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**Datasheet for the decision
of 12 July 2022**

Case Number: T 0311/21 - 3.2.01

Application Number: 16191360.3

Publication Number: 3192401

IPC: A47C27/08, A47C27/16

Language of the proceedings: EN

Title of invention:

INFLATABLE BED

Patent Proprietor:

Bestway Inflatables & Material Corp.

Opponent:

Intex Recreation Corp.

Headword:

Relevant legal provisions:

RPBA 2020 Art. 12(6), 13(2)

EPC Art. 100(a), 54, 56

Keyword:

Late-filed evidence - error in use of discretion at first instance (no) - should have been submitted in first-instance proceedings (yes)

Late-filed objection - error in use of discretion at first instance (no) - admitted (no)

Late-filed facts - should have been submitted in first-instance proceedings (yes)

Amendment after summons - cogent reasons (no)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

G 0007/93

Catchword:



Beschwerdekammern
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Chambres de recours

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Case Number: T 0311/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 12 July 2022

Appellant: Intex Recreation Corp.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 3 February 2021
rejecting the opposition filed against European
patent No. 3192401 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: J. J. de Acha González
S. Fernández de Córdoba

Summary of Facts and Submissions

I. The appeal of the opponent lies against the decision of the Opposition Division to reject the opposition filed against European patent No. 3 192 401.

II. The following documents are inter alia cited in the decision:

E1: JP 2002-176965;

E2: English translation of E1;

E9: FR 2 914 545 A3;

E9a: English Translation of E9; and

E16: US2013/0145560 A1

With the statement of grounds of appeal the appellant further submitted **E19** (INTEX COMFORT REST catalogue, 2014) and with letter of 13 May 2022 **E24** (JPS4934811 U) and **E24a** (English translation of E24), the latter documents after a communication of the Board under Article 15(1) RPBA 2020 (Rules of Procedure of the Boards of Appeal OJ EPO 2019, A63) in preparation to the scheduled oral proceedings.

III. As regards the grounds for opposition under novelty and inventive step the Opposition Division found that these did not prejudice the maintenance of the patent as granted. In particular, the Opposition Division considered that the subject-matter of granted claim 1 was novel over E1 and involved an inventive step starting from E1 in combination with E9.

IV. Oral proceedings were held before the Board on 12 July 2022 by videoconference.

The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained in amended form on the basis of one of the auxiliary requests 1 to 5 filed with the reply to the statement of grounds of appeal.

- V. Granted claim 1 reads as follows (feature numbering according to the decision under appeal):
- i) *An inflatable bed (10), comprising:
a top sheet (11) and a bottom sheet (12) disposed vertically at an interval;*
 - ii) *at least one side wall (13), an upper edge of said side wall being coupled to an outer edge of said top sheet, a lower edge of said side wall being coupled to an outer edge of said bottom sheet,*
 - iii) *an air chamber formed between said top sheet, said bottom sheet and said side wall;*
 - iv) *at least one first tensioning structure disposed in said air chamber, an upper end and a lower end of said first tensioning structure being respectively coupled to said top sheet and said bottom sheet; and*
 - v) *at least one support structure disposed in said air chamber, said support structure being disposed in a longitudinal direction of at least one of said side walls,*
 - vi) *at least two outside edges (152,162) of said support structure being respectively coupled to the side wall adjacent,*
 - vii) *at least one inside edge (153,163) of said support*

- structure being coupled to the top sheet or bottom sheet adjacent,*
- viii) *wherein said support structure comprises a second tensioning structure and a third tensioning structure,*
 - ix) *at least two outside edges of said second tensioning structure are respectively coupled to the side wall adjacent,*
 - x) *at least one inside edge of said second tensioning structure is coupled to the top sheet adjacent; and*
 - xi) *at least two outside edges of said third tensioning structure are respectively coupled to the side wall adjacent,*
 - xii) *at least one inside edge of said third tensioning structure is coupled to the bottom sheet adjacent.*

Reasons for the Decision

- 1. *Admissibility of evidence and objections*
- 1.1 *E16 and novelty over E9 (and its English translation E9a)*
 - 1.1.1 Document E16 and the novelty objection to the subject-matter of granted claim 1 over E9 are not admitted into the appeal proceedings.
 - 1.1.2 During the opposition proceedings the Opposition Division did not admit the late filed novelty objection in view of E9 and late filed document E16.
 - 1.1.3 According to Article 12(6) RPBA 2020, the Board shall not admit objections or evidence which were not admitted in the proceedings leading to the decision

under appeal, unless the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance.

