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**Datasheet for the decision
of 25 July 2008**

Case Number: T 1100/07 - 3.2.03

Application Number: 00109067.9

Publication Number: 1050634

IPC: E03F 7/10

Language of the proceedings: EN

Title of invention:

Apparatus for unwinding/rewinding a suction hose for draining cesspools, septic tanks and sewers in general

Patentee:

Cappellotto S.p.A.

Opponent:

- I. FARID INDUSTRIE S.p.A.
II. Müller Umwelttechnik GmbH Co. KG

Headword:

Apparatus for unwinding/rewinding a suction hose

Relevant legal provisions:

EPC Art. 117

Keyword:

"Substantial procedural violation (yes)"

Decisions cited:

T 0474/04, T 0543/95, T 0374/02, J 0010/04

Catchword:

-



Case Number: T 1100/07 - 3.2.03

DECISION
of the Technical Board of Appeal 3.2.03
of 25 July 2008

Appellant: Müller Umwelttechnik GmbH Co. KG
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
9 May 2007 concerning maintenance of European
patent No. 1050634 in amended form.

Composition of the Board:

Chairman: U. Krause
Members: C. Donnelly
K. Garnett

Summary of Facts and Submissions

- I. By its decision announced orally on 17 April 2007 and issued in writing on 9 May 2007, the Opposition Division held that, taking into account the amendments made by the proprietor during the opposition proceedings, European Patent 1050634 met the requirements of the EPC.

- II. On 9 July 2007 Opponent II (hereafter the appellant) filed an appeal against this decision and on the same day paid the appeal fee. Grounds of appeal were duly filed on 7 September 2007.

- III. In its grounds of appeal, the appellant complained, amongst other things, that the Opposition Division had committed a substantial procedural violation by not hearing two witnesses in support of its allegation of prior public use. On 24 April 2008 the parties were summoned by the Board to oral proceedings. In the annexe to the summons the Board indicated that the only issues to be discussed at these oral proceedings would be whether, for reasons arising out of the decision of the Opposition Division not to hear witnesses, the decision should be set aside and the case remitted to the Opposition Division, and whether the appeal fee should be reimbursed.

- IV. Oral proceedings duly took place on 25 July 2008, at which only the respondent/proprietor was represented. As had been previously announced, neither the appellant nor Opponent I (as 'other party') was represented at those proceedings.

V. The respondent's main request before the Opposition Division had been to reject the oppositions and thus maintain the patent as granted. Claim 1 of the patent as granted reads as follows.

"An apparatus (10) for unwinding/rewinding a suction hose (17) for draining or purging cesspools, septic tanks, sewer or the like, on a truck (11), which comprises a hose guide (14) which is coaxial to said hose (17), said hose guide (14) comprising a composite arm (15) with guiding means (16) for said hose (17), said arm (15) being pivotable about a substantially horizontal axis A in an adjustable manner actuated by actuation means (18), **characterized in that** said apparatus (10) further comprises a reel (13) to wrap up said hose (17), said reel (13) being rotatable about an axis of rotation and being associated with a base (23) for connection to an adapted region of the truck (11), and **in that** said hose guide (14) is associated in a peripheral region with said reel (13) said substantially horizontal axis (A) being parallel to a tangent to said reel (13)."

VI. Claim 1 of the respondent's auxiliary request, on the basis of which the patent was ordered to be maintained by the Opposition Division, reads as follows:

"An apparatus (10) for unwinding/rewinding a suction hose (17) for draining or purging cesspools, septic tanks, sewer or the like, on a truck (11), which comprises a hose guide (14) which is coaxial to said hose (17), said hose guide (14) comprising a composite arm (15) with guiding means (16) for said

hose (17), said arm (15) being pivotable about a substantially horizontal axis A in an adjustable manner actuated by actuation means (18), wherein said apparatus (10) further comprises a reel (13) with a vertical axis of rotation to wrap up said hose (17), said reel (13) being rotatable about an axis of rotation and being associated with a base (23) for connection to an adapted region of the truck (11), and said hose guide (14) being associated in a peripheral region with said reel (13), said substantially horizontal axis (A) being parallel to a tangent to said reel (13), said hose guide (14) extending radially with respect to said vertical axis of rotation, said arm (15) being articulated peripherally with respect to said reel (13)."

