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D E C I S I O N
of 9 October 2003

Case Number: T 0411/01 - 3.2.3

Application Number: 95912100.5

Publication Number: 0746654

IPC: E03D 11/10

Language of the proceedings: EN

Title of invention:
Non-flushing toilet system

Patentee:
Yeung, Shu-Ki

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2); 133(2)
EPC R. 101(1)

Keyword:
"Representation (no)"
"Specifying a period for appointment of a new respresentative (no)"
"Added subject-matter (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0411/01 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 9 October 2003

Appellant: Yeung, Shu-Ki
936 White Street
Saint-Laurent
Quebec H4M 2W6 (CA)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 20 September 2000 refusing European application No. 95912100.5 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: C. T. Wilson
Members: J. B. F. Kollar
M. K. S. Aúz Castro

Summary of Facts and Submissions

I. At the end of the examining proceedings, in the course of which objections to novelty (Article 54 EPC), unallowable amendments (Article 123(2) EPC) and clarity (Article 84 EPC) of the subject-matter of the independent claim 1 received on 9 November 1999 were raised, the European patent application 95 912 100.5 was refused by a decision dated 20 September 2000 of the Examining Division on the grounds that the claim lacked novelty with regard to document

D1: DE-A-2 631 215.

II. The appellant (applicant) with residence in Canada filed an appeal against this decision on 2 November 2000, paying the appeal fee and filing the grounds of appeal on the same day. A new version of independent claim 1 was received on 9 November 1999.

III. In a communication of 25 November 2002 accompanying the invitation to oral proceedings scheduled for 9 October 2003 the Board of Appeal raised objections under Article 123(2) EPC against this new version.

IV. In his response dated 11 August 2003, the appellant submitted an amended set of claims and parts of the description.

The wording of the amended claim 1 reads as follows:

"1.- A toilet (1) comprising :

a frame (2) supporting a toilet bowl (3) and defining a hollow chamber region(6) below said toilet bowl,

said toilet bowl defining a first fluid-receiving volume with a bottom discharge opening (4) in communication with said hollow chamber region,

a tilting bowl (9) disposed generally in said hollow chamber region, said tilting bowl, defining a second fluid-receiving volume,

said tilting bowl mounted for pivoting movement relative to said toilet bowl between a first position with said second fluid—receiving volume at least partially overlapping said first fluid-receiving volume and containing said bottom discharge opening, and a second position permitting flow of fluid from said first fluid-receiving volume, through said bottom discharge opening, and from said second fluid-receiving volume into said hollow chamber region,

said tilting bowl, in said first position, retaining a first volume of fluid sufficient to engage said bottom discharge opening in a manner to restrict flow of gas therethrough,

characterized in that

said tilting bowl remains in said first position in the presence of fluid within said second fluid—receiving volume below a first predetermined fluid weight and/or fluid level, and

said tilting bowl actuated to move from said first position toward said second position by introduction of additional fluid into said second fluid—receiving volume to increase fluid in said second fluid-receiving

volume to exceed a second predetermined fluid weight and/or fluid level, said second predetermined fluid weight and/or fluid level being correspondingly greater than said first predetermined fluid weight and/or fluid level."

In view of the objections of the board that there was no basis in the application documents as filed for the feature fluid parameter of fluid weights and fluid level introduced in the characterising portion of the main claim on which the decision under appeal was based, the appellant contended that by deleting the references to the "predetermined fluid parameter" from the characterising portion of the main claim, this claim no longer included added subject-matter and was therefore in compliance with the provisions of Article 123(2) EPC.

V. On 13 August 2003 the board was informed by the actual professional representatives of the appellant who were the third ones in the course of the examination procedure that they withdrew their representation.

VI. On 26 August 2003 the appellant personally informed the board about the authorisation of new professional representatives.

VII. On 1 September 2003 the board received a fax from these professional representatives advising the board that they did not wish to take over representation and that the information about their taking over by the appellant was given without their consent.

