

Internal distribution code:

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

**Datasheet for the decision
of 5 December 2006**

Case Number: T 0777/06 - 3.2.04

Application Number: 97500214.8

Publication Number: 0848138

IPC: F01K 3/18

Language of the proceedings: EN

Title of invention:

Fusion heat recovery and combustion gases filtering system
with electric power production

Patent Proprietor:

Colorobbia Espana, S.A.

Opponent:

Vai Pomini S.r.l.

Headword:

-

Relevant legal provisions:

EPC Art. 116

EPC R. 67

Keyword:

"Adverse decision issued without granting request for oral
proceedings"

"Substantial procedural violation (yes)"

"Refund of appeal fee (yes)"

Decisions cited:

T 0283/88, T 0598/88

Catchword:

-



Case Number: T 0777/06 - 3.2.04

DECISION
of the Technical Board of Appeal 3.2.04
of 5 December 2006

Appellant: Vai Pomini S.r.l.
(Opponent) Via Leonardo da Vinci 20
I-21053 Castellanza-Varese (IT)

Representative: Marchi, Massimo
c/o Marchi & Partners s.r.l.
Via Pirelli, 19
I-20124 Milano (IT)

Respondent: Colorobbia Espana, S.A.
(Patent Proprietor) Poligono Industrial
Carretera Comarcal 814
Km. 16,3
E-12193 Villafames (Castellon) (ES)

Representative: Carpintero Lopez, Francisco
Herrero & Asociados, S.L.
Alcalá, 35
E-28014 Madrid (ES)

Decision under appeal: Decision of the opposition division of the
European Patent Office posted 17 March 2006
rejecting the opposition filed against European
patent 0848138 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: M. Poock
C. Heath

Summary of Facts and Submissions

I. This appeal lies from the decision of the opposition division posted 17 March 2006 in which the opposition against European patent 0 848 138 was rejected without oral proceedings being held.

II. In the opposition proceedings, the opponent stated on page 2 of the letter of 6 June 2005:

"The Opponent hereby requests oral proceedings (Article 116 EPC) in case the Opposition Division is of the opinion to maintain the opposed patent as it is or in any amended forms."

The file does not contain information that this request had been withdrawn.

III. The opponent (appellant) lodged the notice of appeal on 16 May 2006 together with the statement of grounds of appeal, paid the prescribed fee simultaneously and requested to set aside the decision of the opposition division, to remit the case to the opposition division, and to refund the appeal fee. He further requested that oral proceedings be held before the opposition division issues any decision.

He argued that a substantial procedural violation occurred because no oral proceedings had been held as requested.

IV. In a communication, the board expressed its preliminary view that the impugned decision appears to rest on a substantial procedural violation and indicated its

intention to set it aside, to remit the case to the opposition division for further prosecution and to reimburse the appeal fee.

- V. The respondent (patent proprietor) made no submissions in the appeal.

Reasons for the Decision

1. The appeal complies with the requirements of Article 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.

2. The right of parties to oral proceedings is a fundamental procedural right in proceedings before the EPO. The first sentence of Article 116 EPC makes it clear that a party is entitled to oral proceedings upon request. This provision is mandatory and leaves no room for discretion to take into account considerations as speedy conduct of the proceedings, equity or procedural economy. If such request has been made, oral proceedings have to be appointed (T 283/88 of 7 September 1988 and T 598/88 of 7 August 1989, neither published in the OJ EPO).
 - 2.1 In the letter of 6 June 2005, the appellant requested oral proceedings according to Article 116 EPC "in case that the opposition division is of the opinion to maintain the opposed patent as it is or in any amended forms." This clear and unambiguous request was never withdrawn.

- 2.2 The decision to reject the opposition has the effect that the patent is maintained as granted.

Therefore, the opposition division is not entitled to its decision to reject the opposition and thereby to maintain the patent as granted without appointing oral proceedings.

- 2.3 For these reasons, the opposition division has not taken due account of the procedural requirements of Article 116 EPC. Consequently, the impugned decision has to be set aside.

3. It is established jurisprudence of the Boards of Appeal that an adverse decision issued without granting a party's request for oral proceedings rests on a substantial procedural violation which justifies the reimbursement of the appeal fee under Rule 67 EPC (see Case Law of the Boards of Appeal of the European Patent Office, 4th edition, VI.C.4).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order that oral proceedings according to Article 116 EPC shall take place before the opposition division decides on the opposition.
3. The appeal fee shall be reimbursed to the appellant.

The Registrar

The Chairman

G. Magouliotis

M. Ceyte