

Internal distribution code:

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

**Datasheet for the decision
of 22 April 2009**

Case Number: T 0911/07 - 3.2.01

Application Number: 01930389.0

Publication Number: 1280694

IPC: B63B 1/16

Language of the proceedings: EN

Title of invention:
Hull and propeller arrangement

Patentee:
Stormfageln Projekt AB

Opponent:
Futuretech Technologies Limited

Headword:

-

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):
EPC Art. 122, 106-108, 56

Keyword:
"Re-establishment of rights (yes)"
"Admissibility (yes)"
"Inventive step (no)"

Decisions cited:
J 0005/80, J 0002/86, J 0003/86, J 0010/07, T 0191/82,
T 0043/96

Catchword:

-



Case Number: T 0911/07 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 22 April 2009

Appellant: Stormfågeln Projekt AB
(Patent Proprietor) Box 27707
S-115 91 Stockholm (SE)

Representative: Börllin, Maria
Albihns AB
P.O. Box 5581
S-114 85 Stockholm (SE)

Respondent: Futuretech Technologies Limited
(Opponent) 54 Spitfire Way
Hamble, Hampshire S031 4RT (GB)

Representative: Smee, Anthony James Michael
Gill Jennings & Every LLP
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
15 March 2007 concerning maintenance of
European patent No. 1280694 in amended form.

Composition of the Board:

Chairman: S. Crane
Members: C. Narcisi
S. Hoffmann

Summary of Facts and Submissions

- I. The appeal lies from the Opposition Division's decision posted on 15 March 2007 maintaining European patent 1280694 in amended form.
- II. The Patentee (hereinafter Appellant) filed an appeal against the Opposition Division's decision on 14 May 2007 and the statement setting out the grounds of appeal on 12 July 2007. The Appellant requested that the decision be set aside and that the patent be maintained according to the main request as filed on 2 January 2007.

Claim 1 reads as follows:

"Hull and propeller arrangement for a surface watercraft (1) provided with two propellers (3) which, at high speed of the watercraft, are surface-piercing and are arranged in such a manner that only the propeller blades (11) or parts thereof are submerged in the water at high speeds of the watercraft (1),

- the hull (2) being provided with two streamlined projecting parts (4), which extend essentially in the longitudinal direction of the hull (2),
- each projecting part (4), in terms of its outer shape, having, at its aft end (6), an end edge (15) which, at least in part, extends essentially transversely to the longitudinal direction of the projecting part (4),
- each propeller (3) being located immediately astern of the respective end edge (15) of the projecting parts (4) ,

- and a part of each propeller (3), in the radial direction, extending beyond the delimiting surfaces of the respective projecting part (4),
- characterized in that each projecting part (4) extend from a front end (5) which in the longitudinal direction is located approximately in the centre of the hull (2) to an aft end (6),
- in that the hull (2) is provided with a belly (7), and
- in that the belly (7) and the projecting parts (4) are arranged in such a manner that, at high speeds of the watercraft (1), an aft bearing area (8) for the watercraft (1) is formed on each projecting part (4), each said aft bearing area consisting of a part of the surface of the respective projecting part (4), which part of the surface is situated immediately forward of the end edge (15) and on the very bottom of the projecting part (4), and a forward bearing area is formed on the belly (7), the watercraft being supported by the water flowing past the bearing areas, on which forces act to lift the hull up."

III. Under cover of letter dated 29 June 2007 the Board's registry notified the Appellant that a loss of rights pursuant to Article 108, second sentence, EPC had occurred because the appeal fee had not been paid.

IV. In a letter filed on 29 August 2007 the Appellant requested re-establishment of rights and paid the missing appeal fee and the fee for re-establishment of rights on the same day.

V. In a letter dated 23 November 2007 the Opponent (hereinafter Respondent) contested that the proper

level of due care as required by Article 122 EPC had been taken and at the same time it countered the arguments given by the Appellant in its statement of grounds and requested that the appeal be dismissed.