It is also established case law of the Boards of Appeal that the Board does not have to carry out anew the exercise of discretion as if it were the Opposition Division and decide whether or not it would have exercised the discretion in the same way when reviewing it, but identify whether such exercise by the Opposition Division was arbitrary, unreasonable or was not carried out according to the right principles (see G7/93, point 2.6; Case Law of the Boards of Appeal of the EPO, 9th Edition, V.A.3.5.1).

- 1.1.4 In the case at hand, the Board does not recognize any error in the use of the discretion by the Opposition Division and therefore has no reasons to overrule it.

The Opposition Division assessed *prima facie* the disclosure of E9 according to the embodiment of figure 5 and could not identify an edge of the side wall 35 being coupled to an outer edge of the top sheet 33 of the bed. The appellant objections do not relate to any incorrect application of the exercise of discretion of the Opposition Division in its *prima facie* assessment of E9 but to the substance of what E9 discloses, i.e. a complete reasoned novelty objection.

As regards E16 and bearing in mind the interpretation taken for E1 under novelty in the contested decision by the Opposition Division (in particular with respect to the second interpretation in the impugned decision), the Board cannot either identify any error of judgement in the exercise of discretion, since the *prima facie* examination of the Opposition Division is not

unreasonable when explaining that E16, in particular figure 9, did not disclose at least two outside edges of the second and third tensioning structure in the same way as for E1.

In contrast, the appellant considered that opposite (long side-long side or short side-short side) or adjacent (long side-short side) side walls made out of the same lateral sheet amounted to one side wall.

Consequently, the Opposition Division applied its discretion according to the right principles and in a reasonable way. Additionally, the circumstances of the case do not either justify their admittance since the granted patent is still contested and defended, and the conflicting issues were already submitted and addressed during the opposition proceedings.

1.2 *E19*

1.2.1 Document E19 is not admitted into the appeal proceedings.

1.2.2 Document E19 was filed for the first time with the statement of grounds of appeal.

1.2.3 Under Article 12(6) RPBA 2020 the Board shall not admit facts, objections or evidence which should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

1.2.4 The appellant justified the filing of E19 with the statement of grounds of appeal because it represented proof of common general knowledge since the skilled person would be aware of products available in the market in the field in question. Additionally, E19

constituted a legitimate reaction to the incorrect findings of the Opposition Division in the impugned decision.

However, the Opposition Division followed in its decision the view of the patent proprietor already put forward in the reply to the notice of opposition as regards the disclosure of E1 and the differences of claim 1 with respect to E1. The appellant could and should have filed this evidence already during the opposition proceedings. Furthermore, the Board shares the view of the respondent that the catalogue E19 cannot be seen as representing common general knowledge but only as state of the art. This is confirmed by E19 itself whose disclosed technology pertains to a patent pending for airbeds (see page 6 of E19).

Under these circumstances the Board judges that it is not justified to admit E19 into the appeal proceedings.

- 1.3 *E24 (E24a) and inventive step starting from E9 (E9a)*
- 1.3.1 Document E24 (and its English translation E24a) as well as the inventive step objection to the subject-matter of granted claim 1 starting from E9 (E9a) are not admitted into the appeal proceedings.
- 1.3.2 Document E24 was filed for the first time during the appeal proceedings with letter of 13 May 2022. The inventive step attack starting from E9 as the closest prior art was filed for the first time with letter of 29 June 2022. Both letters were submitted after notification of the summons to oral proceedings before the Board.

1.3.3 Under Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

1.3.4 The appellant justified the filing of E24 at such a late stage in the procedure because it recently became aware of its existence through the US counsel of the appellant due to an infringement procedure in the US. The document was also an old Japanese utility model which was consequently not easy to find. Additionally, it was not long, easy to react to and *prima facie* highly relevant, what would streamline the procedure. The appellant also argued that the filing of the document was a reaction to the Board's preliminary opinion regarding the limiting construction of the term "*side wall*" as defining a single lateral side of the inflatable bed which was surprising for the appellant.

