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**Datasheet for the decision
of 10 September 2010**

Case Number: T 1259/09 - 3.2.01

Application Number: 04101715.3

Publication Number: 1495908

IPC: B60N 2/34

Language of the proceedings: EN

Title of invention:

A seating system and a passenger accommodation unit for a vehicle

Patentee:

Virgin Atlantic Airways Limited

Third Party:

Premium Aircraft Interiors Group Limited/
Premium Aircraft Interiors UK Limited

Headword:

-

Relevant legal provisions:

EPC Art. 115
EPC R. 140

Relevant legal provisions (EPC 1973):

EPC Art. 107(1), 125
EPC R. 65(1)

Keyword:

"Party to first instance examination proceedings (no)"
"Appeal admissible (no)"

Decisions cited:

G 0001/84, G 0009/91, G 0010/91, G 0008/95, J 0008/81,
J 0002/93, T 0222/85, T 0198/88, T 0055/90, T 0226/02,
T 0268/02, T 0713/02, T 0079/07

Catchword:

By filing a request for correction of the grant decision under Rule 140 EPC a third party does not become a party to the examination proceedings.



Case Number: T 1259/09 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 10 September 2010

Appellants:
(Third Party)
Premium Aircraft Interiors Group Limited/
Premium Aircraft Interiors UK Limited
Watchmoor Point
Watchmoor Road
Camberley
Surrey GU15 3EX (GB)

Representative:
Letzelter, Felix Phillip
Meissner, Bolte & Partner GbR
Widenmayerstrasse 48
D-80538 München (DE)

Respondent:
(Party as of right)
Virgin Atlantic Airways Limited
The Office
Manor Royal
Crawley
West Sussex RH10 9HU (GB)

Representative:
Davies, Christopher Robert
Dehns
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Communication under appeal: Communication of the Opposition Division of the European Patent Office posted 17 April 2009 forwarding a communication of the Examining Division concerning the correction of the grant decision.

Composition of the Board:

Chairman: S. Crane
Members: T. Karamanli
Y. Lemblé

Summary of Facts and Submissions

- I. European patent No. 1 495 908, designating *inter alia* the Contracting State GB, was granted by a decision of 7 May 2007. The mention of grant was published in the European Patent Bulletin on 30 May 2007.
- II. Three notices of opposition were filed. One of the notices of opposition was filed in common by Premium Aircraft Interiors Group Limited and Premium Aircraft Interiors UK Limited (hereinafter Premium).
- III. With a letter dated 5 November 2008 Premium requested a correction of the decision to grant pursuant to Rule 140 EPC, by deleting GB from the list of designated Contracting States. In the heading of their letter, Premium was indicated as "opponent".
- IV. With a brief communication dated 23 February 2009, to which a copy of Premium's letter dated 5 November 2008 was attached, the opposition division informed all parties to the opposition proceedings as follows:

"The request for correction of the decision to grant a European patent in respect of GB has been forwarded to the examining division who had taken the decision. It will consider of its own motion, instigated by a letter from a third party, whether the decision should be corrected. Please note however that the EPO is bound by its decisions and that in decisions of the EPO only linguistic errors, errors of transcription and obvious mistakes may be corrected (R. 140 EPC). No separate communication to the third party will be issued in this respect."

- V. On 17 April 2009 the opposition division posted further brief communications. In the communication sent to Premium, the following subject is indicated: *"Your request for correction of the Decision to Grant dated 7 May 2007 under Rule 140 EPC submitted by letter dated 05 November 2008."* The same wording except the possessive pronoun "your" is used for indicating the subject of the communication, sent to the other parties to the opposition proceedings. Both versions, however, comprise the following identical information: *"Please find attached the communication of the Examining Division with respect to the a.m. request."* In this enclosed communication, without any reference to Premium's letter, it is stated that *"the examining division has noted that after examination of the designation of GB on the basis of the documents on file and their treatment in the course of examination proceedings it had come to the conclusion, that it was not necessary to correct the decision with regard to GB"* and the reasons for this statement are set out in brief. The communication has no indication of the addressee and is signed by all three examiners of the examining division.
- VI. On 15 June 2009 Premium (appellants) filed a notice of appeal *"against the decision communicated by the European Patent Office with the communication dated April 17, 2009"* and paid the appeal fee on the same day.
- VII. In a letter filed on 15 July 2009 the patent proprietor (respondent) submitted that the appeal was not admissible since the communication of the examining division transmitted with the brief communication dated 17 April 2009 was not an appealable decision and, in

any case, Premium was not a party adversely affected within the meaning of Article 107 EPC.