(Emphasis added by the Board)

VII. *The Notice of Opposition*

The Notice of Opposition was grounded on lack of inventive step, inter alia relying on a prior public use constituting the sale of a vehicle by the company Eichhoff to Hannover City in 1983. It was asserted that this vehicle had a flat or horizontal suction-hose reel with a boom that could be pivoted and raised/lowered ("... eine liegende Saugschlauchhaspel mit schwenkbarem und anhebbarem Ausleger": see Notice of Opposition, p.6). This hose reel was said to be mounted on the top side of the vehicle and turnable over a ring arrangement ("... über einen Drehkranz drehbar"). The evidence advanced in support of this assertion consisted of the following:

- (a) E8/1, the cover page of a sales brochure. It showed a small photograph of a vehicle. It was said to be dated February 1985.
- (b) E8/2 and E8/3, containing certain technical information, and said to relate to the vehicle sold to Hannover City. E8/2 and E8/3 contained references to a hose drum ("Schlauchtrommel").
- (c) E8/4, said to be a drawing of part of the boom apparatus to be mounted on the vehicle. Although the Notice of Opposition said that it showed a reel for winding up a hose, it was later accepted that this was not the case.
- (d) The offer of a Mr Lonke as a witness to prove that the device for the hose-guide depicted in the drawing E8/4 was configured in accordance with the patent, and was delivered on a vehicle to Hannover City.

VIII. On 21 December 2006 the Opposition Division summoned the parties to oral proceedings. In the communication attached to the summons the Opposition Division stated that the issue of novelty would also be discussed during the oral proceedings. The Opposition Division stated its preliminary opinion that the alleged prior use did not disclose the subject matter of claim 1 of the patent as granted. It noted that the appellant apparently considered that the drawing E8/4 showed an apparatus comprising a reel for winding or wrapping up a hose. The Opposition Division disagreed, saying that E8/4 showed only an apparatus comprising a hose guide and composite arm, and means by which this arm might be

pivotaly adjusted, together with a link arrangement rotated by arms mounted on a ring arrangement. On this basis, the Opposition Division stated that it had decided not to hear Mr Lonke.

IX. It was not in dispute that the notice of opposition was nevertheless admissible since other grounds of opposition (lack of inventive step starting from various cited documents as representing the closest prior art) were adequately substantiated.

X. On 6 February 2007, just over two months before the date set for oral proceedings, the appellant filed a letter with further submissions and materials, as follows:

- (a) It filed a better copy (E8/5) of the cover of the brochure E8/1 which had been found, together with an annotated version of this (E8/6). The letter contained various assertions as to what was shown by the photograph, including a horizontally-lying hose reel for winding up a suction hose mounted on top of the vehicle.
- (b) It was pointed out that E8/3, last page, referred to a hose drum brake ("Schlauchtrommel-Bremse"). This was said to imply the presence on the vehicle of a part by which one or more winds of the hose could be taken up.
- (c) It was accepted that E8/4 was a drawing for only part of the prior public use vehicle, and showed the arrangement of the boom, but not the hose reel.

- (d) Mr Lonke was again offered as a witness, this time to confirm the above assertions.
- (e) Evidence of a further witness, a Mr Fichte, was also offered. This took the form, first, of a statutory declaration (Eidesstattliche Versicherung, E8/7) in which he said that between 1968 and 1990 he had worked for Eichhoff and was responsible for the carrying out of calculations on the basis of technical drawings and parts lists, as well as for sales support. He said that at the time Eichhoff manufactured and sold sewer-cleansing lorries with a flat or horizontally-lying suction hose reel ("mit liegender Saugschlauchhaspel"). He further said that a sales brochure from 1985 showed a vehicle with these features. The accompanying letter of 6 February 2007 stated that the statutory declaration of Mr Fichte confirmed that the relevant vehicle carried a horizontally-lying hose reel ("... eine Eidesstattliche Versicherung ..., in der bestätigt wird, dass die seinerzeit vertriebenen Kanalreinigungsfahrzeuge, insbesondere gemäß Anlage D6/1 eine Saugschlauchhaspel aufwiesen ... Gerade das auf dem Verkaufprospekt aus dem Jahr 1985 gezeigte Fahrzeug hatte diese technischen Funktionen"). However, when the statutory declaration is actually read, it does not contain any such confirmation.
- (f) Mr Fichte was also offered as a witness in the event that doubts remained as to the prior use, on the basis that he was able to give further evidence about the technical details of the prior