As regards the inventive step objection starting from E9, the appellant merely argued that its admissibility depended on and derived from the admissibility of the novelty attack over E9.

1.3.5 The Board judges that the circumstances at hand do not qualify as exceptional. E24 is a registered Japanese utility model in the field of air mattresses from 1972. The mere fact that it is in Japanese does not justify the filing of the document after the 9-month opposition period and a fortiori on filing the statement of grounds of appeal. It might well be that the appellant became for the first time aware of E24 through the infringement procedure in the US but this fact nevertheless does not excuse the late filing and

certainly does not fall under what can be regarded, on objective terms, as exceptional circumstances. Regarding the argument relating to the surprising interpretation of the term "*side wall*" the Board did not raise that interpretation on its own in the communication under Article 15(1) RPBA 2020 in preparation to the oral proceedings. The interpretation came from the respondent itself with the reply to the statement of grounds of appeal (see page 7 last paragraph) and is not at odds with the view of the Opposition Division in the contested decision since the decision does not specify any specific interpretation of a side wall. The Board further notes that at such a late stage of the procedure the *prima facie* relevance of the cited document is not a decisive criterion for its admissibility but rather the principle of fairness to the parties in the proceedings under the circumstances of the case.

As regards the admissibility of the inventive step attack starting from E9 the appellant admitted that it was dependent on the admissibility of the novelty attack based on E9. Since the latter was not admitted there are no cogent reasons presented by the appellant that would justify the admissibility of the former.

2. *Main request - novelty*

2.1 The subject-matter of granted claim 1 is new over the disclosure of E1 (Article 100(a) and 54 EPC).

2.2 The appellant maintained as regards the disclosure of E1 the three different interpretations of the first embodiment disclosed in figures 2 to 4 considered by the Opposition Division in the contested decision.

According to the first interpretation (corresponding to the second interpretation in the contested decision) the two long sides of the one-piece integrally formed wrapping belt 5 would be the second tensioning element and the two short sides the third tensioning element of granted claim 1. Opposing edges of the strip 53 (two for each tensioning structure) were connected to the side wall 4 adjacent. Alternatively, one long side and one short side of the wrapping belt 5 together could define a second tensioning structure and the other long and short sides a third tensioning structure.

The second interpretation (corresponding to the first interpretation in the contested decision) considered the upper portion of the wrapping belt 5 the second tensioning structure and the lower portion of the wrapping belt 5 the third tensioning structure of claim 1. The skilled person would derive from E1 that the plastic strip 53 must have two edges defining its width resulting from the definition of strip as a long, flat, narrow piece. Accordingly, two sides or edges of an upper half portion of the plastic strip 53 corresponded to the at least two outside edges of the second tensioning structure (feature ix) and two sides or edges of a lower half portion of the plastic strip 53 corresponded to the at least two outside edges of the third tensioning structure (feature xi).

Under the third interpretation, the appellant maintained that the upper ring-shaped suction piece 11 together with the upper portion of the wrapping belt 5 corresponded to the second tensioning structure and the lower ring-shaped suction piece 21 together with the lower portion of the wrapping belt 5 corresponded to the third tensioning structure. In particular, the suction pieces 11 and 21 were placed inside the

inflatable product as directly derivable for the skilled person from the exploded view of figure 2 to 4, the second paragraph on page 5 of E2 being incomplete in this regard, and the upper and lower constriction on the wrapping piece 4 corresponded to the connection of the outside edges of the suction pieces to the inner surface of the wrapping piece since there were no other components disclosed that could create such constrictions when the inflatable product was assembled and inflated.

2.3 The subject-matter of claim 1 differs from the disclosure of E1 at least on account of features ix and xi.

Firstly, according to claim 1 the inflatable bed comprises at least one side wall. The further features of the claim are defined with respect to said side wall. Accordingly, this one side wall represents one of the lateral walls of the bed irrespective of the fact that all of the side walls of the bed are made or not as a single sheet. The appellant argued that such an interpretation of the side wall of the bed came at odds with feature iii that defines that an air chamber is formed between the top sheet, the bottom sheet and the side wall. However, feature iii does not define the air chamber as being made exclusively by the top sheet, the bottom sheet and the side wall but merely that the air chamber is situated between those elements without excluding additional elements that limit the extension of the chamber.