- VIII. The statement of grounds of appeal was filed on 10 August 2009.
- IX. On 28 December 2009 the board issued a summons to oral proceedings, together with a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536). The board expressed its preliminary opinion that the patent proprietor was a party as of right within the meaning of Article 107, second sentence, EPC 1973. The appellants, however, were not a party to proceedings before the examining division and therefore not adversely affected within the meaning of Article 107 EPC 1973, irrespective of whether the communication of 17 April 2009 constituted a decision.
- X. In a letter dated 23 December 2009 the respondent submitted that the appeal was inadmissible because Premium, as a third party, was not and had never been a party to the examination proceedings and could not have become a party to these proceedings by filing a request for correction of the decision to under Rule 140 EPC.
- XI. At oral proceedings on 10 September 2010 the appellants requested that the decision communicated by the EPO with a communication dated 17 April 2009 be set aside and that the decision to grant a European patent No. 1 495 908 be corrected to delete GB from the list of designated states. The respondent requested that the appeal be rejected as inadmissible.

XIII. The appellants' arguments made orally and in writing, as far as they are relevant to this decision, can be summarised as follows:

The wording of Rule 140 EPC did not indicate who could request a correction of a decision of the EPO. In its decision G 8/95, the Enlarged Board of Appeal held that the Technical Board of Appeal was competent to decide on an appeal against a refusal of a request for correction since the correction of the grant decision concerned the grant of the patent. However, the decision of the Enlarged Board of Appeal did not say that proceedings with respect to a request for correction were a continuation of the grant proceedings. Moreover Part VII of the EPC did not relate to the grant proceedings. Therefore proceedings concerning a correction of the grant decision were separate from the grant proceedings. Consequently, third parties like the appellants had the right to request a correction of the grant decision.

That this was a correct conclusion was also reflected by the way the EPO handled the appellants' request for correction in the first instance proceedings. The appellants had requested a correction of the grant decision under Rule 140 EPC. In the communication dated 23 February 2009 it was said that there could be an investigation by the examining division and that no separate communication would be issued to the third party. However, the EPO communication dated 17 April 2009, indicating the view of the examining division that the grant decision would not be corrected, concerned the appellants' request for correction and was notified to them. This could be derived from the

wording of the subject of the communication which read:
"Your request for correction of the Decision to Grant dated 7 May 2007 under Rule 140 EPC submitted by letter dated 05 November 2008."

Therefore this communication was a decision of the EPO on the appellants' request. According to established case law of the Boards of Appeal of the EPO (see for example decisions J 8/81 and T 55/90) the legal status of a decision was not dependent on its form but only on its content. It did also not matter which department of the EPO issued the communication which amounted to a decision. From the wording of the subject of the EPO's communication it was clear that the communication was a decision on the appellants' request. If the examining division had taken a decision on its own motion on the basis of a third party's observation it would not have issued anything in writing when the decision was negative as in the present case. The way the appellants' request was handled was not the normal way how third party's observations were dealt with in the EPO.

According to established case law a party was adversely affected within the meaning of Article 107, first sentence EPC, if a decision did not agree with the party's explicit request (see for example decision J 12/85). In the present case the appellants were adversely affected, since their request for correction had been rejected by the decision of the EPO.

It followed that the appeal was admissible.

