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**Datasheet for the decision
of 25 September 2008**

Case Number: R 0003/08
Appeal Number: T 1623/06 - 3.2.06
Application Number: 01943244.2
Publication Number: 1328375
IPC: B23Q 1/54
Language of the proceedings: EN

Title of invention:

Double-rotatable spindle head for machine tools

Petitioner/Patentee:

HPT SINERGY S.R.L.

Other party:

Cytec Zylindertechnik GmbH

Headword:

Fundamental violation of Article 113/HPT SINERGY S.R.L.

Relevant legal provisions:

EPC Art. 112a, 113, 133(3)
EPC R. 4(1), 106, 107, 108, 109, 134

Relevant legal provisions (EPC 1973):

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Keyword:

"Petition for review - as far as not clearly inadmissible -
clearly unallowable"

Decisions cited:

G 0004/95

Catchword:

-

Case Number: R 0003/08

D E C I S I O N
of the Enlarged Board of Appeal
of 25 September 2008

Other party: Cytec Zylindertechnik GmbH
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Decision under review: **Decision of the Technical Board of Appeal 3.2.06 of the European Patent Office of 21 February 2008.**

Composition of the Board:

Chairman: P. Messerli
Members: B. Schachenmann
R. Young

Summary of Facts and Submissions

- I. The petition for review concerns decision T 1623/06 of the Board of Appeal 3.2.06 revoking European patent No. 1 328 375.
- II. The proceedings in case T 1623/06 can be summarized as follows:
- (a) An appeal was filed by the opponent against the interlocutory decision of the opposition division to maintain the patent in amended form. After the written phase of the appeal proceedings the Board of Appeal 3.2.06 summoned the parties to oral proceedings scheduled to take place on 21 February 2008.
 - (b) In an annex to the summons to oral proceedings the Board referred *inter alia* to a feature in amended claim 1 as maintained which, in its preliminary assessment, was "disclosed in the description of the application as filed only in combination with other features, in particular the feature [...]. It would appear that there is no basis in that application as filed to isolate the above-mentioned feature from the combination in which it is disclosed. Accordingly, it would appear that the amendment of claim 1 does not meet the requirements of Article 123(2) EPC."
 - (c) With letter dated 21 November 2007 the professional representative of the opponent-appellant, Mr A., informed the Board that in the oral proceedings he would present the case in the

German language and that he needed translation from the language of the proceedings (English) into German.

- (d) On 5 December 2007 the professional representative of the proprietor-respondent, Mr P., requested postponement of the scheduled oral proceedings. The reason for this request was that the proprietor-respondent wished to be represented in the oral proceedings by Mr B., a sub-authorized professional representative who had represented the proprietor already in the oral proceedings before the opposition division. However, on the scheduled date Mr B. had to attend oral proceedings in another case before the EPO.
- (e) In a communication of 10 December 2007 the Board refused the request of the proprietor-respondent to postpone the oral proceedings. The fact that the further representative, Mr B., had attended the oral proceedings before the opposition division did not, in the Board's view, justify the postponement.
- (f) On 24 January 2008 the registry of the Board informed the parties that translation had been arranged both from German into English and vice versa.
- (g) On 13 February 2008 yet another professional representative, Mr G., informed the Board by a letter sent by facsimile that he was sub-authorized to attend the oral proceedings on behalf of the proprietor-respondent. He further

stated that, like the representative of the opponent-appellant, he would present the case in German and that no translation from English into German was necessary. However, as he would be accompanied by his Italian client translation from German into English would be required. Immediately upon receipt of this letter on 13 February 2008 the registry acting for the Board cancelled the arrangement for translation from English into German. The arrangements for translation from German into English were maintained.

- (h) One day later, on 14 February 2008, a second letter of Mr G. was received in which he informed the Board that in the oral proceedings he would be accompanied by two employees of the proprietor-respondent, Mr F.G. and Mr S.L., for whom he requested permission to make oral submissions on technical issues in English.
- (i) The oral proceedings took place on 21 February 2008 at which the professional representative of the proprietor-respondent was accompanied by the announced employees, Mr F.G. and Mr S.L.. In the course of the proceedings Mr S.L. tried to intervene twice in the discussion in English. This was refused by the Board after having asked the representative of the opponent-appellant for agreement who insisted that the oral discussion should be held in German. According to an affidavit by Mr S.L. filed as annex A to the petition for review, the Board had taken this decision "in spite of my strong objections and those of my representative".

(j) The written decision T 1623/06 revoking the patent was notified to the parties by registered letter posted on 11 April 2008. The ground for revocation substantially corresponded to the objection raised in the communication annexed to the summons to oral proceedings (cf. point (b), *supra*). A first and second auxiliary request filed by the proprietor-respondent during the oral proceedings were rejected as late filed.

