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**Datasheet for the decision
of 31 July 2017**

Case Number: T 0395/16 - 3.3.05

Application Number: 07710600.3

Publication Number: 1981620

IPC: B01F1/00, B01F3/04, B01F5/00

Language of the proceedings: EN

Title of invention:
APPARATUS AND METHOD FOR DISSOLVING GAS IN LIQUID

Applicant:
Hydro Processing&Mining Ltd

Headword:

Relevant legal provisions:
EPC Art. 113(1), 116(1), 125
EPC R. 103(1)(a), 115(2)
RPBA Art. 15(3)

Keyword:
Reimbursement of appeal fee

Decisions cited:

G 0008/91, T 0212/08, T 1493/13, T 0086/10, T 0243/09,
J 0015/10, T 1625/06, T 0628/07, T 0055/91, G 0012/91,
R 0005/08, T 1093/05, R 0004/15

Catchword:



Beschwerdekammern
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Case Number: T 0395/16 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 31 July 2017

Appellant: Hydro Processing&Mining Ltd
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 22 September
2015 refusing European patent application No.
07710600.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman E. Bendl
Members: J.-M. Schwaller
O. Loizou

Summary of Facts and Submissions

- I. The appeal was filed by the applicant against the decision of the examining division refusing the European patent application no. 07710600.3 on the ground that it did not meet the requirements of Article 123(2) EPC.
- II. A summons to attend oral proceedings, held by the examining division on 2 July 2015, was received by the applicant on 13 January 2015.
- III. On 2 June 2015 the applicant submitted further arguments and filed an amended set of claims.
- IV. The applicant on 1 July 2015 informed the examining division that it was "not proposing to attend the oral proceedings" and requested that matters previously put in writing be considered.
- V. Oral proceedings were then held in its absence and at the end of the oral proceedings the examining division announced its decision.
- VI. With a letter dated 7 July 2015 the applicant requested that the examining division set aside the "oral pronouncement" and allowed the arguing of the applicant's case at further oral proceedings.
- VII. The examining decision replied to said letter informing the applicant that its submissions could not be considered, and that the decision could only be amended by an appeal.

- VIII. On 26 November 2015 the applicant filed a notice of appeal. In its statement of grounds of appeal it requested that the decision under appeal be set aside and the case be remitted to the department of first instance with an order to "replace" oral proceedings held on 2 July 2015 and appoint new oral proceedings. In the alternative it requested a patent to be granted on the basis of the set of claims of the main request as filed on 2 June 2015 or of one of the two auxiliary requests as filed with its statement of grounds of appeal. Further it requested that the appeal fee be reimbursed.
- IX. The appellant, inter alia, argued that its rights to be heard (Article 113 EPC) and to oral proceedings (Article 116 EPC) had been infringed by the examining decision. The reason for its absence from oral proceedings was the lack of instructions from its client due to serious and unexpected health problems experienced by the president of the applicant during the period between the deadline for filing the written submissions and the oral proceedings. It argued that prior to issuing a written decision the oral announcement by the examining division could not be final and nothing in the EPC prevented the examining division from setting the pronounced decision aside and re-opening the procedure.

To reiterate its arguments it referred to two cases of the Supreme Court **L and B (Children) Re (2013) UKSC 8** and **Thomas Cook Tour Operations Ltd & Anor v Louis Hotels SA (2013) EWHC 2469 (QB)** and invited the Board in the absence of any procedural provisions in the EPC according to Article 125 EPC to take them into account. Further the appellant argued that also according to **G 12/91** (paragraphs 2 and 3 of the reasons), since the

appellant had not been notified of the decision until well after its request for rescheduling, there was a discretion for the examining division to re-open the oral proceedings and reconsider its decision.