- VI. In the Board's communication dated 11 April 2008, the Appellant was invited to clarify its case and to submit evidence.
- VII. In the letter filed on 25 July 2008 the representative of the Appellant explained his firm's time limit monitoring system and submitted his own sworn statement and that of his assistant and also a printed example list concerning entries of time limits in the computer system.
- VIII. The Appellant's essential arguments can be summarised as follows:

In the representative's firm the time limits were entered into a computerised time limit monitoring system. The time limits were then checked by the representative and in addition by his assistant. Due to the time limit for filing a notice of appeal in the present case, the Appellant's representative signed the notice of appeal on 14 May 2007 and handed it over to his assistant and told her that the appeal had to be filed on the same or at the latest on the next day. According to a general instruction the assistant had then the task to "pay" the required appeal fees by adding to the notice of appeal a signed EPO Form 1010 which concerned the deduction of fees from the representative's deposit account. The time limit for the payment of the fee and for filing the notice of

appeal were not separately monitored. According to the practice in the firm, the representative was not obliged to ascertain that the assistant had done what she/he had been told. The representative's firm took great care in education of assistants and provided possibilities to attend external and internal European patent procedure courses on a regular basis and at high level. The assistant concerned with the present case was one of the most experienced in the firm and well acquainted *inter alia* with the payment of appeal fees. Her omission to pay the required appeal fee through the representatives deposit account was a singular mistake in a well functioning system.

The Appellant's arguments as to the substance may be summarized as follows:

There is no support in D1 (W0-A-99/39973) for the assumption that bearing areas are created in the aft portion of the boat. The convex, generally arcuate profile projections have only a very short extension in the longitudinal direction according to D1 (see figure 1) and they are thus only present in the very end portion of the hull. It is therefore fair to conclude that the bearing area at high planing speed corresponds to the single bearing area of a Vee bottom boat, such as known for instance from D2 (US-A-5 685 253; figure 12). Thus, they are not comparable to the projections according to claim 1 of the invention. This conclusion is in line with the teaching of D1 (page 16, lines 17-20), where it is stated that no convex projections should be present for very high speed planing craft. Further, it is stated in D1 (see claim 1) "that said propeller operates in a transom

cavity created behind the transom of the hull in use of the craft" (see also page 14, lines 4-10; page 15, lines 3-5). It is thus clear from the cited passages of D1 that this document only is concerned with a propulsion system for a craft having a conventional Vee bottom hull since it is essential for the function of the propulsion system according to D1 to take advantage of the "transom cavity" of a conventional Vee bottom hull.

The combination of D1 and D4 (US-A-3 469 549) made by the Opposition Division, and also the objective problem stated in the appealed decision, are based on the wrong assumption that the projections shown in the figures of D1 are the only bearing areas in the aft of the boat and not parts of a triangular bearing area corresponding to the bearing area of a conventional hull of the Vee bottom type. D1 is directed to a propulsion system which is particularly effective at low speeds (D1, page 3, lines 25-26; page 5, lines 11-14) whereas D4 is directed to improving the performance of a boat at planing speeds. Furthermore, D1 discloses propellers that are surface-piercing at all speeds of the boat whereas D4 discloses a propeller that is submerged at all speeds of the boat. Finally, there is no indication in D1 that the propulsion system described could be used on boats with totally different types of hulls than the disclosed Vee bottom type. Since the efficiency of the propulsion system of D1 is dependent on a hull of Vee bottom type, a skilled man would not consider replacing the hull of D1 with totally different types of hulls.

IX. The Respondent's essential arguments can be summarised as follows:

The Appellant has not proven that the proper level of care was taken. The Appellant did not exercise reasonable supervision over the work of the assistant and the representative could not leave the task for payment entirely to the assistant because the payment was urgent and associated with an irrevocable loss of rights if any error or delay occurred. The Respondent further submitted that the Appellant failed to show any evidence of a reliable system of cross-checking as required by the jurisprudence of the Board of Appeals. In contrast, the Appellant confirmed that he was not obliged to ascertain that the assistant had done what she was told by requiring to have the file back before it was put back into the file store. The oral confirmation from the assistant that the appeal has been filed without a personal check of the file by the representative does not fulfil the requirement of due care incumbent on the representative himself.

