109 EPC),
- that the appeal fee be reimbursed (Rule 67 EPC),
and
- that a patent be granted on the basis of the claims filed with the statement of grounds of appeal.

The statement of grounds also contains a request for oral proceedings but this is withdrawn in the letter of 10 January 2001 if the case is sent back to the examining division and the appeal fee is reimbursed.

Reasons for the Decision

1. The appeal is admissible.
2. *Interlocutory revision*
 - 2.1 The request for interlocutory revision under Article 109 EPC is a request that only the examining division could have granted. It chose not to rectify its decision but forwarded the appeal to the board, without reasons because it was prohibited by Article 109(2) EPC from commenting on the merit of the appeal.
 - 2.2 The only reason for refusing the application given in the examining division's decision (see page 2, section 2) concerned the contravention of Article 76(1) EPC by the features in claim 1 then on file of "and a sterilizing agent dispersed in an organic solvent, said sterilizing agent selected from the group consisting of ethanol, isopropyl alcohol, and DL-pyrrolidone carboxylate."

However, these features are not present in the version of claim 1 filed with the statement of grounds of appeal (see section IV of this decision).

2.3 Thus, irrespective of the aspect of the representative failing to arrive at the time scheduled for the oral proceedings (see section 4 below), it seems that the examining division should have rectified its decision and resumed examination proceedings (Article 109(1) EPC).

If the examining division had merely declined to reimburse the appeal fee then this aspect could have been dealt with separately by the board (see section 5 below).

3. *Request that a patent be granted - Remittal to the first instance*

3.1 As stated in section 2.2 above, the new claim 1 differs substantially from that refused by the examining division. It would be inappropriate in these appeal proceedings for the board to consider this claim 1 and so the board could not allow the appellant's request for grant of a patent on its basis.

3.2 The board instead makes use of its power under Article 111(1) EPC to remit the case to the examining division for further prosecution.

4. *The oral proceedings held by the examining division*

4.1 Section 2 of the minutes of the oral proceedings state that the first member "received a personal telephone call from the Applicant the day before (10.07.00) in order to confirm the later than normal starting time of the oral proceedings at 10.00 hrs."

Thus, on the day before the oral proceedings, the

representative confirmed that he would be coming.

- 4.2 Although not mentioned in the minutes, it is written on page 1 of the statement of grounds of appeal that during this telephone call the representative said he would be taking a flight from Paris to Munich on the morning of the oral proceedings but that he might be delayed and so might arrive late for the oral proceedings.

As the starting time of 10.00 am had already been confirmed by the summons to attend oral proceedings dispatched on 19 May 2000, it seems to the board that the starting time was not the only reason for the telephone call. The board assumes that the representative would at least have mentioned that he was flying from Paris to Munich on the day of the oral proceedings, this being the reason for the 10.00 am start. This is not inconsistent with the minutes, they are merely silent on this point.

- 4.3 The minutes of the oral proceedings state that after 10.00 am the examining division checked that the applicant had been correctly summoned, checked twice with the porter's lodge at the main entrance of the EPO PschorrHöfe building to establish whether or not the applicant had arrived and checked that no facsimile, telegram or telephone calls had been received pertaining to the applicant's absence. The examining division then started the oral proceedings at 10.30 am, discussed the case, refused the application and closed the oral proceedings at 10.45 am.

- 4.4 Thus the examining division checked whether information had been received about the applicant's absence. This

implies that, had such information been received, the examining division might not have started the oral proceedings at 10.30 am It would make no sense to check if any information had been received unless such information was going to influence how the examining division was going to act.

It might be asked whether the examining division, instead of checking whether a facsimile, telegram or telephone call had been **received**, should have **arranged** a telephone call to the representative's office. A good reason for the examining division not to do this was that it knew that the representative was coming and indeed it must have assumed that he was on his way. The board can see no reason why the examining division might have supposed that the representative had changed his mind and decided not to come. This was not a case where a party had remained silent or had hinted that it might not attend an oral proceedings.

Nevertheless the examining division did not wait for the representative.

The board thus considers that the wait of merely 30 minutes before starting the oral proceedings and the taking of the decision 15 minutes later were unreasonable in this ex parte case involving a representative known by the examining division to be coming and presumably known to be coming from Paris that morning (see section 4.2 above).

4.5 However also the representative was at fault.

The last paragraph on page 1 of the statement of grounds states that the representative had encountered

problems the week before in Munich or in Paris and knew that his flight might be delayed and that he might arrive late. Nevertheless he chose to fly on the morning of the oral proceedings instead of travelling the day before.

The first paragraph on page 1 of the statement of grounds states that the representative's flight of 07.20 am was overbooked. Thus he knew at check-in well before 07.20 am that he was going to be delayed. Organising a replacement flight, changing terminals and checking in would have been his priority and would have taken considerable time. However the board assumes that at some point - at least once he had checked in - he would have had the time needed to make a telephone call and, even if he did not have a mobile phone, he would have been in an area with public telephones. He argues "that it was not possible at around 8.15 am before going into the plane to inform either our office in Paris or in Munich or the EPO of the situation" but the board considers it should have been possible at this time at least to have left a message with the EPO switchboard.

The flight landed at 10.45 am, the same time as the decision was taken. What happened after this is not relevant.

5. *Request for reimbursement of the appeal fee*

5.1 Remittal forms an adequate basis for deeming the appeal allowable (one of the conditions in Rule 67 EPC for ordering the reimbursement of the appeal fee).

Moreover the board considers that reimbursement in this

case is equitable by reason of a substantial procedural violation, namely the unreasonable action by the examining division on the morning of the oral proceedings (see section 4.4 above). Thus the other relevant condition in Rule 67 EPC is fulfilled.

The board has explained in section 4.5 above why it considers also the representative to have been at fault. However this does not neutralise the substantial procedural violation committed by the examining division.

5.2 Accordingly the appeal fee will be reimbursed.

5.3 The board does not wish this order to reimburse the appeal fee to be seen as a licence to parties, who have informed the division that indeed they will be coming to oral proceedings, to arrive when convenient to them. However in this particular case the representative was known to be coming from a distance on the day of the oral proceedings. A longer delay before starting this particular oral proceedings would not have seriously inconvenienced the examining division (and of course there was no other party to be inconvenienced).

6. Oral proceedings before the board are unnecessary because the conditions set in the appellant's letter of 10 January 2001 are satisfied. The request for oral proceedings is a request in appeal proceedings so, if the appellant wishes oral proceedings in the further prosecution before the examining division, then he should request them. If so, then the examining division should grant the request (and not make use of the possibility set out in Article 116(1) EPC of rejecting a request for further oral proceedings).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the patent documents submitted with the statement of grounds of appeal.
3. The request for reimbursement of the appeal fee is allowed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries