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**D E C I S I O N**  
of 30 March 1994

**Case Number:** T 0892/91 - 3.2.3  
**Application Number:** 87201794.2  
**Publication Number:** 0260769  
**IPC:** E01C 13/00  
**Language of the proceedings:** EN

**Title of invention:**

Method of providing a substructure construction for an artificial grassfield and an artificial grassfield having such a substructure construction

**Patentee:**

Wegenbouwmaatschappij J. Heijmans B.V.

**Opponent:**

- 01) Heidemij Uitvoering B.V.  
02) Wijsman, Willem Gijsbertus Cornelius

**Headword:**

Missing translation of notice of opposition/WIJSMAN

**Relevant legal norms:**

- EPC Art. 14(4)  
EPC R. 6(2), (3)  
RFees 12(1)

**Keyword:**

"English translation of notice of opposition filed in time (yes)"

**Decisions cited:**

T 0128/87

**Catchword:**

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Case Number: T 0892/91 - 3.2.3

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.3  
of 30 March 1994

**Appellant:** Wijsman, Willem Gijsbertus Cornelius  
(Opponent 02) Catherina van Rennesstraat 294  
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**Representative:** Winckels, J.H.F., Ir.  
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**Representative:** Prins, Hendrik Willem  
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**Respondent:** Wegenbouwmaatschappij J. Heijmans B.V.  
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**Representative:** Van kan, Johan Joseph Hubert, Ir.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office dated 9 September 1991  
rejecting the opposition filed against European  
patent No. 0 260 769 as inadmissible on the basis  
of Rule 56(1) EPC.

**Composition of the Board:**

**Chairman:** C.T. Wilson  
**Members:** W. Moser  
J. Kollar

### Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 0 260 769 was published in the European Patent Bulletin on 3 January 1990.
- II. A Notice of opposition has been filed in Dutch by the Appellant (Opponent 02) on 2 October 1990.
- III. With communication dated 28 December 1990, the Appellant was informed that no translation in one of the official languages of the EPO had been filed with the Notice of opposition on 2 October 1990.
- IV. In a letter dated 25 January 1991, the Appellant argued that the translation had been attached to the Notice of opposition. For evidence, he submitted the acknowledgement of receipt.
- V. With communication dated 17 May 1991, the Appellant was informed that, despite an exhaustive investigation, no indication could be found suggesting that a translation had been provided together with the Notice of opposition.
- VI. On 9 September 1991, the Opposition Division rejected the notice of opposition of the Appellant as inadmissible on the basis of Article 14(4) and Rule 6(2) EPC.
- VII. On 7 November 1991, the Appellant lodged a notice of appeal against this decision in Dutch, together with an English translation thereof. The appeal fee was simultaneously paid. On 8 January 1992, the Appellant filed a Statement of Grounds of Appeal in Dutch and submitted thereafter an English translation thereof on

6 February 1992. The Appellant requested that the impugned decision be set aside and the opposition be accepted as admissible. Moreover, he requested that, on the basis of Rule 6(3) EPC, a reduction of the appeal fee be granted. Finally, as an auxiliary request, the Appellant asked for oral proceedings to be held in case the Board did not intend to set aside the appealed decision and did not intend to accept the opposition as admissible.

VIII. The Appellant argues as follows:

- Conclusive evidence that the translation of the Notice of opposition had been filed on 2 October 1990 could not be adduced; however, there were considerably more facts pointing in the direction of the translation having been filed than not.
- The use of EPO Form 1037 removed the possibility of conclusively proving later that a specific enclosure had been filed. Furthermore, the list of enclosed documents on page 4 of the notice of opposition was lacking an item "Translation of Facts and Arguments". On the other hand, since it had been assumed that the Dutch and the English version of the notice of opposition formed one document because both had been headed "Facts and Arguments", there was no reason to mention the translation under item "Other" in said list as had been suggested by the Opposition Division.
- A translation was virtually always filed later, so that an entry in the memo book was standard practice. The absence of any note in the memo book, referred to by the Opposition Division, pointed therefore to the action in question rather than to its omission as suggested by the Opposition

Division. Thus, no irregularity in the procedure followed by the Appellant could be established from the memo book and it had therefore to be concluded that everything pointed to the translation having been filed.