The Respondent's submissions as to the substance may be summarized as follows:

The Appellant does not dispute that the preamble of claim 1 of the main request reads onto D1 and likewise that D4 teaches all of the features of the characterizing portion of claim 1 of the main request. Thus the Appellant's position seems to be that the skilled person would not combine D1 and D4. This contention is incorrect. The hull and propulsion system of D1 does have two aft bearing areas at high speed, provided on each of the two arcuate, generally convex

projections shown in figures 1,2,4 and 6 of D1. Keeping the aft bearing areas at a minimum size leads to an improvement of the planing resistance values, thus ensuring that the arcuate convex surfaces 3 of D1 provide the same effect as the projecting parts 4 of the patent in suit. Although the projecting parts 4 of the patent in suit are drawn deeper in the respective figures, no difference to the convex surfaces 3 of D1 results taking into account that according to D1 the arcuate convex surfaces can have an included angle of 0° to 180° (D1, page 10 lines 4-5), which angle range includes and extends beyond any included angle shown or suggested by the patent in suit. Thus, even though D1 does not stipulate any specific depth for the arcuate convex portions, the indicated choice of an included angle of up to 180° makes clear that the patent in suit shows just a special case of the teaching of D1. Furthermore, the length of the projections is not important, the aft bearing areas according to the patent in suit having only a very limited extent. Indeed their length appears to be no greater than the diameter of the propeller's hub and almost certainly less than the propeller's diameter from blade tip to blade tip. This corresponds essentially to what is shown in figure 1 of D1. There is no particular reason for the projecting parts of the invention to terminate at approximately the centre of the hull, or for the arcuate sections of D1 not to do so. These arcuate sections designed with an included angle of 180° being much deeper might well terminate at approximately the mid length of the hull. In summation, there is no reason to suggest why at high speeds the hull shown in D1 would not plane on the water with only the arcuate convex projection in contact with the water, as the

person skilled in the art would readily understand. Also, the effect of the transom cavity according to D1 is the same as that according to the invention. The propellers in D1 are located immediately behind the rear edge of the underside of the craft in the cavity created by the hull and a similar arrangement is shown by the invention. Thus D1 is not limited to a conventional Vee bottom hull or to any particular type of hull, it only discloses how to adapt any given hull to the disclosed propulsor. Concerning the distinction which has to be made between "high speed" and "very high" speed the Opposition Division rightly concluded that according to D1 only for "very high" speeds convex projections may not be required. Consequently, these projections are provided for the high speed range of up to 35 or 40 knots. Finally, the skilled person would obviously consider the teaching of D1 when looking to address the problem of craft pitching in a longitudinal direction.

Reasons for the Decision

1. As regards the EPC 2000, which entered into force on 13 December 2007, the present Board follows the reasoning in decision J 10/07 (OJ EPO 2008, 567, reasons, points 1.1, 1.2 and 1.3) that the provisions of Article 106 to 108 and 122 EPC 1973 and the Implementing Regulations 1973 which are linked to these Articles are to be applied in the present case.
2. The Appellant's notice and grounds of appeal comply with the time limits according to Article 108(1), sentences 1 and 3 EPC. However, the appeal fee was only paid on

29 August 2007 together with the fee for re-establishment and consequently the appeal is deemed not to be filed pursuant to Article 108(1), sentence 2 EPC unless re-establishment of rights is granted.

3. The application for re-establishment of rights fulfils the conditions laid down in paragraphs (2) and (3) of Article 122 EPC and is admissible.
4. Article 122 EPC provides for an applicant who, in spite of all the due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the EPO, thereby losing a right or other redress, to have his rights re-established upon application subject to the conditions referred to in paragraph 1, above, being met. It is the established jurisprudence of the Boards of Appeal that Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2 and 3/86, OJ EPO 1987, 362).
5. Whether or not a request for re-establishment of rights may be allowed, however, depends on whether or not the applicant can show that all the due care required by the circumstances of the particular case was in fact taken to comply with the time limit. With respect to due care, the following principles relevant to the present case were laid down by the Board in J 5/80 (OJ 1981 343):
6. (1) When an applicant is represented by a professional representative, a request for re-establishment of rights cannot be acceded to unless the representative himself or herself can show that he or she has taken the due care

required of an applicant or proprietor by Article 122(1) EPC.