use vehicle ("Für den Fall, dass nach wie vor Bedenken hinsichtlich der Relevanz der offenkundigen Vorbenutzung bestehen, wird zusätzlich auch Zeugenbeweis durch Herrn Frank Fichte angeboten. Herr Fichte war in dem fraglichen Zeitraum bei der Firma Eichhoff Kommunalfahrzeuge beschäftigt und kann über die technischen Details des offenkundig vorbenutzten Fahrzeuges bei Bedarf weitere Aussagen machen").

XI. Oral proceedings duly took place on 17 April 2007.

- (a) During the proceedings the Opposition Division raised a number of points (see the Minutes). Thus, it was queried whether there was any evidence that a 10m hose (and thus a reel) would be required; whether the hose-drum ("Schlauchtrommel") referred to in E8/3 was not in fact the reel for the rinse-hose shown on the back of the vehicle in E8/6; why only the last page of the prospectus (E8/1, E8/5) had been produced; how reliable Mr Fichte's statement was. The respondent also argued that the E8 documents showed various inconsistencies concerning the presence of a hose reel.
- (b) In its decision on novelty in relation to the main request, the Opposition Division held that:
 - (i) E8/6 did not prove the presence of a hose reel.
 - (ii) Generally, it was speculative to say that a 10m suction hose was required for such a vehicle and therefore that a reel was needed.

- (iii) It was not clear that the hose-drum referred to in E8/2 and E8/3 was not in fact for the rinse-hose shown on the back of the vehicle.
 - (iv) The drawing E8/4 did not support the presence of the relevant reel.
 - (v) Generally there were inconsistencies between different E8 documents. This statement apparently refers to: (a) the fact that the hose-carrying arm shown in E8/5 is bent, whereas in E8/4 it is straight (see para. 6.8 of the minutes); (b) the presence of guiding rolls; and (c) the part numbers used.
 - (vi) The appellant had been unable to provide a complete copy of the brochure to substantiate technical details of the vehicle.
 - (vii) Mr Fichte's evidence should be considered with care, since it dealt with events which were 20 years old.
 - (viii) As documents E8 were insufficient proof that a hose reel and thus all features of the claim were present, no reason had been seen to hear witnesses.
- (c) There being no prior art that disclosed all the features according to claim 1 of the main request, the subject matter was novel. However, having

regard to the cited closest prior art, the subject matter was not inventive.

- (d) As to the subject matter of the auxiliary request, this had been disclosed in the application as filed, and was novel and inventive.

XII. In its grounds of appeal, the appellant made various submissions in relation to the alleged prior public use. In relation to the issues of substantial procedural violation, remittal and reimbursement of the appeal fee, however, the appellant's arguments can be summarised very shortly by saying that the Opposition Division committed a procedural violation in refusing to hear the two witnesses offered by the appellant on the issue of prior public use.

XIII. In relation to these issues, the respondent's arguments in writing and made during the oral proceedings, can be summarised as follows

- (a) Rule 71(1) EPC 1973 did not place the Opposition Division under any obligation to hear a witness.
- (b) The request to hear Mr Fichte as a witness was too late: it had only been made in the letter of 6 February 2007. Further, the addresses of the witnesses had not been supplied. All this made it difficult, if not impossible, for the Opposition Division to summon Mr Fichte in accordance with R.72(2) EPC (1973) in time for the oral proceedings scheduled for 17 April 2007.