- III. On 23 June 2008 the proprietor-respondent (in the following referred to as the petitioner) filed a petition for review of this decision by the Enlarged Board of Appeal pursuant to Article 112a EPC. The petition is based on the grounds referred to in Article 112a(2)(c) and 112a(2)(d) EPC. In particular the petitioner raises the following objections.
- IV. A first objection concerns the fact that the petitioner's request for postponement of the oral proceedings was rejected by the Board and that, for this reason, his representative of choice, Mr B., was excluded from attending the oral proceedings and had to be replaced by another professional representative, Mr G. This amounted to a serious violation of the petitioner's right to be heard.
- V. A second objection refers to the fact that the Board did not allow Mr S.L., an employee of the petitioner, to make submissions in English at the oral proceedings, notwithstanding his explicit protests. The Board should have heard Mr S.L. in order to comply with the petitioner's right to be heard.

- VI. Thirdly, the communication of the Board of Appeal attached to the summons to oral proceedings led the petitioner to understand that by an amendment of claim 1 the problems with regard to Article 123(2) EPC could readily be solved. However, at the oral proceedings the Board raised further objections under Article 123(2) EPC and rejected auxiliary request 1 filed in response to these objections as late filed. Moreover, the Board did not grant the petitioner enough time to prepare his second auxiliary request. All this not only violated Article 113 EPC but also Rule 104(b) EPC.
- VII. The petitioner requested that the decision to revoke European Patent No 1 328 375 be set aside and that the proceedings before the Board of Appeal 3.2.06 be re-opened. As an auxiliary request oral proceedings were requested.
- VIII. Oral proceedings before the Enlarged Board of Appeal in its composition pursuant to Rule 109(2)(a) EPC took place on 25 September 2008.

Reasons for the Decision

1. *Admissibility of the petition for review*
- 1.1 The petitioner is adversely affected by the decision T 1623/06 to revoke its patent. The petition for review was filed on the grounds referred to in Article 112a(2)(c) and (d) EPC. It contains an indication of the decision to be reviewed and reasons

for setting aside this decision. The petition therefore complies with the provisions of Article 112a(1) and (2) EPC and of Rule 107(1)(b) and (2) EPC.

- 1.2 The written decision T 1623/06 was notified to the parties by registered letter posted on 11 April 2008. The two months period for filing a petition for review expired on Saturday, 21 June 2008. It extended, according to Rule 134 EPC, to Monday, 23 June 2008. This is the day on which the present petition for review was filed and the fee was paid. The petition therefore also complies with Article 112a(4) EPC.
- 1.3 Pursuant to Rule 106 EPC a petition under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings. The present petition refers to three objections (cf. points IV. to VI., *supra*) concerning three incidents which occurred independently of each other and which therefore have to be considered separately. Accordingly, for each of these separate objections it has to be examined by the Enlarged Board of Appeal in its composition according to Rule 109(2)(a) EPC whether or not the petition, as far as it is based on one these objections, is "clearly inadmissible" under this Rule in combination with Rules 106 and 108(1) EPC.
- 1.4 The first objection (cf. point IV., *supra*) refers to the petitioner's request for postponement of the scheduled oral proceedings as his representative of choice, Mr B., was prevented from attending the oral

proceedings. This request was refused by the Board of Appeal (cf. point II (e), *supra*). However, the only reaction of the petitioner to the communication refusing this request was to appoint another professional representative, Mr G., who attended the oral proceedings on behalf of the petitioner (cf. point II (g), *supra*). Neither he nor any of the other professional representatives involved in the appeal proceedings on behalf of the petitioner raised any objection against the Board's communication not to postpone the oral proceedings. The requirement of Rule 106 EPC has clearly not been met for this objection. Accordingly, as far as the petition for review is based on this objection, it is clearly inadmissible (Rule 109(2)(a) EPC in combination with Rules 106 and 108(1) EPC).

- 1.5 The second objection concerns the Board's refusal to allow Mr S.L. to make oral submissions in English "in spite of my strong objections and those of my representative" (cf. point II (i), *supra*). The affidavit of Mr S.L. filed in this connection is supported by private minutes taken by Mr. F.G., the other employee of the petitioner attending the oral proceedings, filed as annex B to the petition. As far as the "strong objections" raised by Mr S.L. are concerned, it is to be noted that he was not authorized under Article 133(3) EPC to act on behalf of the petitioner in the oral proceedings before the EPO. He therefore attended the oral proceedings as an accompanying person within the meaning of decision G 4/95 (OJ EPO 1996, 412) of the Enlarged Board of Appeal. The question therefore arises whether an accompanying person can validly raise a procedural

objection pursuant to Rule 106 EPC. However, in the present circumstances this question needs not to be answered since, based on the affidavit of Mr S.L., it is credible that the professional representative himself explicitly supported his procedural objections. Even if, in the absence of further evidence, the exact circumstances of the representative's intervention is not established, the Board is prepared to assume in favour of the petitioner that the objections raised in that phase of the oral proceedings met the requirements of Rule 106 EPC. Accordingly, as far as the petition for review is based on the second objection, it is at least **not clearly** inadmissible.