(2) If the representative has entrusted to an assistant the performance of routine tasks, the same strict standards of care are not expected of the assistant as are expected of the applicant or his representative.

7. As regards the foresaid first condition, the Appellant relied on a computerised time limit monitoring system by which the time limits were checked by himself and his assistant. The Appellant gave proof of these facts by his own sworn statement, the declaration of his assistant and a hard copy of a monitoring list of the computer system. In the Board's view, this reminder system can be assessed as normally satisfactory to ensure compliance with time limits under the EPC. The double check by the representative and its assistance can be considered a cross check as required by the established case law. There was no need to monitor the time limit for the payment of the appeal fee separately. For the Board it is credible that in the representative's firm, unless otherwise ordered, the assistant signed and added EPO Form 1010 to the notice of appeal whereby payment of the appeal fee was ensured by reduction from the deposit account. Even if the examples of the EPO Forms submitted by the Appellant do not clearly show whether or not they were signed by an assistant, the statement of the representative and his assistant seems to provide convincing proof that the general rule existed at least in the department where the Appellant's representative worked.

8. In the present case, the question arises whether or not the representative's duty of care relating to the filing of the appeal ceased when he handed over the notice of appeal to his assistant. As a rule, the representative is not obliged to monitor that the outgoing mail is made ready for posting and delivered to the postal service. Such a task can be entrusted to an assistant because the issuance of a letter causes no difficulties. Although the payment of the appeal fee is a crucial event in the appeal proceedings which normally needs special care, the Board can accept the Appellant's submission that in the monitoring system of its firm the task to file EPO Form 1010 together with the notice of appeal can be considered a routine work which can be trusted to an assistant because no legal or factual difficulties are to be expected in performing this.
9. As regards the lower standard of care for assistants as mentioned in point 6(1) above, the jurisprudence of the Boards of Appeal (J 5/80, OJ EPO 1981, 343; T 191/82, OJ 191/82; T 043/96) only excuses under Article 122(1) EPC a singular mistake or error of the employee when this person had been suitable selected, properly instructed and reasonably supervised. In this regard the Board sees no reason to question the statements made by the representative and his assistant. According to these statements, the assistant was well trained and long experienced in the tasks of a patent assistant and in particular fully acquainted with all deadlines and fees to be paid in proceedings before the EPO. The fact that the notice of appeal was filed in due time allows the conclusion that a clear order was given by the representative and that the assistant's omission to add EPO Form 1010 to this notice was a singular mistake

within an otherwise satisfactory system and which could not be detected by the representative in the circumstances of the present case. As regards the routine work of adding EPO Form 1010, the Board holds that in the present case the representative could rely on the oral confirmation from the assistant that the notice of appeal was filed and no further supervision was required.

10. As all requirements pursuant to Article 122(1) to (3) EPC are fulfilled, re-establishment of rights can be granted. Consequently, the appeal is admissible pursuant to Articles 106 to 108 EPC.
11. In its statement of grounds of appeal the Appellant does not dispute that the features according to the preamble of claim 1 are known from D1 and that D4 discloses the entirety of the characterizing features of the claim. The Board shares this view.
12. The Appellant's arguments as to the substance essentially hinge on the contention that the basic assumption of the impugned decision is erroneous, given that the two arcuate convex surfaces 3 of D1 (figures 1,2,4) actually do not act as aft bearing surfaces of the hull at high speeds of the watercraft. This argument was already brought forward by the Appellant during the opposition procedure (see letter dated 2 January 2007). The impugned decision states that "closest prior art D1 achieves improved planing resistance values when compared with usual planing boats since it achieves a reduction of the planing surface restricted just to the aft portion of the hull bottom immediately forward of the propeller discs" (decision, page 4). Thus the decision considers that given the high speed of the watercraft ranging from

about 35 to 40 knots (decision, page 6) explicitly indicated in D1 (see pages 20,21) there is no doubt that due to the hydrodynamic lift bearing surfaces are formed on the arcuate convex surfaces 3 of D1.