- The Opposition Division admitted that another possibility was that the translation had been mislaid on the way from The Hague to Munich.
- On 1 November 1990, the Formalities Officer of DG2 in Munich had requested that the entire notice of opposition with enclosures be furnished because, except for a copy of the first page of the notice of opposition received by telefax from The Hague, all documents filed by the Appellant had been missing. This request had been complied with on 6 November 1990 through the letter which had been sent with enclosures by courier and which had reached Munich on 7 November 1990.
- He had been surprised to receive the communication of the Formalities Officer of DG2 in Munich dated 4 December 1990 requesting that a translation be filed within a term of two months, because a copy of this translation had already been enclosed to his letter dated 6 November 1990.
- At the Appellant's explicit request, the enclosures belonging to his letter dated 6 November 1990 had been checked, whereupon it had been established that the translation, hitherto unnoticed, had actually been attached to the letter in question.
- The fact that the presence of a translation had been established only upon the Appellant's explicit request seemed to be a very strong indication that

the Dutch and the English text, both headed "Facts and Arguments", could easily be considered as one and the same document, the more so because both documents comprised nine pages and had virtually the same lay-out.

- The originally filed notice of opposition had meanwhile arrived in Munich in several parcels, but, according to the Formalities Officer of DG2 in Munich, without the translation. The reason for this absence might have been the confusion of the Dutch and the English documents.

- If the notice of opposition had been regularly sent from The Hague to Munich, the Formalities Officer of DG2 in Munich would at most have noticed on 1 November 1990 that the translation was missing, whereupon it could have been sent by telefax. Therefore, it seemed unfair to confront the Appellant with the consequences of the fact that the shipment from The Hague to Munich went wrong.

IX. In a teletype dated 22 June 1992, confirmed by letter received by the EPO on 23 June 1992, the Respondent (Proprietor of the patent in suit) took the view that in case it was impossible for the Appellant to make sure that the translation had been filed within the required terms, such a translation could no longer be accepted and then the documents as filed by the Appellant should no longer be discussed.

X. The party to the appeal proceedings as of right (Opponent 01) refrained from making any comments.

## Reasons for the Decision

1. The appeal is admissible.
2. Contrary to the opinion of the Opposition Division expressed in the impugned decision, the Board is satisfied that there are strong facts pointing to a greater likelihood that the English translation of the notice of opposition was filed on 2 October 1990.
  - 2.1 As already stated with good reason by the Appellant, the Dutch and the English text of the notice of opposition may easily be considered one and the same document because both documents are headed "Facts and Arguments" and have virtually the same lay-out and comprise the same number of pages. Consequently, there was no reason to mention the English translation of the notice of opposition, under item "Other" in the list of enclosed documents on page 4 of EPO Form 1037, solely because this list failed to provide an item "Translation of Facts and Arguments".
  - 2.2 A confusion based on this similitude constitutes, in all probability, the reason why the English translation of the notice of opposition enclosed with the Appellant's letter dated 6 November 1990 had remained unnoticed until, at the Appellant's explicit request, the enclosures belonging to this letter were thoroughly checked. The same confusion most likely occurred when the original opposition documents were filed on 2 October 1990.
  - 2.3 The Appellant showed convincingly that an entry in the memo book was standard practice because, as a rule, translations of documents in an official language of the EPO were always filed later. The fact that, in the

present case, no entry in the memo book has been made points rather to the translation of the notice of opposition having been filed together with the notice of opposition.

- 2.4 Since the originally filed notice of opposition has not been regularly sent from The Hague to Munich, the possibility that the translation of the notice of opposition has been mislaid on the way from The Hague to Munich cannot be excluded.
  
3. In the Board's judgment, proof of the actual filing in time of the translation of the notice of opposition has been furnished because, on the strength of the circumstances described above, the likelihood that said translation was filed in time is considerably greater than that it was not (cf. T 128/87; OJ EPO 1989, 406). The opposition filed by the Appellant complies therefore with Article 14(4) and Rule 6(2) EPC. Consequently, the decision under appeal has to be set aside and the case remitted to the Opposition Division for further prosecution.
  
4. On the basis of Rule 6(3) EPC, a reduction of the appeal fee has to be granted. According to Article 12(1) of the Rules relating to Fees, this reduction shall be 20% of the appeal fee, i.e. DM 200 in the present case.
  
5. As matters stand, the auxiliary request for oral proceedings submitted by the Appellant is irrelevant.



Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The opposition filed by the Appellant complies with Article 14(4) and Rule 6(2) EPC.
3. The case is remitted to the Opposition Division for further prosecution.
4. Twenty per cent of the appeal fee paid has to be refunded.

The Registrar:



N. Maslin

The Chairman:



C. Wilson