- X. After the filing of the appeal, a notice drawing attention to Rule 51(2) EPC Article 2 No. 5 RFees dated 15 March 2016 regarding the renewal fees due was sent, but the appellant failed to pay the renewal fee and surcharge.
- XI. Subsequently a noting of loss of rights pursuant to Rule 112(1) EPC dated 19 October 2016 was dispatched. Since the appellant did not request any means of redress the European patent application 07710600.3 was deemed to be withdrawn under Article 86(1) EPC.
- XII. The Board sent a preliminary opinion to which the appellant did not reply in substance.
- XIII. Oral proceedings were held before the Board on 31 July 2017 in the absence of the appellant, as confirmed by the representative of the appellant in its email dated 25 July 2017. At the end of the oral proceedings the chairman announced the Board's decision.

Reasons for the Decision

- 1. The appeal is admissible.
- 2. As announced with email dated 25 July 2017 the appellant did not attend the oral proceedings. In

accordance with Rule 115(2) EPC and Article 15(3) RPBA, the proceedings were continued in its absence.

3. According to Rule 103(1) (a) EPC, the appeal fee is reimbursed when a board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.

3.1 A review of the decision under appeal, as to its merits, is no longer possible as the European patent application no. 07710600.3 was deemed to be withdrawn under Article 86(1) EPC and hence the appeal to this respect is not allowable.

Therefore, solely for the lack of allowability of the appeal, reimbursement of the appeal fee is not justified. However, the board can also not see a substantial procedural violation by the examining division, as will be explained below.

3.2 As the appellant requested reimbursement of the appeal fee based on an alleged substantial procedural violation on behalf of the examining division, the board considered this request for reimbursement to be a procedural issue in respect of which the appeal procedure is to be continued, and the appeal proceedings cannot be closed without a decision (see case law of the Boards of Appeal **G 8/91 points 3 and 5; T 212/08, points 2 and 3; T1493/13, point 1; T 86/10, points 1.1 and 1.2; T 243/09 point 9**).

4. As oral proceedings before the examining division were held on 2 July 2015, by not attending the appellant effectively chose not to avail itself of the opportunity to present its arguments orally but instead to rely on its written submissions (Art. 15(3) RPBA;

see also **J 15/10; T 1625/06; T 628/07; T 55/91**).

Therefore the examining division had no reason not to proceed in its absence and no substantial procedural violation was committed. Same holds true for announcing, after deliberation, its decision.

5. Regarding the requests set out in its letter of 7 July 2015 that the examining division should have set aside its "oral pronouncement", not proceed with drawing up a written decision and allow further oral proceedings, the board disagrees with the appellant.

According to the case law of the Boards of Appeal an examining division is bound by its final decision on an application, which can in the present case be set aside only following an admissible and allowable appeal.

6. The board sees no discretion that the examining division could have exercised in favour of the appellant's request and failed to do so.

Where oral proceedings are held the decision taken orally becomes effective by virtue of its announcement and cannot be amended even by the department that issued it (**G 12/91, OJ EPO 1994, 285, point 2; R 5/08, point 11 and 21; T 1093/05, point 6; T 361/08, point 11**). The board also disagrees with the appellant when arguing that according to "paragraph 3" in G 12/91 there is a discretion for the examining division, because the debate can be reopened only before a final decision is taken.

7. Regarding the decisions of the English courts referred to by the appellant the board notes that every decision depends upon its own particular circumstances and these

decisions dealt with specific issues, i.e. a child care family case and an application for summary judgement respectively and they cannot be seen that they show the principles of procedural law generally recognised in the UK as a contracting state to the EPC.

8. In view of the above the board does not consider an absence of procedural provisions in the European Patent Convention which might have necessitated applying Article 125 EPC and accordingly taking into account, in the present case, the principles of procedural law generally recognised in the contracting states **(R 4/15)**.
9. For the reasons as stated supra the Board finds therefore that neither the appellant's right to be heard (Article 113 EPC) nor its right to oral proceedings (Article 116 EPC) had been infringed by the examining decision.
10. As no substantial procedural violation had occurred during the first instance proceedings a reimbursement of the appeal fee on the ground of a substantial procedural violation is not justified.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



L. Stridde

E. Bendl

Decision electronically authenticated