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**Datasheet for the decision
of 24 November 2006**

Case Number: J 0005/06 - 3.1.01

Application Number: 03380180.4

Publication Number: 1582665

IPC: E05B 65/00

Language of the proceedings: EN

Title of invention:

Automatic door locking device for a barrel

Applicant:

Agrupacion olcina, S.L.

Opponent:

-

Headword:

Correction under Rule 88/AGRUPACION OLCINA, S.L.

Relevant legal provisions:

EPC Art. 123(2), 80

EPC R. 88

Keyword:

"Correction (not allowed) - exchange of application documents
intention of applicant (not relevant)"

Decisions cited:

T 0158/89, T 0726/93, J 0021/94, G 0003/89, G 0010/91,
G 0002/95

Catchword:

-



Case Number: J 0005/06 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 24 November 2006

Appellant: Agrupacion olcina, S.L.
Ctra. Caravaca, 56
E-30814 Lorca (Murcia) (ES)

Representative: Maldonado Jordan, Julia
Linares, 7 Pta. 3
E-46018 Valencia (ES)

Decision under appeal: Decision of the Receiving Section of the
European Patent Office posted 22 August 2005
refusing a correction under Rule 88 EPC.

Composition of the Board:

Chairman: B. Günzel
Members: T. Bokor
B. Müller

Summary of Facts and Submissions

- I. This is an appeal from the decision of the Receiving Section, posted 22 August 2005, in which decision the Receiving Section refused the request of the appellant for a correction under Rule 88 EPC. The request sought to replace the totality of originally filed application documents with a new set of documents.
- II. European patent application 03380180.4 was filed on 22 July 2003. According to the request form (EPO Form 1001), the title of the invention was "Automatic door locking device for a barrel". The request form listed 5 sheets of description, 2 sheets of claims, 4 sheets of drawings and 1 sheet of the abstract. The priority of the Spanish utility model No. U 200202808, filed on 21 November 2002 was claimed. Check box 25a, referring to a complete translation of the previous application pursuant to Rule 38(5) EPC, second sentence, was not crossed.
- III. Together with the EPO request form (Form 1001) a specification in the Spanish language was filed, titled "Dispositivo de cierre para puerta automática de bombo", having 5 sheets of description, 1 sheet of claims (2 claims), 4 sheets of drawings and 1 sheet of abstract. The request form was also accompanied by a specification in English, having 5 sheets of description, 2 sheets of claims (2 claims), 4 sheets of drawings and 1 sheet of abstract. The application was further accompanied by an authorisation (EPO Form 1003), designation of inventor (EPO Form 1002), and a voucher for settlement of fees (EPO Form 1002). No other document was filed with the application.

- IV. With letter dated 10 February 2004, received at the EPO 13 February 2004, the appellant filed a certified copy of the priority document ES U 200202808, mentioned in the request form, and an English translation purporting to be the translation of the certified copy.
- V. With letter dated 25 February 2004, received at the EPO 11 March 2004, the appellant informed the EPO that "the specification and its English translation which was enclosed to the application as filed, corresponded to another utility model which is not claimed in the request form". It was also confirmed that the certified copy of the priority document filed with the letter of 10 February 2004 (see IV above) was indeed that of the priority application ES U 200202808. However, its English translation corresponded to another utility model.
- VI. In the same letter, the appellant filed a specification in English and Spanish, claiming that these were the ones that should have been treated as the specification of the European Patent ("the right specification"), and which truly corresponded to the Spanish utility model No. U 200202808, i.e. the priority document claimed upon filing of the application. Separate from the English translation of the Spanish text proposed as the "right specification" of the European patent, an English translation of the priority document was also submitted. The newly proposed English text of the application contained 5 sheets of description, 1 sheet of claims (2 claims), 1 sheet of drawings and an abstract.