Consequently, the first interpretation of the appellant is not persuasive since it considers different side walls and not the side wall adjacent in order to identify the different outside edges of the tensioning structures couple to the side wall.

Secondly, according to claim 1 two outside edges of the second and third tensioning structures are coupled to the side wall. Accordingly, four edges are coupled to the side wall adjacent. Said edges belong to two different structures which form part of the support structure but which also represent two separate entities within the claim. Consequently and in contrast to the submissions of the appellant, the claimed outside edges are not shared among tensioning structures.

Further, the bed of figures 2 to 4 of E1 only has the strip 53 which is connected to the inner surface of the side wall 4, i.e. there is only one edge of the wrapping belt 5 which is coupled to the side wall since the strip 53 defines only a single contact edge in the sense of the contested patent. The view of the appellant that the element 53 of E1 includes two edges since it is defined as strip comes at odds with the disclosure of the patent in suit. Said edge is clearly understood as representing the outer peripheral end of the tensioning structures which is coupled to the side wall (see e.g. figures 5, 9 and 16 of the patent where the tensioning structures are also made out of sheets which each include such two edges on its outer peripheral end 152 and 162 as argued by the appellant). Accordingly, the second interpretation of E1 from the appellant does not disclose features ix and xi because the alleged upper and lower tensioning structures of the wrapping belt 5 do not include each two outside edges coupled to the side wall adjacent.

Thirdly, bearing in mind the interpretation above of the outside edges of the second and third tensioning structures coupled to the side wall, the third interpretation of the appellant also fails since it

considers the outside edge of strip 53 as being simultaneously an outside edge of the second tensioning structure and an outside edge of the third tensioning structure.

Furthermore, it is not directly and unambiguously derivable from the explosive view of figure 2 how the suction pieces 11 and 21 are placed with respect to the upper piece 1 and the wrapping piece 4. The description specifies that the strip 51 is connected to the upper and lower piece which does not concur with the exploded view since the strips 51 would then be connected to suction pieces 11 and 21 when considering the argumentation of the appellant regarding the exploded view (see page 4 lines 22 ff. of E2). Also, out of the schematic figures 2 to 4 it is not possible to derive directly and unambiguously whether the outer edges of the suction pieces are connected respectively to an inner surface of the wrapping piece matching the upper and lower constrictions of the wrapping piece 4 shown in those figures. The description is also silent in respect of the specific connection of the outer edges of the suction pieces to the rest of the inflatable product. Consequently, the exact construction and assembly as regards the suction pieces is not directly and unambiguously derivable either implicitly nor explicitly from the disclosure of E1 as a whole. It follows that at least features ix and xi of granted claim 1 are also not disclosed by the third interpretation of E1 of the appellant.

3. *Main request - inventive step*

- 3.1 The subject-matter of granted claim 1 is not rendered obvious starting from the disclosure of E1 as laid down by the appellant (Article 56 EPC).

- 3.2 In the statement of grounds of appeal the appellant argued that the subject-matter of granted claim 1 differed from the third interpretation of E1 mentioned above under novelty on account of feature v. Additionally, during the oral proceedings before the Board, the appellant put forward for the first time a second line of attack starting also from the mentioned third interpretation of E1. The appellant argued this time that the difference of the subject-matter of granted claim 1 resulted from the consequence of considering the connection of the plastic strip 53 with the wrapping piece 4 (side wall in claim 1) as only one outside edge of either the upper or lower part of the wrapping belt 5 - which represented the second and third tensioning structures of claim 1 respectively - connected to the side wall 4 of the inflatable product. Accordingly, the subject-matter of claim 1 differed from the third interpretation on account of either feature ix or xi since only one of the tensioning structures included the second outside edge (of strip 53) connected to the wall.
- 3.3 However, as pointed out above under point 2.3 the subject-matter of granted claim 1 differs from the third interpretation of E1 from the appellant on account of both features ix and xi. Consequently and irrespective of the admissibility of the second line of argumentation submitted during the oral proceedings before the Board, none of the two lines of attack starting from that interpretation of E1 as the closest prior art is persuasive since they are based on the incorrect assumption that either feature v or feature ix (alternatively xi) represent the only difference therefrom.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Voyé

G. Pricolo

Decision electronically authenticated