

Internal distribution code:

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

**Datasheet for the decision
of 25 October 2019**

Case Number: T 1021/15 - 3.2.07

Application Number: 08801388.3

Publication Number: 2209556

IPC: B02C18/14, B27L11/02

Language of the proceedings: EN

Title of invention:

Wood chipping machine with peripheral sieving and
disintegration device and method for producing wood chips

Patent Proprietor:

PC Maskiner ApS

Opponent:

Eschlböck - Maschinenbau Gesellschaft m.b.H.

Headword:

Relevant legal provisions:

EPC Art. 113(1), 113(2)
EPC R. 115(2), 103(1)(a)
RPBA Art. 15(3)

Keyword:

Oral proceedings - held in absence of appellant/respondent
Right to be heard - non-attendance at oral proceedings
Text or agreement to text withdrawn by patent proprietor
Reimbursement of appeal fee (no)

Decisions cited:

T 1704/06, T 0163/99, T 1637/06, T 0784/14, T 2524/12

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1021/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 25 October 2019

Appellant: PC Maskiner ApS
(Patent Proprietor) Håndværkervej 6
8881 Thorsø (DK)

Representative: Rottenberg, Annabell Simone
Tropa ApS
Aagade 97, 1st Floor
8370 Hadsten (DK)

Respondent: Eschlböck - Maschinenbau Gesellschaft m.b.H.
(Opponent) Grieskirchnerstraße 5
4731 Prambachkirchen (AT)

Representative: Hübscher, Helmut
Patentanwaltskanzlei Hübscher
Spittelwiese 4
4020 Linz (AT)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 April 2015
revoking European patent No. 2209556 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman K. Poalas
Members: A. Beckman
R. Cramer

Summary of Facts and Submissions

- I. An appeal was lodged by the patent proprietor (hereinafter "the appellant") against the decision of the opposition division to revoke the European patent No. 2 209 556.
- II. In its statement setting out the grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims filed together with said statement as main request, as first auxiliary request and as second auxiliary request. The appellant further requested reimbursement of the appeal fee.

In its reply to the statement of grounds of appeal, the opponent (hereinafter "the respondent") requested that the appeal be dismissed.

- III. The parties were summoned to oral proceedings to be held on 25 October 2019 in accordance with Rule 115 EPC.

The Board provided the parties with its preliminary opinion on the above requests in a communication dated 28 May 2019 pursuant to Article 15(1) RPBA.

- IV. The respondent with a letter dated 18 October 2019 informed the Board that it will not attend the scheduled oral proceedings.
- V. In a letter dated 22 October 2019 also the appellant informed the Board that it will not attend the scheduled oral proceedings and stated the following:

"... we no longer wish to maintain the patent as requested in the main request, the first auxiliary request or the second auxiliary request.

We however maintain our request for reimbursement of the appeal fee."

VI. Oral proceedings before the Board took place as scheduled on 25 October 2019.

Since neither the respondent, as announced with its submission dated 18 October 2019, nor the appellant, as announced with its submission dated 22 October 2019, attended, the oral proceedings were continued without the parties according to Rule 115(2) EPC and Article 15(3) RPBA.

The present decision was given at the end of the oral proceedings.

Reasons for the Decision

1. Right to be heard - non-attendance at oral proceedings

Although the parties did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 9th edition 2019, sections III.B.2.7.3 and V.A.4.5.3).

2. Basis for the assessment of patentability

Pursuant to Article 113(2) EPC the *"European Patent Office shall examine, and decide upon, the European Patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent."*

The appellant does not wish to maintain any of its claim requests (see section V. above). It thus follows from the provision cited above that there is no subject-matter upon which the Board could decide. In such a situation, where a substantive requirement for allowing an appeal against a decision to revoke the patent is lacking, the proceedings should be terminated by a decision ordering the dismissal of the appeal (see for example decisions T 163/99, T 1637/06, T 784/14 and T 2524/12).

3. Request for reimbursement of the appeal fee

3.1 Under section 5. of its above-mentioned communication pursuant to Article 15(1) RPBA dated 28 May 2019 the Board stated the following:

"The patent proprietor argues that in the impugned decision it is stated in paragraph 13 that the proprietor has "been given opportunity to respond" to the arguments presented by the opponent. However, no deadline was presented for the reply to these arguments. Therefore, by not giving the patent proprietor a deadline for response to the arguments presented by the opponent or enough time to file a response, the patent proprietor was deprived of his right to be heard (statement setting out the grounds for appeal, point 2).

The Board notes that the patent proprietor was requested with the communication of notices of oppositions according to Rule 79(1) EPC dated 20 November 2013 to file observations to the arguments presented by the opponent. The patent proprietor filed a reply to the communication under Rule 79(1) EPC with letter dated 14 March 2014. Therefore, the patent proprietor has been given the opportunity to respond to the opponent's arguments. The opponent submitted a reply dated 25 July 2014 to the patent proprietor's submission dated 14 March 2014. The opponent's reply dated 25 July 2014 was sent to the patent proprietor with a communication dated 1 August 2014, wherein no a time limit for a patent proprietor's response was set. The Board notes that setting further time limits at this stage of the proceedings lies within the discretionary power of the opposition division (cf. Rule 81(2), second sentence, EPC). Parties should therefore be aware of the fact that, if no request for oral proceedings is made and the opposition division is of the view that the right to be heard has been observed (Article 113(1) EPC), it may decide on the case at any time. In the present case the decision was issued more than eight months after the letter of 25 July 2014 was forwarded to the appellant. Therefore the Board cannot find any fault in the opposition division's conclusion that the "proprietor has not advanced any reasons as to why the teachings of E1 and E6 would not be combined despite having already heard the argument and been given the opportunity to respond" (impugned decision, point 13.).

Hence, the Board is of the preliminary opinion that, even if the appeal were found to be allowable (Rule 103(1) (a) EPC), the patent proprietor's request for reimbursement of the appeal fee could not be allowed."

3.2 The above-mentioned preliminary finding of the Board has not been commented on nor has been contested by the appellant during the appeal proceedings.

Furthermore, as the appeal is not allowable, there is no legal basis for the appellant's request for reimbursement of the appeal fee.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated