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**Datasheet for the decision
of 8 March 2013**

Case Number: T 0744/11 - 3.2.01
Application Number: 06727164.3
Publication Number: 1863706
IPC: B64C 39/06, B64C 29/00
Language of the proceedings: EN

Title of invention:

A craft having a rotatable fluid propulsion device

Applicant:

Aesir Limited

Headword:

-

Relevant legal provisions (EPC 1973):

EPC Art. 83, 84, 122

Keyword:

"Admissibility: Re-establishment of rights (yes)"

"Clarity (no)"

"Sufficiency of disclosure (no)"

Decisions cited:

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Catchword:

-



Case Number: T 0744/11 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 8 March 2013

Appellant: Aesir Limited
(Applicant) 6 The Furrows
St Ives
Cambridgeshire PE27 5WG (GB)

Representative: Tolfree, Roger
Tolfree Patents and Trademarks
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 17 November 2010
refusing European patent application
No. 06727164.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Pricolo
Members: Y. Lemblé
D. T. Keeling

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Examining Division, posted on 17 November 2010, to refuse European patent application No. 06 727 164.3 on the grounds of lack of clarity (Article 84 EPC), insufficiency of disclosure of the invention (Article 83 EPC) and lack of novelty (Article 54 EPC) having regard to D2: GB-A-2 387 158.

- II. The Appellant filed a notice of appeal on 17 August 2010. The statement setting out the grounds of appeal was received in electronic form at three minutes past midnight on 29 March 2011, i.e. three minutes after expiry of the four-month time limit for filing the grounds of appeal under Article 108 EPC.

- III. In the statement of grounds of appeal the Appellant requested that the decision under appeal be set aside and that the case be remitted to the Examining Division with the order to grant a patent on the basis of the claim set constituting the main request filed during the oral proceedings of 18 June 2010 before the Examining Division, or in the alternative, on the basis of the auxiliary claim set appended to the statement of grounds of appeal.

- IV. Claim 1 of the main request reads as follows:

"A craft of the type in which a rotor directs a jet of fluid over a dome or canopy shaped to divert the jet from a radial or horizontal direction towards an axial or vertical direction, thereby providing lift or thrust, characterised in that the angular inertia of the rotor

and an associated drive unit are such that, in operation at full power, the vehicle is in a state of positive stability."

Claim 1 of the auxiliary request reads as follows:

"A craft of the type in which a rotor directs a jet of fluid over a dome or canopy shaped to divert the jet from a radial or horizontal direction towards an axial or vertical direction, thereby providing lift or thrust, characterised in that by virtue of the angular inertia of the rotor and an associated drive unit when in, operation, the craft is caused to be in a state of positive stability such that when rotated from a datum stable orientational position, it will in response to such displacement, return towards that datum stable orientational position."

- V. By a communication dated 29 April 2011, pursuant to Article 108, third sentence and Rule 101(1) EPC, the registrar of the Board informed the Appellant of the late receipt of the statement setting out the grounds of appeal.

- VI. The Appellant responded on 27 May 2011 by requesting the Board to decide under Rule 112(2) EPC that the statement of grounds of appeal was filed within the relevant time limit or, in the alternative, to grant re-establishment of rights under Article 122 EPC in respect of the non-observance of the time limit for filing the statement of grounds of appeal, paid the corresponding fee and put forward grounds on which the request was based.

VII. The Board summoned the Appellant to attend oral proceedings scheduled for 8 March 2013. In an annex accompanying the summons pursuant to Article 15(1) RPBA, the Board gave its provisional opinion on the claimed subject-matter and *inter alia* made the following statement:

"5. Main request

5.1 The Board has carefully considered the response of the Appellant to the objections of the Examining Division in respect of clarity, sufficiency of disclosure and novelty.

5.2 For the Board claim 1 remains unclear because a skilled person does not know what should be understood by "a state of positive stability". [...] Claim 1 is drafted in such a broad and speculative way that it covers many arrangements for the craft which are in no way disclosed or suggested in the description of the present application. It is questionable whether there is support in the description for the full breath of the claim (Guidelines for examination C-III, 6.3 and 6.4; see also objection made in connection with Art. 83 EPC).

5.3 Sufficiency of disclosure

The Board has doubt as to whether the subject-matter of claim 1 is described in a manner sufficiently clear and complete for it to be carried out by the skilled person (Art. 83 EPC).

Because of the definition of the invention in terms of a result to be achieved ("angular inertia of the rotor and associated drive unit is such that...") , the technical features implied by the claimed solution remain speculative and the description of the present patent application fails to disclose in a manner sufficiently clear and complete how the claimed result is obtainable in its broad ambit.

