

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

D E C I S I O N
of 15 December 2005

Case Number: T 0243/05 - 3.3.05

Application Number: 96926665.9

Publication Number: 0863798

IPC: B01J 19/18

Language of the proceedings: EN

Title of invention:

Method for thermal treatment of non-gaseous material

Applicant:

BIOMASS TECHNOLOGY GROUP B.V.

Opponent:

-

Headword:

Thermal treatment/BIOMASS TECHNOLOGY

Relevant legal provisions:

EPC Art. 82, 113(1)

EPC R. 67

Keyword:

"Procedural violation: no"

"Re-imbusement of appeal fee: no"

Decisions cited:

G 0003/03, T 0939/95

Catchword:

-



Case Number: T 0243/05 - 3.3.05

D E C I S I O N
of the Technical Board of Appeal 3.3.05
of 15 December 2005

Appellant: BIOMASS TECHNOLOGY GROUP B.V.
(Applicant) Drienerlolaan 5
NL-7522 NB Enschede (NL)

Representative: Kupecz, Arpad
Octrooibureau Los en Stigter B.V.
Postbox 20052
NL-1000 HB Amsterdam (NL)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 21 June 1999
refusing European application No. 96926665.9
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. M. Eberhard
Members: B. P. Czech
J. H. P. Willems

Summary of Facts and Submissions

I. The application underlying the present appeal case was refused by the examining division on the ground that it did not comply with the requirement of Article 82 EPC, i.e. that it lacked the required unity of invention in the sense of Rule 30 EPC.

II. In accordance with the request presented by the applicant with its statement of grounds of appeal dated 20 October 1999, the examining division subsequently

- set aside the contested decision;
- decided to grant a patent on the basis of the sole amended (method) claim 1 filed with the said statement of grounds of appeal.

The examining division forwarded the case to the board for a decision on the appellant's further request for reimbursement of the appeal fee.

III. In its statement of grounds of appeal, the appellant has acknowledged the line of reasoning concerning the lack of unity as relied upon by the examining division in the contested decision and has consequently dropped all apparatus claims previously on file.

In support of its request for reimbursement of the appeal fee, the appellant argued

- i) that "It was only in the Decision to refuse a European Patent that a coherent and closely-reasoned line of reasoning was presented";

ii) that "the Examiner has stretched the meaning of the word "converted" beyond its meaning as generally recognized in the art...";

iii) and that "the decision to refuse a European Patent fails to discuss this amended claim 1, which claim meets all the requirements of the EPC".

The amended claim 1 referred to under iii) above was claim 1 in its version filed earlier with letter dated 16 April 1999.

In view of these circumstances, it considered that the procedure had been substantially violated.

IV. In its communication dated 24 May 2005, the board indicated that *"under these circumstances, what remains to be seen is whether the contested decision was based on grounds on which the applicant had an opportunity to present its comments (Article 113(1) EPC)."* and informed the appellant of its provisional opinion concerning the issue of reimbursement of the appeal fee (see points 6.1 to 7.). More particularly, the board noted the following:

"The objection concerning the lack of unity was already raised in the IPER (see section IV) having regard to the three independent apparatus claims 2, 4 and 5 upon which the report was based, which were considered to define three separate inventions not so linked as to form a single general inventive concept. It was also pointed out in the IPER

- that the apparatus features common to these claims were all known from D1 = US-A-1 284 488;
- that "the approach defined in each of these claims and the advantages of each approach are entirely different"; and
- that these claims related "to three entirely different methods for returning solid materials to a rotating chamber".

Moreover, the method "for the thermal [sic] treatment of non-gaseous material" of claim 1 as discussed in the IPER was found to lack novelty over D1.

In the communication dated 17 December 1998, the examining division maintained the objection concerning lack of unity and referred to the IPER.

In response to this communication, the applicant merely amended method claim 1 (see claim 1 filed with letter dated 16 April 1999). This claim was amended in comparison to the one discussed in the IPER by specifying that the "thermal [sic] treatment" mentioned therein was a "thermal [sic] treatment to convert said solid material by a conversion reaction". Without any further explanations, the applicant argued that since the three apparatuses according to the three independent apparatus claims all "rely on the method disclosed in claim 1", there was no lack of unity. In particular, the applicant has not identified which "special technical features" (in the sense of Rule 30 EPC) of the said apparatus claims could be considered to provide the required common general inventive concept.

The board notes that the three independent apparatus claims 2, 4 and 5 neither contained a back-reference to the method of claim 1 nor a reference to the "conversion reaction". Moreover, the appellant has not indicated and the board cannot see how the objection as to the lack of unity of invention raised with respect to the three independent apparatus claims then on file could have been affected by interpretations of the term "converted". Neither did the applicant indicate in which way the method of claim 1 could play a role in establishing the unity of invention. In this connexion ..., it is observed that the contested decision actually discusses amended claim 1 (see Reasons 2.5, 2nd paragraph). Hence, the amendment carried out in claim 1 filed with letter dated 16 April 1999 has no apparent bearing on the unity of invention of the apparatus claims 2, 4 and 5.

Apparently, the reply of the applicant did not convince the examining division that the suitability of the apparatuses according to the three apparatus claims for carrying out the method of claim 1 as amended necessarily meant that they were united by a single general inventive concept, and that the objection concerning the lack of unity had thus been overcome. Consequently, the examining division decided to refuse the application, using the essential legal and factual reasoning already given in the IPER, although in a more exhaustive manner. The requirements of Article 113(1) EPC were thus met.

Therefore, under the present circumstances, the board comes to the provisional, non-binding conclusion that no substantial procedural violation justifying the

reimbursement of the appeal fee pursuant to Rule 67 EPC occurred."

- V. In its statement of grounds of appeal, the appellant had also requested oral proceedings in case its request for the grant of patent on the basis of the newly filed amended claim 1 was not allowable. The board informed the appellant in its communication dated 24 May 2005 that since a patent had already been granted on this basis, it understood that oral proceedings were not requested as far as the issue of reimbursement of the appeal fee was concerned, and that it did not envisage holding oral proceedings, unless they would be requested in reply to the communication.
- VI. The appellant has not replied to this communication within the set time limit of two months.
- VII. The sole pending request of the appellant is that the appeal fee be reimbursed.

Reasons for the Decision

1. Following decision G 0003/03 (OJ EPO, 2005, 344, see Order), it is the present board of appeal that is competent to decide on the appellant's request for reimbursement.
2. A refund of the appeal fee is equitable in the case of an interlocutory revision by reason of a substantial procedural violation, see Rule 67 EPC and decision T 0939/95 (OJ EPO, 1998, 481).

3. In its communication dated 24 May 2005, the board has informed the appellant of its provisional opinion concerning the issue of reimbursement of the appeal fee and indicated the reasons why it considered that no substantial procedural violation justifying such a reimbursement had occurred (see point IV. above). The appellant has not replied to this reasoned provisional opinion. Therefore, the board has no reason to depart from it. For the reasons indicated in the said communication, the board concludes that, considering the circumstances of the present case, there has been no procedural violation justifying the reimbursement of the appeal fee pursuant to Rule 67 EPC.

Order

For these reasons it is decided that:

The request for re-imbusement of the appeal fee is refused.

The registrar

The chairman

A. Wallrodt

M. Eberhard