- VII. Although Rule 88 EPC was not mentioned explicitly, the Receiving Section interpreted the appellant's intention of "providing" the "right specification" as an implied request for allowing substitution of the application documents on the basis of that rule.
- VIII. In a communication pursuant to Article 113 EPC dated 25 August 2004 the Receiving Section informed the appellant that the requested substitution of the application documents could not be allowed. The communication pointed out that a correction under Rule 88 EPC, second sentence was not applicable in the light of the decision G 2/95 of the Enlarged Board of Appeal. The communication of the Receiving section quoted extensively the reasoning of the decision, and informed the appellant that it intended to refuse the request. The appellant was invited to comment.
- IX. The appellant was further invited to submit a corrected translation of the priority document, as the translation received by the EPO apparently referred to the previous application as granted, and not as filed.
- X. Responding to the communication (see VIII above), the appellant filed a corrected certificate of the priority document, together with an English translation. No comments were provided concerning the possibility of correction under Rule 88 EPC.
- XI. The Receiving Section issued the decision under appeal, substantially repeating the arguments of the previous communication.

- XII. Notice of appeal was filed on 21 October 2005, and the appeal fee was paid simultaneously. The statement setting out the grounds of the appeal was filed on 21 December 2005.
- XIII. The appellant acknowledged in the grounds of appeal that the refusal was based on decision G 2/95. In support of his case, the appellant cited case T 726/93, in which a complete substitution of the application documents had been allowed under allegedly similar circumstances. It was put forward that the analogies between case T 726/93 and the present case were substantial, hence the reasons developed in case T 726/93 should be similarly applicable.
- XIV. Therefore, the appellant requested that the decision under appeal be set aside and that the substitution of the originally filed application documents with the new documents filed on 25.02.2004 be allowed.
- XV. The Board sent a communication to the appellant dated 29 June 2006, in which the Board indicated its preliminary opinion of the case, effectively in line with the reasons which follow below. The appellant was invited to file observations within a time limit of two months.
- XVI. The appellant did not respond to the communication.

II.

Reasons for the Decision

1. The appeal is admissible.

Procedural issues

2. The decision G 2/95 of 14 May 1996 of the Enlarged Board of Appeal (OJ EPO 1996, 555), which is acknowledged by the appellant as being the legal basis of the decision under appeal, was triggered by the contradictory jurisprudence of the decision T 726/93 of 1 July 1994 (OJ EPO 1995,478) cited by the appellant on the one hand, and other decisions, such as J 21/94 of 20 January 1997 (OJ EPO 1996,016) on the other hand (see points II and III of G 2/95). Though not expressed explicitly, the order, the headnote and the reasoning of decision G 2/95 make it abundantly clear that the Enlarged Board of Appeal disapproved of the application of Rule 88 EPC as applied by the board in T 726/93.
3. Accordingly, if the present board had wished to decide in the appellant's favour, such a decision would deviate from an earlier decision of the Enlarged Board of Appeal. Pursuant to Article 16 of the Rules of Procedure of the Boards of Appeal (OJ EPO 2003, 89), in such a case the question shall be referred to the Enlarged Board of Appeal.
4. Therefore, the present Board could only refer the issue to the Enlarged Board, but may not decide on it in appellant's favour of its own motion.

Substantive issues

5. Such a referral to the Enlarged Board of Appeal would have been considered by the present Board if it were convinced that the findings of G 2/95 needed to be reconsidered. However, beyond the mere repetition of the arguments set out in T 726/93, no arguments have been put forward by the appellant which would be suitable to challenge the interpretation by the Enlarged Board of Appeal of Rule 88 EPC, as expressed in decision G 2/95, which develops further decisions G 10/91 (OJ EPO 1993,420) and G 3/89 (OJ EPO 1993,117). Nor is the present Board aware of any such arguments. On the contrary, this Board finds that the interpretation of Rule 88 EPC, as applied by the present jurisprudence on the basis of the cited decisions of the Enlarged Board of Appeal, is the correct interpretation.

