

**Internal distribution code:**

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

**Datasheet for the decision  
of 23 April 2008**

**Case Number:** T 1094/07 - 3.3.05

**Application Number:** 01926231.0

**Publication Number:** 1278587

**IPC:** B01D 47/02

**Language of the proceedings:** EN

**Title of invention:**

Gas flow neutralising device and method

**Applicant:**

Stichting Rechtenbeheer Knauf

**Headword:**

Gas Flow Neutralising Device/STICHTING R. KNAUF

**Relevant legal provisions:**

EPC Art. 133(1)(2)

EPC R. 103(1)a

**Relevant legal provisions (EPC 1973):**

-

**Keyword:**

Interlocutory revision - reimbursement of appeal fee (no; no  
substantial procedural violation)"

"Oral proceedings in the absence of duly summoned applicant"

**Decisions cited:**

G 0003/03

**Catchword:**

-



Case Number: T 1094/07 - 3.3.05

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.05  
of 23 April 2008

**Appellant:** Stichting Rechtenbeheer Knauf  
J.J.P. Oudweg 6  
NL-1703 DE Heerhugowaard (NL)

**Representative:** Jilderda, Anne Ayolt  
Octroibureau LIOC B.V.  
Postbus 13363  
NL-3507 LJ Utrecht (NL)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 15 January 2007  
refusing European application No. 01926231.0  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** G. Raths  
**Members:** H. Engl  
S. Hoffmann

## Summary of Facts and Submissions

- I. European patent application no. 01926231.0 was refused by a decision of the examining division taken during oral proceedings on 27 September 2006 on the grounds of lack of novelty of claims 4 to 6 and of non-compliance with the requirements of Rule 29(2) EPC [1973].

The decision was reached at the oral proceedings in the absence of the applicant or his professional representative. The latter, having been duly summoned, had announced by telefax sent one day before the oral proceedings his resignation as a professional representative and had requested a postponement of the hearing.

However, the examining division remarked in its decision that the subject matter of claims 1 to 3 and 7 to 10 (as far as referring to claims 1 to 3) appeared to be new and to involve an inventive step.

- II. With the statement of the grounds of appeal the applicant (appellant) filed a new set of claims, amended along the lines indicated by the examining division as patentable, and a description adapted thereto. The appellant requested interlocutory revision and a reimbursement of the appeal fee.
- III. On 2 July 2007 the examining division decided to set aside the decision refusing the application and to continue the examination procedure. However, the request to reimburse the appeal fee was not allowed and the case forwarded to the Boards of Appeal for a decision on that matter.

The only pending matter in this appeal case is therefore to decide on this reimbursement.

- IV. The board issued a communication dated 28 January 2008 in which it provisionally regarded the appellant's request as unfounded.
- V. Further arguments were brought forward by the appellant in a letter dated 8 April 2008.
- VI. The appellant's arguments, insofar as they concern the request for reimbursement, may be summarized as follows:

The appellant's argument concerns the fact that oral proceedings before the examining division were conducted on 27 September 2006 in the absence of a representative of the appellant. The reasons for said resignation were not deemed to be particularly relevant. More relevant was that the appellant found itself in a situation without a professional representative to defend its case. The appellant argues that it was thus adversely affected as it could not file amended application documents in the course of normal substantive examination of first instance, but had to resort to an appeal.

Although the examining division did recognise patentable subject matter in the application, as indicated in its decision, it decided to refuse the application right away rather than issuing a further communication to express the allowability of claims 1 to 3, possibly with a short time limit for reply. The examining division thus wrongly weighed its own

interest in a quick procedure against the interest of the appellant in being rewarded for its invention with a patent. Said behaviour did not bear witness to a proper procedural conduct on the part of the examining division.

The appellant also contended that in a situation where

- a representative suddenly passes away and the applicant was left without professional representative;
- where the examining division already acknowledged a clear basis for grant of a patent;
- where practical alternatives, such as a postponement of the oral hearing or a further communication would have been at hand to meet both the appellant's and the examining division's interests;

the examining division should have refrained from a final decision to refuse the application. A refund of the appeal fee was accordingly warranted to compensate the appellant for at least a part of the adverse consequences of the said refusal.

VII. Requests:

The appellant requested a refund of the appeal fee.

**Reasons for the Decision**

1. Competence to decide

The Enlarged Board of Appeal stated in its decision G 0003/03 (see Order, point 2):

*"2. The board of appeal which would have been competent under Article 21 EPC to deal with the substantive issues of the appeal if no interlocutory revision had been granted is competent to decide on the request."*

Consequently, the present board is competent to decide on that matter.