- (c) It is the function of a witness to confirm what has been alleged and not to fill in the gaps in facts brought forward to support the case. The witnesses here, in particular Mr Fichte, were being offered to fill in gaps. Thus, his statement did contain sufficient facts to establish the prior use. It contained only a very generic description and did not describe what kind of reel was present on the vehicle or whether it was horizontal. It did not link the leaflet and the relevant vehicle. It also did not address the issue of the radially extending arm, a feature which was implicit in the claims as granted and explicit in the claims according to the first auxiliary request. The statement also did not deal with the issue of whether the axis of the arm was displaced from the edge of the reel.
- (d) The respondent thus did not know how the witnesses intended to fill the gaps in the appellant's case, and was therefore in no position to prepare possible auxiliary requests to deal with what might be brought forward.
- (e) The prior use related to mechanical parts which were per se easily identifiable. The parties and the Opposition Division were therefore in a position to assess what was constituted in the alleged prior use.

XIV. Opponent I, as 'other party', did not file any requests or submissions in the course of the appeal proceedings.

XV. The appellant requested that:

- (b) The decision under appeal be set aside;
- (c) The case be remitted to the Opposition Division;
- (d) The appeal fee be reimbursed;
- (e) The patent be revoked (auxiliary request).

XVI. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. In relation to the hearing of witnesses, the Board takes the relevant principles to be:

2.1 A party is entitled to adduce evidence by any of the methods set out in Article 117 EPC. The deciding body cannot choose the evidence which it considers sufficient for establishing the truth: T 474/04 (OJ EPO 2006, 129), point 8.

2.2 Nevertheless, it is the function of a witness to confirm what has been alleged (T 543/95) and not to fill in the gaps in facts brought forward to support the case (T 374/02, point 1.3, second paragraph). For this reason, it is necessary that a party who wishes to adduce evidence by means of a witness should indicate what factual details it wishes to prove by this means (T 374/02, point 1.3, first paragraph).

2.3 The credibility (and this includes the reliability) of a witness can only be evaluated by hearing his oral

evidence (J 10/04, point 3, p.6). If the maker of a statement is also offered as a witness, it is thus wrong to evaluate his written evidence without hearing him.

3. Before discussing the evidence in any detail, it is important to examine what was relevant for the Opposition Division in reaching its decision on the issue of public prior use.

3.1 It is perfectly true, as the respondent pointed out, that the offer of Mr Fichte as a witness was made very late and a decision to hear him as a witness would have inevitably involved adjourning the oral proceedings which had been scheduled for 17 April 2007. This was not, however, the ground on which the Opposition Division declined to hear him.

3.2 The sole question on which the Opposition Division concentrated in considering the issue of public prior use was whether or not the vehicle which was sold by Eichhoff to Hannover City had a storage reel for a hose. The Opposition Division concluded that since documents E8 were insufficient to prove that the hose reel and thus all features of the claim were present, no reason had been seen to hear witnesses. See point 4.2, final sentence, and point 4.3 of the decision.

4. The issue of public prior use was only discussed by the Opposition Division in relation to the novelty of the subject matter of the main request (ie, the claims as granted), which subject matter was subsequently held not to be inventive on the basis of other material (see paragraph XI(c), above). The respondent has not

appealed against this decision. In relation to the auxiliary request, the issue of the presence or otherwise of the hose reel on the public prior use vehicle was understandably not further discussed in the decision, it having already been decided that its presence had not be proved. Nevertheless, in relation to the appellant's appeal this issue is highly relevant having regard to the subject matter of the auxiliary request. Thus it is apparent from the submissions of the appellant and from the evidence on file that there is a high probability that the alleged prior use also comprised the additional features of the vertical reel axis and radial hose guide with peripheral articulation (see paragraph VI, above).

5. Turing to the Opposition Division's decision not to hear the witnesses, first, as to the offer of Mr Lonke, the Board concludes that the Opposition Division was justified in deciding not to hear him. In the notice of opposition he was offered as a witness to prove that the device for the hose-guide depicted in the drawing E8/4 was configured in accordance with the patent, and was delivered on a vehicle to Hannover City ("Zum Beleg der offenkundigen Vorbenetzung wird Zeugenbeweis durch Herrn Lonke angeboten, der seinerzeit bei der Firma Eichhof tätig war. Herr Lonke kann bezeugen, dass die in Zeichnungen dargestellte Vorrichtung zur Führung des Saugschlauches entsprechend dem Streitpatent ausgebildet war und an einem Fahrzeug an die Stadt Hannover ausgeliefert wurde."). As was pointed out by the Opposition Division in its communication of 21 December 2006, however, the drawing E8/4 does not show a reel for winding up a hose and so the evidence offered did not relate to the issue of the hose reel.