13. The Board agrees with the above conclusions of the Opposition Division. Indeed these are confirmed by the specific configuration of the convex arcuate surfaces 3 disclosed in figures 1,2 and 4 of D1 in conjunction with the corresponding parts of the description. As pointed out by the Respondent, the longitudinal extent of these convex surfaces according to D1 is about the same or even larger than the propeller diameter from blade tip to blade tip (D1, figure 1). This length is at least as large as the aft bearing area of the invention (see figure 2 of the patent in suit). Moreover, as it ensues from the corresponding part of the description (D1, page 10, lines 4-5), the arc formed by said convex arcuate surfaces may include an angle of up to 180° . In such a case, as stated by the Respondent, the depth of said convex arcuate surfaces designed according to the teaching of D1 would be much larger and might well terminate at approximately the mid length of the hull. Thus, the actual aft bearing area of the convex arcuate surfaces 3 of D1 and its overall configuration is in all respects comparable to the respective aft bearing area and the respective configuration of the projections formed on the hull of the watercraft according to the patent in suit. Therefore it has to be concluded that there is no reason why at the mentioned high speeds the hull disclosed in D1 should not plane on the surface of the water with the arcuate convex projections acting as aft bearing surfaces.

14. The impugned decision acknowledges that "there is a passage on page 16, lines 17-20 (D1) in which it is stated that the hull profile of fig. 4 is not suitable for very high speed planing". However, as further set out in the decision, a distinction has to be made between the term "very high speed" and the term "high speed". D1 does not give any definition of "very high speed". Nevertheless it is clear from the overall disclosure of D1 that all of the hull configurations illustrated therein are intended to be used in a high speed watercraft (D1, page 1, lines 1-5) and the examples given in D1 (page 20,21) exemplify the speed range which is implied. Hence there is no doubt that the convex arcuate surfaces 3 shown in figure 4 are indeed intended for use in a high speed watercraft.
15. The Respondent emphasizes correctly that D1 does not disclose any particular hull type, it only discloses what is required to adapt any given hull to the disclosed propulsion system. Thus, irrespective of the specific hull type, the underside of the hull has arcuate convex projections 3 which are intended to be substantially in line with the hub of each propeller. The propellers in D1 are located immediately behind the rear edge of the underside of the craft in the cavity created by the trailing edge of the hull immediately forward of the propellers. An entirely analogous arrangement is disclosed by the patent in suit.
16. The impugned decision asserts that "on achieving aft areas to develop lift (bearing area) it is clear that navigation at high speeds could result in heavy slamming of the forward part of the hull when operating in rough or choppy waters; the alternative rising and falling of

the bow of the vessel result in uncomfortable riding and increased resistance" (decision, page 5). The Board concurs with the Opposition Division's view in that the objective problem to be solved consists in improving the planing qualities of a planing boat as known from D1, in particular seeking a remedy for bow pitching in the longitudinal direction. As set out by the Respondent, given that both D1 and D4 relate to high speed planing crafts, there is no reason why the skilled person would not consider the teaching of D4 when looking to address the problem of pitch stability arising at planing speeds with the hull disclosed in D1. Additionally, as stated in the impugned decision, "the problem of bow pitching, slamming and porpoising is present in most planing boats", "independently of whether the vessel has surface piercing propellers like it is in the case of D1, or regular fully submerged discs like in D4" (decision, page 5). Finally, it is clear from D4 that it addresses inter alia the problem of stability in the pitch direction (column 2, lines 40-45). The skilled person would therefore combine in an obvious manner the teachings of D1 and D4 to arrive at the subject-matter of claim 1 (Article 56 EPC 1973).

Order

For these reasons it is decided that:

1. The Appellant is re-established in its rights in respect of the time limit for the payment of the appeal fee.
2. The appeal is admissible.
3. The appeal is dismissed.

The Registrar:

The Chairman:

A. Vottner

S. Crane