2. The following relevant procedural facts can be established from the file:
  - 2.1 In a letter dated 22 April 2004 the appellant auxiliarily requested oral proceedings should the examiner be inclined to reject the application.
  - 2.2 On 26 April 2006 the examining division issued a summons for oral proceedings to be held on 27 September 2006 and an annex thereto explaining the questions to be discussed.
  - 2.3 Receipt of the summons was acknowledged by the appellant on 27 April 2006.
  - 2.4 In an urgent facsimile received at the EPO on 26 September 2006, at 11:43 hrs, the representative informed the office that he resigned as the professional representative of the appellant and hence would not attend the oral proceedings. Postponement of the oral proceedings to another date, to be scheduled directly with the appellant, was requested.

2.5 Oral proceedings took place on 27 September 2006 in the absence of the appellant or its representative. The application was refused.

3. Considering these circumstances, and the appellant's arguments and explanations, the board finds the appellant's request unfounded, for the following reasons:

3.1 Oral proceedings were initiated at the appellant's own request. The appellant was duly notified of the summons almost five months before the scheduled date. In spite of this ample time for preparation, the resignation of the appellant's representative was only notified less than 24 hours before the oral proceedings, without giving reasons for this act. Although the appellant refers in its letter dated 8 April 2008 to "*a situation where a representative suddenly passes away...*", the board notes that the factual situation presented in the said urgent facsimile was quite different. It is clear from the express wording in the said urgent facsimile, namely: "*... I resigned as the professional representative of applicant*" that the appellant was not suddenly left without professional representation due to an act of God, but by a deliberate act of resignation. Since no reasons whatsoever have been put forward as to why the professional representative resigned and why he chose to resign (or at least to communicate his resignation to the office) only one day before the day scheduled for the oral proceedings, the board cannot see any specific obligation on the examining division to be proactive. Were it otherwise, any oral hearing could be torpedoed by resignation of the representative "in the eleventh hour".

In accordance with the Guidelines for Examination in the EPO, E-III 7., a request for postponement of oral proceedings can only be allowed if sufficiently substantiated by important grounds. This condition is not met here.

The board would also like to observe that, pursuant to Article 133(1)(2) EPC, natural or legal persons having their residence or principal seat of business in a Contracting State need not be represented by a professional representative. Therefore, no immediate reason for a postponement of the oral proceedings and a suspension of the procedure arose.

Under these circumstances, the board considers that the examining division was not obliged to postpone the oral proceedings.

- 3.2 It was furthermore neither the duty of the examining division nor would it have indeed appeared promising to try and arrange a new date directly with the appellant, because the resigning representative himself declared that he was unable to contact the appellant "*despite ample effort*" (see facsimile dated 26 September 2006). A representative, not able to contact the applicant (appellant) for whatever reasons, cannot simply "kick the ball into the field of the examining division" and ask them to find out the whereabouts of his (former) client.

There is also no doubt that the appellant was aware of the oral proceedings scheduled in its case, because it was duly summoned (see point 2.3 above).



3.3 The board can also not accept the appellant's argument that the examination division should have postponed the oral proceedings and issued a further communication because novel and inventive subject matter had been identifiable in the application. It is evident from the annex to the summons for oral proceedings (sent out almost five months in advance) that mainly novelty of claims 4 to 6 and inventive step of claim 1 were under dispute. In this situation and in order to avoid oral proceedings, it would have been up to the appellant to file amended claims, possibly by way of auxiliary request(s), and suitable supporting arguments. Since, however, nothing of the like was forthcoming, the examining division was right in taking an immediate decision on the claims on file and thus offering the applicant the immediate possibility of having this decision reviewed in appeal proceedings.

Moreover and in general, it is also not considered equitable to compensate the appellant for adverse consequences for which it bears the sole, or at least the overwhelming, responsibility.

4. In accordance with Rule 103(1)a EPC, the board shall order a reimbursement of the appeal fee in the event of interlocutory revision, if such reimbursement is equitable by reason of a **substantial procedural violation**. For the reasons given above, a procedural violation has not taken place, let alone a **substantial** one which would call for a reimbursement for reasons of equity.

**Order**

**For these reasons it is decided that:**

The request for reimbursement of the appeal fee is refused.

The Registrar

The Chairman

S. Sánchez Chiquero

G. Raths