XIII. The respondent's arguments made orally and in writing, as far as they are relevant to this decision, can be summarised as follows:

Under Article 107 EPC, an EPO decision could be appealed only by a party to the proceedings which had given rise to it. In the present case the examining division took a decision on its own motion. As clarified in decision T 150/89, the EPO was entitled to make corrections under Rule 140 EPC (former Rule 89 EPC 1973) of its own motion. Hence the communication dated 17 April 2009 could only constitute an examination of the EPO of its own motion as to whether the grant decision of 7 May 2007 contained an error which required correction under Rule 140 EPC. However, it did not and could not constitute a decision pursuant to the appellants' request dated 5 November 2008, since the appellants were not party to the proceedings before the examining division and had no right under the EPC to request correction of a grant decision as a third party. It therefore followed that the communication of 17 April 2009 was not an appealable decision since there was no party to the relevant proceedings which was adversely affected by it. Moreover, even if it were an appealable decision, the appellants were not entitled to appeal because they were not party to the relevant proceedings. The only party to the relevant proceedings was the patentee. However, the examining division did not send any communication to the patentee. This also speaks against an appealable decision of the examining division.

Article 115 EPC defined the only right that existed within the framework of the EPC for third parties to

make observations in relation to European patent applications and European patents. Those observations were confined to the patentability of the invention. It was expressly provided in Article 115 EPC that a third party did not become party to the proceedings. What the appellants essentially argued was that a third party, who was not a party to the application and grant procedure for a European patent, could become a party to those proceedings by making a request for a correction of any decision under Rule 140 EPC. However, this assumption was incorrect since Rule 140 EPC provided a mechanism for correction of errors and not a mechanism for third parties to become parties to the examination and grant procedure of European patents. In other words the grant procedure could not become *inter partes* proceedings only because a third party filed a request.

Consequently, the appeal was inadmissible.

Reasons for the Decision

Introductory note

1. The present decision is being taken after the entry into force of the revised European Patent Convention (EPC) on 13 December 2007. At that time, the contested European patent had already been granted. The board has therefore applied the transitional provisions in accordance with Article 7(1), second sentence, of the Revision Act of 29 November 2000 and the decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006

(Special edition No. 1, OJ EPO 2007, 89). Articles and rules of the revised and former texts of the EPC are cited in accordance with the practice described on page 6 of the 14th edition of the Convention.

Admissibility

2. Article 107 EPC 1973 determines the persons entitled to appeal and to be parties to appeal proceedings. Only parties involved in the first instance proceedings before the EPO have the right to file an appeal provided they were adversely affected by the decision of the department of first instance (Article 107, first sentence EPC 1973).
3. The appellants assert that the communication dated 17 April 2009 constituted an appealable decision of the examining division on their request for correction and, therefore, they were a party to the first instance proceedings within the meaning of Article 107, first sentence EPC 1973.
4. It is undisputed in the present proceedings that the examining division has the competence to correct its own decision to grant under Rule 140 EPC (identical with former Rule 89 EPC 1973) (see G 8/95, OJ EPO 1996, 481), even in situations where opposition proceedings are pending (T 226/02, T 268/02 and T 79/07, all three decisions not published in the OJ EPO).
5. The dispute at issue is whether the appellants, by filing their request for correction, initiated proceedings before the examining division which were separate from the *ex parte* examination proceedings with

- the consequence that the appellants had become a party to the proceedings before the examining division.
6. In its decision G 8/95 (loc. cit., Reasons, points 3.3 and 3.4) the Enlarged Board of Appeal concluded that a party's request for correction of the decision to grant concerns the grant of the patent and that therefore the decision on the correction must also concern the grant of the patent within the meaning of Article 21(3)(a) EPC 1973, since it is the request of the party which defines the subject of the dispute. With regard to the subject of the dispute in the second instance, the Enlarged Board of Appeal ruled that the decisive criterion in Article 21(3)(a) EPC 1973 is not that the decision under appeal is the decision to grant itself, but that it is sufficient for the decision to "concern" the grant and that this must necessarily be the case if the subject of the decision is the text in which the patent is to be or has been granted, since this is the result of the substantive examination and defines the rights conferred by the patent (Reasons, point 4). The Enlarged Board of Appeal concluded that the technical boards of appeal as defined in Article 21(3)(a) and (b) EPC 1973 have to decide on appeals from a decision of an examining division refusing a request under Rule 89 EPC 1973 for correction of the decision to grant (Reasons, point 6).
7. From this reasoning of the Enlarged Board of Appeal the present board draws the conclusion that a positive or negative decision of an examining division on a correction of the grant decision under Rule 140 EPC concerns the grant of a patent in examination proceedings. Thus proceedings concerning a correction