In point 2.16 of the statement of grounds of appeal the Appellant argues that:

"Constructing a craft which is capable of being placed in a state of positive stability requires consideration of a variety of factors; a (non-exhaustive) list of these is given below:

- the maximum velocity of the fan blades; (*)
- the weight of the fan and weight distribution within the fan (*);
- the arrangement of the electric motor e.g. does the motor include the relative heavy magnets;
- the size and shape of the canopy including its radius; (*)
- the comparative weight of the canopy and craft as a whole compared with the rotating parts; (*) and
- the size/shape/weight and position of any payload carried by the craft (*)."

None of the technical considerations or indications marked by an (*) are contained in the application as originally filed. Apart from the feature of claim 2 as filed, the description does not contain any technical explanation as to how the claimed result could be achieved and how a skilled person could come to the technical features implied by the formulation of the

claim (see the above features marked by an (*) by the Board). In the opinion of the Board, these features do not represent a trivial exercise that belongs to the general knowledge of the person skilled in the art.

[...]

6. Auxiliary request

The constructional requirements "the rotor and an associated drive unit are such that..." of claim 1 as filed have been replaced by the expression "by virtue of...". This wording appears more general than the original one in that it no longer implies that the rotor and associated drive unit, respectively their angular inertia, is a special feature of the invention. Moreover, the "displacement" mentioned in the last line of the claim has not been defined before. The wording of the two last lines of claim 1 does not seem to make sense.

It would therefore appear that claim 1 of this request does not comply with the requirements of Article 123(2) EPC and Article 84 EPC."

VIII. Oral proceedings were held as scheduled on 8 March 2013. The Appellant's representative was not present and confirmed by telephone that no one would appear on behalf of the Appellant. The Board therefore discussed the matter in the absence of the Appellant and decided on the appeal.

Reasons for the Decision

1. Admissibility of the appeal

1.1 The decision refusing the European patent application was notified by registered letter on 17 November 2010 and thus was deemed to have been received 10 days later on 27 November 2010 (Rule 126(2) EPC). The four-month time limit for filing the statement of grounds of appeal, under Article 108 EPC, would have expired on 27 March 2011. However, this day was a Sunday, so the time limit expired at midnight on the following day (Rule 134(1) EPC). The Appellant filed his statement of grounds electronically. The receipt for this document was generated at 00.03 hours on 29 March 2011, i.e. three minutes after the expiry of the time limit for filing the grounds of appeal. This should normally result in the appeal being rejected as inadmissible (Rule 101(1) EPC).

1.2 The representative of the Appellant argued that his office was based in Cambridge and that, since the clocks in the United Kingdom were one hour behind Central European Time (CET), he had sent the statement of grounds on 28 March 2011, which was within the time limit fixed by Article 108 EPC. According to Article 9(3) of the "Decision of the President of the EPO dated 26 February 2009 concerning the electronic filing of documents" (OJ 3/2009, 182) the date of receipt accorded to documents electronically filed within the European Patent Office under Rule 2 EPC should be the date on which they were received at the European Patent Office. This wording was broad and covered, at the very least, the date in any EPC state on which the documents were received at the EPO. The time marked on the receipt was 00.03 Central European Time (CET) 29 March 2011. The United Kingdom, however, was situated in a time zone one hour behind CET, and so

the time and date when the document was received at the EPO was 23.03 British Summer Time (BST) on the 28 March 2011.

The Board cannot accept this argument for the simple reason that the relevant time for the purpose of the law is the time at the EPO (i.e. the time at Munich or The Hague) and not the time in the United Kingdom. Therefore, the Appellant missed the time limit for filing the grounds of appeal (Article 108 EPC) which normally results in the appeal being rejected as inadmissible (Rule 101(1) EPC) and, thus, in the loss of a means of redress.

1.3 According to Article 122(1) EPC, the applicant for a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the EPC, of causing the loss of a means of redress.

1.3.1 The Board considers the appellant's request for re-establishment of rights as regards the time limit for filing the notice appeal allowable (Article 122(4) EPC), in particular because the appellant has shown that the non-observance of the time limit was not caused by lack of due care but rather by a justifiable human error of the representative. However, it is not necessary to go into more details because the appeal, though admissible, is not allowable for the reasons set out herein below.

2. Clarity (Article 84 EPC); sufficiency of disclosure (Article 83 EPC)

Following the concerns expressed by the Board in the annex accompanying the summons to oral proceedings (see point VII above), the Appellant did not make any further attempt to remove or challenge them. Under these circumstances the Board sees no reasons to review its position and accordingly, as communicated to the Appellant, confirms the objections that the subject-matter of claim 1 of the main request is not described in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC) and that claim 1 of both the main and the auxiliary requests does not fulfil the requirements of clarity (Article 84 EPC).

Order

For these reasons it is decided that:

1. Re-establishment of the right lost as a result of the late filing of the statement of grounds of appeal is granted under Article 122 EPC.
2. The appeal is dismissed.

The Registrar

The Chairman

A. Vottner

G. Pricolo