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D E C I S I O N
of 30 August 2006

Case Number: T 0716/05 - 3.2.01

Application Number: 00969673.3

Publication Number: 1220723

IPC: B21C 23/00

Language of the proceedings: EN

Title of invention:
Continuous extrusion apparatus

Applicant:
BWE Limited

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 109
EPC R. 67

Keyword:
"Interlocutory revision - repayment of appeal fee (no) "

Decisions cited:
-

Catchword:
-



Case Number: T 0716/05 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 30 August 2006

Appellant: BWE Limited
Beaver Industrial Estate
Ashford
Kent TN23 7SH (GB)

Representative: Lewis, David Overington
BWE Limited
Beaver Industrial Estate
Ashford
Kent TN23 7SH (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 20 April 2005
refusing European application No. 00969673.3
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: S. Crane
Members: J. Osborne
G. Weiss

Summary of Facts and Submissions

- I. European patent application No. 00 96 9673.3 published as WO-A-01/26834 was refused with a decision posted 20 April 2005.
- II. An appeal was filed against the decision and reimbursement of the appeal fee was requested due to an alleged violation of the provision of Article 113(1) EPC. The examining division granted interlocutory revision but refused the request for reimbursement of the appeal fee.
- III. The procedure before the examining division may be summarised as follows:

The published application contained claims 1 to 5 relating to a continuous extrusion apparatus and claims 6 and 7 relating to an extrudate product.

In its first communication pursuant to Article 96(2) EPC the examining division referred to the International Preliminary Examination Report which had stated that claim 7 was so unclear that no meaningful opinion concerning novelty and inventive step could be formed because it defined a product only in terms of its method of manufacture. In response to the first communication the applicant did not address the objection in respect of claim 7 which was maintained unamended.

In its second communication the examining division explicitly repeated the objection of lack of clarity in respect of claim 7. It indicated its view that the

objection was such that there appeared to be no possibility of overcoming it by amendment and that the claim therefore should be deleted. It further indicated that if the applicant failed to do so refusal of the application was to be expected. In response to the second communication the applicant filed a new set of claims in which claim 6 was essentially identical to previous claim 7. In its letter the applicant addressed only the patentability of the subject-matter of the claim.

The examining division issued the decision, reasoning *inter alia* that claim 6 was unclear and therefore failed to satisfy the requirement of Article 84 EPC.

IV. In its statement of grounds of appeal the applicant requested that the contested decision be set aside and that a patent be granted on the basis of an amended set of claims filed therewith and the appeal fee refunded. It further requested "a hearing in the event that the matter might be argued orally" in the event that the requests were not granted. The examining division rectified its decision pursuant to Article 109(1) EPC but refused the request for refund of the appeal fee.

V. The applicant justified its request for refund of the appeal fee essentially as follows:

Although the examining division in its second communication had warned that the objection of lack of clarity in respect of present claim 6 was such that it was unlikely that it could be overcome by amendment, the possibility did not appear to be excluded. The response to the second communication therefore advanced

arguments accordingly. The examining division rejected those arguments and refused the application without giving an opportunity to amend the application by deleting the claims or to request an oral hearing.

- VI. The board issued a communication pursuant to Article 110(2) EPC in which it indicated its provisional opinion that the examining division had not committed a substantial procedural violation which would justify reimbursement of the appeal fee and it invited the applicant to consider if it wished to maintain its request for oral proceedings. In response the applicant stated that it had decided "not to file observations in respect of the refusal to re-imburse the appeal fee ..." and "not to press for reimbursement".

Reasons for the Decision

1. The statements by the applicant quoted above can in the circumstances only be understood as meaning that the request for oral proceedings is withdrawn. The case therefore may be decided in written procedure.
2. The applicant twice failed to respond to the examining division's objection of lack of clarity of original claim 7. Contrary to the statement in the notice of appeal the applicant at no stage dealt with the objection that claim 6 (original claim 7) was unclear because it attempted to define a product by its method of manufacture.
3. The applicant argues that the examining division rejected the arguments filed in response to the second

communication and refused the application without giving an opportunity to amend the application by deleting the claims or to request an oral hearing. However, the applicant had the opportunity since receipt of the examining division's first communication to delete original claims 6 and 7 but failed to do so until after receipt of the decision to refuse the application. Moreover, the applicant had the opportunity since entry of the application into the European phase to request oral proceedings as a precautionary measure but failed to do so.

4. It follows that the Examining Division has not committed a substantial procedural violation which would justify reimbursement of the appeal fee (Rule 67 EPC).

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

A. Vottner

S. Crane