of the grant decision are a continuation or extension of the examination proceedings and not new proceedings which are separate from examination proceedings. This finding does not conflict with the appellants' argument that Rule 140 EPC belongs to Part VII of the EPC and does therefore not relate to the grant proceedings. The provisions in Part VII of the EPC and of the Implementing Regulations are rules common to all proceedings of the EPO and can therefore be applied in any proceedings provided for in the EPC. However, in the board's view, these provisions cannot be the basis for any proceedings *sui generis*.

8. Examination proceedings are as a rule *ex parte* proceedings which involve only the applicant(s). This can be derived from several EPC provisions. Article 60(3) EPC, for example, provides that the applicant is deemed to be entitled to exercise the right to a European patent in proceedings of the EPO. It is therefore the applicant who is entitled to file requests in grant proceedings before the EPO (see for example Article 93(1)(b) EPC (request for early publication), Rule 70(1) EPC (request for examination) and Rule 71(4) EPC (request for amendments)). It is also the applicant who receives the EPO communications regarding the European patent application (see for example Rules 55, 56(1), first sentence, and (2), second sentence, 58, 60, 65, 69(1), 70(2) EPC and Article 94(3) EPC together with Rule 71 EPC).

9. The provisions of the EPC foresee a few exceptional situations where, apart from the applicant, a person other than the applicant (so-called "third party") is involved as a party in proceedings prior to the grant

of the patent, with the result that such proceedings are *inter partes* proceedings involving opposing parties. Such a situation arises for example in the event of requests for stay of proceedings (Rule 14 EPC) or requests for correction of the designation of the inventor (Rule 21(1) EPC). In these provisions it is clearly indicated that a third party may file the respective request. Rule 140 EPC, however, is silent on whether a third party may request the correction of a grant decision. Hence the general principles of third parties in examination proceedings apply. According to Article 115, first sentence EPC, third parties may present observations concerning the patentability of the invention in respect of which the application has been filed. However, third parties filing observations are not party to the proceedings before the EPO (Article 115, second sentence EPC). From this it follows that, according to Article 115 EPC, third parties are not entitled to file requests in examination proceedings. Therefore, if they file a request as a third party within the meaning of Article 115 EPC, they cannot expect a communication or decision from the examining division on their request. Third parties cannot become a party to the examination proceedings, simply by filing a request.

10. In the present case, in the course of the opposition proceedings, the appellants, being one of the opponents, filed observations on the validity of the designation of the Contracting State GB and requested the correction of the grant decision, by deleting that designation. This can also be derived from the heading of Premium's letter dated 5 November 2008 where Premium is indicated as "opponent". As to this, it is important

to bear in mind that opposition is an independent procedure following the grant procedure and is not to be seen as a continuation or extension of the examination procedure (see decisions G 1/84, OJ EPO 1985, 299, Reasons, point 9; G 9/91 and G 10/91, OJ EPO 1993, 408 and 420; and for example decision T 198/88, OJ EPO 1991, 254). Consequently, with respect to their observations and their request for correction, the appellants have to be considered as third parties in examination proceedings, since corrections of the grant decision concern the *ex parte* proceedings before the examining division (see points 6 - 8 above). Hence the board agrees with the respondent that the grant procedure could not become *inter partes* proceedings only because the appellants filed a request for correction.