- 1.6 Considering the third objection (cf. point VI., *supra*), there is no indication that the petitioner raised any objection under Rule 106 EPC. Rather, it follows from the private minutes taken by Mr F.G. (cf. annex B of the petition for review) that, in reaction to the further issues raised by the Board under Article 123(2) EPC, the professional representative of the petitioner elaborated on their substance without raising a procedural objection under Rule 106 EPC in this connection. Moreover, even if it is credible that the professional representative of the petitioner had to prepare his second auxiliary request under time pressure as the Board interrupted the oral proceedings for only 30 minutes, there is no indication that he objected to the shortness of the interruption or asked the Board for more time. Accordingly, as far as the petition for review is based on the third objection referred to above, it is clearly inadmissible (Rule 109(2)(a) EPC in combination with Rules 106 and 108(1) EPC).

2. *Allowability of the petition for review*

- 2.1 As follows from the above, the present petition for review is not rejected as clearly inadmissible as far as it concerns the second objection referred to in points V. and 1.5, *supra*. It has therefore to be examined pursuant to Rule 109(2)(a) EPC whether, to this extent, the petition is clearly unallowable or not.
- 2.2 From the facts referred to above it follows that Mr S.L., the employee of the petitioner who wished to make oral submissions in English, was not authorized pursuant to Article 133(3) EPC to represent his employer in the appeal proceedings. Even if he were to have been in possession of a signed authorization by his employer, he admitted to having not filed the same at the EPO. Consequently, the Board could not treat him as a representative of his employer but had to treat him as an accompanying person within the meaning of the decision G 4/95.
- 2.3 According to decision G 4/95 (cf. point (3)(a) of the Order) oral submissions cannot be made, by an accompanying person, as a matter of right, but only with the permission of and under the discretion of the EPO. The Board therefore had the discretionary power to allow Mr S.L. to make submissions during the oral proceedings. In the circumstances of the present case the Board exercised this power to the effect that Mr S.L. was not allowed to make submissions in English, because the professional representative of the other party, when asked by the chairman, did not agree.

- 2.4 In this connection it has to be considered that the other party had requested interpretation from English into German by letter of 21 November 2007 and that, by letter of 13 February 2008, the petitioner's representative, Mr G., had informed the Board that he would use the German language and that no interpretation would be necessary from English to German. The registry acting for the Board then immediately cancelled the arrangements made for interpretation from English to German. One day later another letter of Mr G. was received in which he announced that he would be accompanied Mr F.G. and Mr S.L. who would like to make oral submissions in English (cf. points II(g) and (h), *supra*). However, at that moment in time, the period of one month under Rule 4(1) EPC for requesting interpretation had already lapsed so that the EPO could no longer provide for interpretation from English into German. In these circumstances, for which the petitioner's representative was responsible, the only language to be used in the oral proceedings was German.
- 2.5 Against this factual background it appears that the Board's decision neither constituted a misuse of its discretion nor unduly restricted the petitioner's right to be heard. In particular, Mr S.L.'s oral submissions could have been presented by the professional representative in German so that the interests of both parties could have been safeguarded.
- 2.6 As further argued by the petitioner, the purpose of the principles developed by the Enlarged Board of Appeal in decision G 4/95 was to ensure that during oral proceedings one party did not present oral submissions

which took an opposing party by surprise and for which such opposing party was not prepared. In the petitioner's view the representative of the other party could not have been taken by surprise by the fact that an accompanying person wished to make oral submissions in English because this was the language of the proceedings and the intention to use English was announced a week before the oral proceedings. However, it is to be noted in this connection that, had the Board allowed Mr S.L. to make oral submissions in English, it would have risked a violation of the right to be heard of the other party who had clearly stated more than one month before the oral proceedings that interpretation from English into German was needed. As the petitioner alone was responsible for the fact that the respective arrangements of the EPO had been cancelled, it would have been up to him to provide for interpretation from English into German if necessary.

- 2.7 The petitioner further argued that when he informed the EPO that an accompanying person wished to make oral submissions in English he should have been warned that the arrangement for interpretation from English into German had been cancelled. However, it has to be emphasized again that according to decision G 4/95 oral submissions may be made by an accompanying person, not as a matter of right, but under the discretionary control of the EPO. If a request for an accompanying person to present oral submissions is made shortly before the oral proceedings, the request should be refused unless the other party agrees (G 4/95, point 10 of the reasons, *in fine*). On this basis alone the petitioner could not expect that the Board should have reacted in any way to his letter announcing the

accompanying persons which arrived at the EPO only one week before the oral proceedings.

- 2.8 For these reasons the refusal the Board of Appeal 3.2.06 to allow the making of oral submissions by Mr S.L. in the oral proceedings was clearly not a fundamental violation of Article 113 EPC. Accordingly, the petition for review, as far as it is based on this objection, is dismissed as clearly unallowable (Rule 109(2)(a) EPC).

Order

For these reasons it is decided that:

To the extent that the petition is not rejected as clearly inadmissible, it is dismissed as clearly unallowable.

The Registrar:

The Chairman:

S. Fabiani

P. Messerli