Although the offer of Mr Lonke as a witness was repeated in the appellant's letter of 6 February 2007, he was here only offered as witness to confirm what was stated in the letter, which itself only consisted of assertions about what various documents showed, in particular E8/5 and E8/6. The documents, however, spoke for themselves and Mr Lonke's confirmation of what the documents showed could add nothing relevant to the case.

6. As to Mr Fichte, however, the position is different. It is true that the content of his statutory declaration was unsatisfactory. For example, he did not tie the brochure he mentioned to E8/1 or E8/5, he did not state precisely when the lorries he refers to were sold or to whom, nor did he give any details of what was mounted on the vehicles. However, he was also offered as a witness and this was not just to confirm the truth of his declaration. When the letter of 6 February 2007 is read as a whole, including the statement about what the statutory declaration was said to contain (see paragraph X(e), above), and taken with the other evidence and what was asserted in the notice of opposition, it appears to the Board that he was being offered as a witness to give evidence about the technical details of the lorry which had been sold to Hannover City. One of these technical details concerned the hose reel which was said to be mounted on the vehicle, which was the single point on which the Opposition Division expressed itself as not being satisfied about the prior use.

7. While the Opposition Division was correct in saying that Mr Fichte's statutory declaration as to facts taking place 20 years previously needed to be

- considered with care, the Opposition Division appears to have overlooked that he was not being offered merely to confirm the contents of the statement (see paragraph 6, above). In any event, given that he was being offered as a witness, it was incorrect to evaluate his written evidence without hearing him (see paragraph 5.3, above).
8. As to the respondent's other arguments, it is true that Mr Fichte's statement was not specific about the details of the vehicle but, again, he was also being offered as a witness to deal with the technical details of the vehicle and there cannot be any real doubt about what it was being said he could deal with in his evidence as a witness, particularly in view of the annotations on E8/6 filed with his statement. The respondent was in a position to know that Mr Fichte might corroborate the fact of the existence of the hose reel if the Opposition Division remained in doubt on the basis of the other evidence. The respondent was thus in a position to prepare auxiliary requests to meet this eventuality if the Opposition Division had decided to summon Mr Fichte.
 9. The decision not to hear Mr Fichte was thus wrong and may have affected the outcome of the case, at least as regards the proprietor's auxiliary request. In the circumstances, the decision as a whole should be set aside and the case remitted to the Opposition Division so that the evidence of Mr Fichte can be heard.
 10. Since the appellant was entitled under the EPC to adduce evidence by any of the methods set out in Article 117 EPC, the failure to allow it to do so

constituted a substantial procedural violation. Since the decision not to hear Mr Fichte may have affected the outcome of the case, it would also be equitable to reimburse the appeal fee.

11. The Board nevertheless has considerable sympathy with the predicament in which the Opposition Division found itself when considering the request to hear witnesses, given the unsatisfactory way in which the appellant's case on this issue had been presented. Much of the evidence was confusing and not directed to the crucial issue. This was notwithstanding that the Opposition Division had in its communication of 21 December 2006 clearly identified what it considered to be a defect in the appellant's case, namely the issue of the suction hose reel. As already pointed out, the notice of opposition had failed to make out a case for hearing Mr Lonke and, even having regard to what was said in the appellant's letter of 6 February 2007, the Opposition Division's decision in relation to Mr Lonke was clearly correct. As to Mr Fichte, his statement, on which perhaps the Opposition Division understandably concentrated, was also unsatisfactory, for the reasons given in paragraph 6 above. Had this been all that was offered, the Opposition Division would have been justified in deciding as they did. It is only on a close reading of the letter of 6 February 2007 and looking at the case as a whole that it can be seen that something more was being offered, in particular that it was being said that Mr Fichte would be able to give evidence about the technical details of the public prior use vehicle, including as to the presence of the hose reel. Since it was on the basis of the failure to establish the presence of this single technical feature

that the Opposition Division reached its decision,
Mr Fichte should have been heard.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.
3. The request for reimbursement of the appeal fee is allowed.

The Registrar:

The Chairman:

U. Bultmann

U. Krause