VIII. By communication of 12 September 2003 the board reminded the applicant of the requirements of Article 133(2) EPC and informed him that the date for the oral proceedings would be maintained.

IX. At the oral proceedings on 9 October 2000 the appellant was not represented.

X. The appellant requested that the decision under appeal be set aside and that the patent be granted on the basis of amended claims 1 to 17 filed on 11 August 2003.

Reasons for the Decision

1. The appeal is admissible.

2. *Representation*

2.1 Pursuant to Article 133(2) EPC natural or legal persons not having either a residence or their principal place of business within the territory of one of the Contracting States must be represented by a professional representative and act through him in all proceedings established by this convention, other than filing the European patent application.

This provision applies to the present appellant who has his residence in Canada and thus outside the territory of one of the Contracting States. The requirements pursuant to Article 133(2) EPC are checked within the framework of the examination as to formal requirements (Article 91(1)(a) and (2) EPC).

Rule 101(1) fourth sentence EPC stipulates that where the requirements of Article 133(2) EPC have not been satisfied a period shall be specified by the office for the notification of the appointment of a representative and for the filing of the authorization.

2.2 The application under consideration was filed within the framework of the PCT by a Canadian patent attorney. Before entering into the regional phase before the EPO the appellant's Canadian representative as well as the appellant himself were informed about the requirements pursuant to Article 133(2) EPC (EPO Form 1201.1, point 7).

The appellant was thus informed that pursuant to Article 133(2) EPC he could only act through a professional representative before the EPO.

The purpose of Rule 101(1) fourth sentence is in the judgement of the board not to grant a time limit every time a representation comes to an end in the course of the proceedings. This would run counter to the purpose of procedural economy. In the case under consideration the date for oral proceedings was scheduled nearly one year in advance, so the appellant had ample time to make sure that he would be represented if he so wished. Oral proceedings serve the purpose of concentrating all the points to be discussed and are normally terminated by a decision. The board had no reason to postpone the oral proceedings in order to give the appellant another time limit for the appointment of a new representative. Once the appellant was informed pursuant to Rule 101(1) fourth sentence EPC this provision had served its purpose.

3. *Allowability of the amendments*

3.1 Amendments to a European patent application are only permissible if they do not "contain subject-matter which extends beyond the content of the application as filed" in accordance with Article 123(2) EPC.

3.2 The effect of the amendment "and/or" made to claim 1 of 11 August 2003 is that protection is now sought for a toilet wherein the tilting bowl is actuated to move from the first position toward the second position when

(a) a second predetermined fluid weight or

(b) fluid level or

(c) a second predetermined fluid weight and fluid level

is correspondingly greater than the

(a) the first predetermined fluid weight or

(b) fluid level or

(c) the first predetermined fluid weight **and** fluid level.

3.3 However, the originally filed application's disclosure as a whole does not suggest to apply a predetermined fluid weight **and** a fluid level (alternative (c) above) in order to move the tilting bowl, but merely discloses the use of either the predetermined fluid weight (alternative (a) above) **or** the predetermined fluid level (alternative (b) above) in order to move the bowl.

3.4 Reference is made in this respect to the examples of the application in suit which describe that **either** the use of the predetermined fluid weight (alternative (a)) according to the embodiment shown in Figure 1 **or** the use of the predetermined fluid level (alternative (b)) according to the embodiment shown in Figure 4 serves to actuate the movement of the tilting bowl.

3.5 The original application in suit nowhere suggests the use of both the predetermined fluid weight **and** the predetermined fluid level for the purpose of actuating the movement of the tilting bowl.

For such a concept, the application in suit does not provide a basis as shown above.

The appellant in his response to the Board's communication met these observations by deleting the expression "parameter" from the claims, but did not give any reasons whatsoever why the observations should not be correct.

3.6 It follows from the above reasoning that the now claimed alternative (c) was not included within the teaching of the application as filed.

Therefore, the application has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed and, thus, the requirement of Article 123(2) EPC is not met with the consequence that the appellant's request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

A. Counillon C. T. Wilson