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**Datasheet for the decision
of 12 May 2009**

Case Number: T 0114/09 - 3.2.03

Application Number: 99122223.3

Publication Number: 1001241

IPC: F28F 9/00

Language of the proceedings: EN

Title of invention:

Side member for heat exchanger and heat exchanger
incorporating side plate

Patentee:

Valeo Inc.

Opponent:

Behr GmbH & Co. KG

Headword:

-

Relevant legal provisions:

EPC Art. 113(1), 116(1)

EPC R. 103(I)(a)

Relevant legal provisions (EPC 1973):

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Keyword:

"Request for oral proceedings ignored"

"Substantial procedural violation (yes)"

Decisions cited:

T 0560/88, T 0598/88, T 0556/95

Catchword:

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Case Number: T 0114/09 - 3.2.03

DECISION
of the Technical Board of Appeal 3.2.03
of 12 May 2009

Appellant:
(Patent Proprietor)

Valeo Inc.
4100 North Atlantic Boulevard
Auburn Hills, MI 48326 (US)

Representative:

Rolland, Jean-Christophe
Valeo Systemes Thermiques
Propriété Industrielle
8, rue Louis-Lormand
La Verrière
F-78321 Le Mesnil St Denis Cedex (FR)

Respondent:
(Opponent)

Behr GmbH & Co. KG
Mauserstr. 3
D-70469 Stuttgart (DE)

Representative:

Brisch, Georg
Grosse Falterstrasse 1
D-70597 Stuttgart (DE)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 21 November 2008
revoking European patent No. 1001241 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: U. Krause
Members: C. Donnelly
I. Beckedorf

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division, posted on 21 November 2008, to revoke European Patent No. EP-B-1001241.

II. The patent proprietor (hereinafter "the appellant") filed a notice of appeal on 13 January 2009 and paid the corresponding fee the same day. The grounds of appeal were filed on 31 March 2009.

The appellant requests that the impugned decision be overturned and the opposition rejected or, alternatively, that the patent be maintained in amended form on the basis of one of the auxiliary requests 1 to 3 filed with the grounds of appeal. It is also requested that the appeal fee be reimbursed since the opposition division committed a substantial procedural violation.

III. Concerning the allegation that a substantial procedural violation had been made, the appellant argued that despite its explicit request, sent by telefax of 10 November 2005, for oral proceedings to be held, the contested decision had been taken on 11 November 2008 and subsequently posted on 21 November 2008 without any such proceedings being appointed. The fact that it had not made any comments in writing up to that point in the opposition proceedings cannot excuse the non-respect of a fundamental right to be heard at oral proceedings, consequently a substantial procedural error has occurred.

IV. By letter of 5 May 2009 the opponent-respondent indicated that it did not intend to file any comments.

Reasons for the decision.

1. The appeal is admissible.
2. The impugned decision must be set aside, without an examination of its substantive merits, for the sole reason that the opposition division has made a substantial procedural error in violating the appellant's fundamental right to be heard enshrined in Article 113 EPC.
 - 2.1 Indeed, an inspection of the opposition file confirms that the appellant(then patent proprietor) made a request by letter of 10 November 2005, received at the Office by telefax the same day, for oral proceedings according to Article 116 EPC to be held, if the opposition division intended to revoke the patent ("Si la division d'opposition devait toutfois envisager une révocation du brevet, nous requérons alors la tenue d'une procédure orale au sens de l'article 116 CBE"). The Board considers this request to be clear and unequivocal and therefore valid.
 - 2.2 The decision of the opposition division to revoke the patent was taken on 11 November 2008 and dispatched on 21 November 2008, as the conclusion of a procedure conducted entirely in writing and three years after the request for oral proceedings was received and placed on file. This protracted delay and the fact that the promised response to the opposition, made by the

appellant in the same letter, never seems to have been sent does not detract from the validity of the request for oral proceedings to be held. It is also of no consequence to the validity of the request that it was made after the refusal to extend the time limit to respond pursuant to Rule 84 EPC 1973 using EPO form 2944C had been dispatched. The right to be heard in oral proceedings subsists so long as proceedings are pending before the EPO (T 556/95 point 4.4, T 598/88 point 3.). Thus, at the time the contested decision was taken a valid request for oral proceedings was on file which should have been respected. It is consistent case law of the Boards of Appeal that a failure to do so constitutes a substantial procedural violation.

2.3 Since a substantial procedural violation has been made the appeal fee must also be reimbursed (Rule 103(1)(a) EPC 2000) if this is otherwise equitable. In view of the fact that the contested decision makes no mention of a request for oral proceedings, the Board can only assume that it was overseen. In consideration of the fact that the appellant was thereby denied the opportunity of submitting further arguments during such oral proceedings which may have had influence on the decision in question, reimbursement of the appeal fee is deemed justified in the present case.

3. Furthermore, despite the severe delay in the opposition procedure incurred so far, the Board has no choice but to set the contested decision aside as null and void and to remit the case to the department of first instance in order that the appellant's right to be heard be respected (T 560/88- point 6).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. The appeal fee is to be reimbursed.

Registrar:

Chairman

A. Wolinski

U. Krause