11. The appellants argue that they acquired party status in examination proceedings by the way the EPO departments of first instance handled their request dated 5 November 2008. The board, however, cannot agree with the appellants.
12. First of all, it is the board's view that, when deciding how the actions of the first instance department are to be understood, all circumstances have to be taken into account and it has to be assessed how these actions have to be construed in good faith by a reasonable addressee taking part in proceedings with the EPO.
13. In the present case the opposition division forwarded Premium's letter dated 5 November 2008 to the examining division. In its communication dated 23 February 2009,

the opposition division informed not only Premium but all parties to the pending opposition proceedings about this. In the same communication, the opposition division made very clear that the examining division would consider of its own motion, "instigated by a letter from a third party", whether the grant decision was to be corrected under Rule 140 EPC and that no separate communication would be issued to the third party. The board considers that from this communication it should have been clear to all parties to the opposition proceedings that the letter from the opponent Premium was treated as a letter of a third party as far as the issue of correction was concerned. Moreover, the board notes that the appellants have not objected to the communication in first instance proceedings.

14. Turning now to the communications of the opposition division dated 17 April 2009. The appellants argue that the communication notified to them constituted an appealable decision since not its form but its content was decisive. It is indeed established jurisprudence of the Boards of Appeal that whether a document issued by the EPO constituted a decision or a communication depends on the substance of its content, not on its form or heading (see for example J 8/81, OJ EPO 1882, 10; J 2/93, OJ EPO 1995, 675; T 222/85, OJ EPO 1988, 128, T 55/90, not published in the OJ EPO). However, the criterion of substance has to be assessed in its procedural context (T 713/02, OJ EPO 2006, 267, Reasons, point 2.1.4).

15. The communication dated 17 April 2009 which was notified to the appellants by the opposition division

differs from that which was notified to the other parties on the same day. The only difference which can be found is that the wording of the subject of the communication sent to Premium refers to "your request for correction" instead of "request for correction". The board considers that this difference is a logical consequence of the fact that the opponents Premium filed the request for correction in opposition proceedings. As stated in point 13 above, it was clear from the previous communication of the opposition division that Premium was considered as a third party with regard to its request for correction. Therefore, in its procedural context, the reference to "your request" could not be interpreted in such a way that the communication was a decision on the request.

In the text of the communication reference was also made to the enclosed "communication" of the examining division. The board cannot see how any recipient could draw the conclusion from this reference that a decision on the opponents' request was enclosed. In the attached communication which was signed by all examiners of the examining division there is no reference to any request. The communication does also not mention any addressee. What the text of the communication indicates is that the examining division looked into the issue of the designation of the Contracting State and came to the conclusion that there was no need for a correction. It may well be that only because of the letter of the third party the examining division came to this conclusion. In the board's view it is the normal mechanism that third party's observations can effect an action of the examining division or even a decision. Even if the communication at issue was a decision under

Rule 140 EPC of the examining division's own motion, the appellants could not become party to the examination proceedings (see also point 9 above). Moreover the board considers that, with its communication, the examining division envisaged to merely inform the opposition division that no correction of the grant decision would take place. This information was indeed helpful because the opposition proceedings could be continued on the basis of the patent as granted.

16. The appellants submit that it did not matter which EPO department notified the communication of the examining division to the third party. This argument cannot be successful in the present case. Premium as opponents in opposition proceedings filed a request for correction which was forwarded as the observations of a third party to the examining division, being the competent department for a correction of the grant decision (see point 4 above). This was also indicated in the first communication of the opposition division. From the communications dated 17 April 2009 it was clear that all opponents and the patentee were informed on the examining division's conclusion on the designation of the Contracting State GB in the grant decision. There is no indication that the opposition division forwarded a decision of the examining division.

17. Lastly, the board turns to the principle of good faith which is applicable pursuant to Article 125 EPC 1973 in proceedings before the EPO. The board is convinced that the appellants could not have legitimately expected a decision from the examining division on their request for correction since it was indicated from the outset

that they were treated as a third party in this respect. Moreover the appellants did not object to the treatment as a third party at any stage of the first instance proceedings.

18. In view of the above, the board agrees with the respondent and believes that, irrespective of whether the examining division took an appealable decision within the meaning of Article 106 EPC, the appellants were not a party to the proceedings before the examining division and thus not entitled to file an appeal in accordance with Article 107, first sentence EPC 1973. Hence the appeal must be rejected as inadmissible in accordance with Rule 65(1) EPC 1973.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman

A. Vottner

S. Crane