6. All the arguments in support of the appellant's request were treated - at least implicitly - by decision G 2/95. This decision made it clear that an exchange of the complete application documents is not possible as **a question of principle**, because such an exchange would constitute a violation of Article 123(2) EPC. This holds good irrespective of particular aspects of a case, such as the intention of the applicant, any possible contradiction between the request for grant and the application, or the weight of the evidence presented in support of the applicant's true intentions. Therefore, a case based on such arguments must fail.

7. The appellant seeks to support its case with the following key findings of T 726/93:
 - a. the requested correction is a non-technical modification, and it is similar to the correction of a missing or erroneous designation;
 - b. there is no violation of Article 123(2) EPC because the complete application documents are substituted, hence there is no need to interpret their content (see T 726/93, point 7 of the reasons, in support of point 9 of the reasons);
 - c. it is the intention of the applicant, namely the intention to file an application corresponding to the priority application which is decisive (T 726/93, point 10 of the reasons).

These questions are briefly treated below.

8. Ad a,: If an application is accorded a date of filing pursuant to Article 80 EPC, the content, namely the **technical content** of the application is definitively established (see G 2/95, point 4 of the reasons). It is beyond doubt that exchanging this technical content with another one **is** a technical modification. As it has been correctly pointed out by the President of the European Patent Office in his comments to the referral leading to G 2/95, a comparison with a designation is inappropriate, because the latter defines the territorial scope of the patent, which territorial scope is not touched upon by Article 123(2) EPC (see point V of G 2/95).
9. Ad b,: This finding has no basis in the EPC. The application of the strict requirements of either Article 123(2) or Rule 88 EPC, second sentence, is not

limited to those circumstances when a minor part of a complete description needs to be interpreted relative to the rest, but these requirements are applicable to **any** suggested amendment or correction. This means that the technical content of the application as filed cannot simply be discarded, even if it does not correspond to the intention of the applicant, but **must** be considered when deciding whether an amendment or correction is allowable or not. It is another matter that, realistically, any amendment under Article 123(2) EPC or any correction under Rule 88 EPC will have a chance of success only under such circumstances of minor corrections as mentioned above. Further, it is also irrelevant **why** the amendment or the correction is requested, the cogent and objective requirements imposed by said provisions still need to be fulfilled.

10. Ad c,: As stated above, the intention of the applicant at the time of filing (or even later) is immaterial in establishing the technical content of a patent application. It is wholly irrelevant whether the documents actually filed do or do not correspond to the true intention of the applicant, and therefore there is no room in this context for submitting evidence concerning the intention of the applicant, see G 2/95, point 2 of the reasons. Only evidence in support of the general knowledge of the skilled person is admissible.

11. Moreover, in the present case the requirements of Rule 88 EPC are not fulfilled. Even if the Board were convinced beyond all reasonable doubt that the appellant indeed wished to file an application corresponding to the priority document *verbatim*, it would not be sufficient to allow the requested

correction under Rule 88 EPC, second sentence. Establishing that a suggested set of documents is a **probable** and **suitable** replacement does not amount to establishing that **nothing else** would have been intended. This latter threshold implies that there is only **one single** plausible replacement (see also T 158/89 of 20 November 1990, point 6.3.2 of the reasons) - the one which the skilled person would have deduced from those parts of the application which make up the disclosure of the invention (and not from the request for grant or any other document). On the contrary, a complete exchange of the application documents quite obviously would open the door to a plethora of plausible replacements.

12. Finally, the Board notes that there is no evidence on file whatsoever that the appellant intended to file claims and a description identical to the priority document. Box 25a on the Request form was not crossed, and the priority document was not filed with the application. Instead, the appellant filed the priority document and its translation later, see points IV-V above. Therefore, contrary to the allegations of the appellant, the "intended" precise content of the application remains a pure speculation. This fact by itself precludes the application of Rule 88 EPC, either first or second sentence.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

B. Günzel