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**Datasheet for the decision
of 17 January 2020**

Case Number: T 2864/18 - 3.2.03
Application Number: 15732380.9
Publication Number: 3146130
IPC: E04H6/18, E04H6/24, E04H6/30,
E04H6/36
Language of the proceedings: EN

Title of invention:

TRANSFERRING CARRIAGE OF VEHICLES FOR AUTOMATIC MECHANICAL
PARKING SYSTEMS

Applicant:

Sotefin Patents SA

Headword:

Relevant legal provisions:

EPC R. 139, 140

Keyword:

Correction of errors in decisions - grant decision

Decisions cited:

G 0001/10, T 1003/19

Catchword:



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Case Number: T 2864/18 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 17 January 2020

Appellant: Sotefin Patents SA
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Representative: Fabiano, Piero
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Decision under appeal:

Composition of the Board:

Chairman G. Ashley
Members: E. Kossonakou
R. Baltanás y Jorge

Summary of Facts and Submissions

- I. The present appeal was filed against the decision of the examining division to grant European patent n° 3146130 dated 17 August 2018 on the grounds that an error had occurred in the application documents and this adversely affected the patentee.
- II. The appellant requests a correction of the description, submitting that, instead of a corrected page 2 and original page 3, the description annexed to the communication pursuant to Rule 71(3) EPC contains original page 2 and an amended page 2 numbered as page 3.
- III. In a communication dated 23 September 2019 the Board set out its preliminary view of the case and enclosed a summons to oral proceedings, although there was no such request on file.
- IV. With letter dated 14 January 2020 the appellant informed the Board that it would not be attending the oral proceedings scheduled for 17 January 2020 and submitted the following observations:

" ... the text referred to in the Communication under Rule 71(3) EPC dated 06.06.2018 does not reflect the true will of the Applicant.

In fact, the duplication of page 2 (incorrectly marked as page 3) during the examination procedure is not a misspelling or another inaccuracy as those referred to by G1/10, Reasons n. 8 to 12.

For the same reason, the text of the above mentioned Communication under Rule 71(3) does not reflect the true will of the Examining Division; had the Examining

Division realized that an entire page had been misfiled, the Communication under Rule 71(3) would not have been issued.

Therefore, the Applicant is of the opinion that the reasoning of decision T1003/19 and in particular 2.4.5 and 4.5 should apply, mutatis mutandis, to the present case."

- V. The oral proceedings took place as scheduled in the absence of the appellant. At the end, the present decision was pronounced.

Reasons for the Decision

1. The appeal is admissible as the time limits specified in Article 108(1) EPC were observed and the grounds for the appeal, although rather sketchy, nevertheless allow the Board to understand the alleged adverse effect and the remedy sought.
2. However, as indicated in the Board's communication in preparation of the oral proceedings, the requested remedy is not allowable.
3. The appellant's submissions appear to be factually correct as far as "the duplication of page 2 incorrectly marked as page 3" is concerned. However, the argument that the correction, namely the replacement of the wrong page by the correct one, is allowable according to the decision of the Enlarged Board of Appeal (in the following EBA) G1/10 (OJ EPO 2013, 194) is not persuasive.

4. Indeed, decision G1/10 cannot be read as restrictively as submitted by the appellant and thus be limited to only "misspelling or another inaccuracy". Nor can "the true will of the Examining Division" serve to correct mistakes originating from the applicant.

The Enlarged Board was adamant in its understanding of the applicability of Rule 140 EPC, stating at Reasons 5., 2nd full paragraph: "Rule 140 EPC is not available to correct patents." Point 15. of the Reasons clearly confirms this, concluding that: "as regards correction of patents, Rule 140 is not available at all".

As to Rule 139 EPC, the EBA explained that it only concerns the pre-grant phase (Reasons, 9. to 10.; cf. in particular last sentence in Reasons 9.: "before grant that mistake can be corrected under Rule 139 EPC on request."); hence this Rule also cannot be applied to a granted patent.

5. The Board does not consider it necessary to reproduce the entire reasoning of the EBA regarding the above, which can be found in points 2. to 8. of the Reasons for the decision.

Suffice to say that the EBA essentially refers to the necessity for legal certainty and to the fact that, once the decision to grant has been issued, "the EPO is no longer competent to deal with any further matters relating to the text of the patent."

6. The appellant argued that *"the text referred to in the Communication under Rule 71(3) EPC dated 06.06.2018 does not reflect the true will of the Applicant. ... For the same reason, the text of the above mentioned Communication under Rule 71(3) does not reflect the true will of the Examining Division"*.

According to the EBA (Reasons, 11.), it is the responsibility of the applicant to ensure that no errors remain in the text approved for grant; it is "illogical" to impute remaining mistakes to the examining division "by suggesting the examining division did not intend to make a decision which in fact included the very text approved by the applicant himself". An appeal can succeed only if "the examining division proceeds to make a decision to grant which contains an error made by it, so that the granted text is not that approved by the proprietor." (Reasons, 12.).

- 6.1 In its reply to the first communication under Rule 71(3) EPC issued on 9 January 2018 the appellant requested certain corrections in the translations of the claims and then proceeded to state *"All the other pages of the text enclosed to the Communication under Rule 71(3) EPC do not require amendments or corrections and are hereby approved by the Applicant"* (last paragraph, letter dated 23 April 2018).

- 6.2 From these statements it can be inferred that the appellant was fully aware of the complete set of documents proposed as forming the basis for the intended grant. The approval of the text is unequivocal and was repeated, albeit not explicitly in writing, but

by reacting to the second communication under Rule 71(3) EPC issued on 6 June 2018.

- 6.3 Under these circumstances the Board fails to see how the examining division could have realised that anything was amiss or how the annexes to the communication under Rule 71(3) EPC of 6 June 2018 "do not reflect the true will of applicant", when the appellant has done everything to confirm the opposite.
- 6.4 Finally, the error was of the appellant's own making, so that the exception allowed by the Enlarged Board, namely for a correction to be possible when the error is due to the examining division's actions, does not apply (see point 6. above, *in fine*).
7. Regarding the request for the analogous application of the reasoning given in decision T1003/19, the Board finds the facts underlying that case fundamentally different from the facts of the case at hand. In case T1003/19 the granted version did not correspond to documents either submitted or approved or deemed approved by the applicant. In the present case, the (then) applicant has given every appearance of having thoroughly checked the documents, and of approving them both explicitly (letter of 23 April 2018) and implicitly (payment of fees in reaction to the second communication under Rule 71(3) EPC). There is therefore no similarity in the facts of the two cases which would allow for an analogous treatment.
8. The preceding reasons and considerations lead to the conclusion that the present appeal cannot succeed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated