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Datasheet for the decision of 28 April 2023

Case Number: T 0939/21 - 3.3.05

Application Number: 15189220.5

Publication Number: 3136476

IPC: H01M4/16, H01M4/76, H01M10/06, H01M4/04

Language of the proceedings: EN

Title of invention:
MULTITUBULAR GAUNTLET FOR LEAD-ACID BATTERIES

Patent Proprietor:
Mecondor S.A.

Opponent:
Amer-Sil S.A.

Headword:
Gauntlet/MECONDOR

Relevant legal provisions:
EPC Art. 54(1), 54(2), 56, 104, 108
EPC R. 126(2)
RPBA 2020 Art. 16

Keyword:
Admissibility of appeal - notice of appeal - filed within time limit (yes)
Novelty - main request (yes)
Inventive step - main request (yes)
Apportionment of costs - non-attendance at oral proceedings - (yes)

Decisions cited:
T 0170/87, T 1467/11

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 0939/21 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 28 April 2023

Appellant: (Opponent)	Amer-Sil S.A. 61 rue d'Olm 8281 Kehlen (LU)
Representative:	Brantsandpatents bv Pauline Van Pottelsberghelaan 24 9051 Ghent (BE)
Respondent: (Patent Proprietor)	Mecondor S.A. Rodter Strasse, 26 4780 Sankt Vith (BE)
Representative:	AWA Benelux Parc d'affaires Zénobe Gramme - Bât. K Square des Conduites d'Eau 1-2 4020 Liège (BE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 20 April 2021 rejecting the opposition filed against European patent No. 3136476 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	E. Bendl
Members:	T. Burkhardt
	P. Guntz

Summary of Facts and Submissions

I. The opponent's (appellant's) appeal is against the opposition division's decision to reject the opposition against European patent No. 3 136 476 B1.

II. The following documents were among those discussed at the opposition stage:

D5	WO 95/08195 A1
D6a	FR 2 189 881 A1
D8	GB 318,527 A
D9	US 2,995,990 A
D10	US 3,537,636 A
D11	GB 1,130,464 A

III. The opposition division held, *inter alia*, that the patent as granted met the requirements of:
- Article 54(1) and (2) EPC over each of D5 and D6a
- Article 56 EPC in view of D6a even when considering D8 to D11.

IV. After the opposition proceedings, the appellant submitted a first notice of appeal, but with an incorrect name of the appellant, namely Hurrah Sarl. This notice of appeal was later withdrawn.

V. Two months and ten days after notification of the decision under appeal, the appellant submitted a second notice of appeal with its correct name, i.e. Amer-Sil S.A.

VI. The independent claims of the main request in opposition and appeal proceedings (patent as granted) read as follows:

"1. Multitubular gauntlet (10) for lead-acid batteries comprising at least one sheet of fabric (11) of a porous material seamed along parallel lines (14, 16) and forming a plurality of parallel tubes, characterized in that the lateral tubes forms [sic] the edges (15) of said gauntlet and wherein both edges of said gauntlet are free of lateral finish."

"6. Process for the production of a multitubular gauntlet (10) for lead-acid batteries according to any one of the preceding claims comprising the following steps:
a) providing at least one sheet of fabric (11);
b) folding the at least one sheet of fabric to obtain both edges, the lateral ends of the at least one fabric sheet being assembled on one of the intermediate parallel seams;
c) seaming said fabric along seams (14, 16) parallel to the first edge, thereby forming a plurality of flat tubes parallel to the first edge;
d) thermoforming the plurality of flat tubes into the desired shape corresponding to the electrode to be used, thereby obtaining the multitubular gauntlet (10)."

Dependent claims 2 to 5, 7 and 8 refer to preferred embodiments.

VII. At first, the appellant indicated that it would be attending the oral proceedings, and requested interpreting services.

VIII. However, late in the afternoon the day before the oral proceedings, the appellant announced, without further explanation, that it would not be attending.

IX. Oral proceedings took place in the absence of the appellant.

X. The appellant's arguments at the appeal stage relevant to the present decision can be summarised as follows.

The subject-matter of claims 1 to 5 lacked novelty over each of D5 and D6a.

The subject-matter of claims 1 to 8 lacked inventive step in view of D6a, possibly in combination with one of D8 to D11.

XI. The respondent's (proprietor's) arguments at the appeal stage relevant to the present decision can be summarised as follows.

The appeal was late-filed and was not to be admitted.

The appeal was not allowable.

Because of the appellant's very late declaration that it would not be attending the oral proceedings, it should bear the respondent's costs related to the oral proceedings at the appeal stage.

XII. The appellant requests that the decision under appeal be set aside and the patent be revoked.

The respondent requests that the appeal be dismissed and the patent be maintained as granted. As an auxiliary measure it requests that the patent be

maintained in amended form on the basis of one of five auxiliary requests as submitted with the letter dated 25 November 2020.

Additionally it requests apportionment of costs.

Reasons for the Decision

1. Admissibility of the appeal

In the respondent's view, the appeal should not be admitted as it was late-filed.

However, the appellant submitted the second notice of appeal with its correct name two months and ten days after notification of the decision under appeal. This is in line with the current requirements of Rule 126(2) EPC.

The appeal is therefore admissible (Article 108 EPC).

Main request

2. Novelty

2.1 General remarks

The appellant held that the subject-matter of claims 1 to 5 lacked novelty over each of D5 and D6a, and argued that the figures in these documents disclosed that the edges of the gauntlet were "free of lateral finish" as required by claim 1.

According to paragraph [0015] of the patent in suit, this means for example that no seam is present on both lateral edges of the gauntlet.

However, the threshold for novelty, i.e. a direct and unambiguous disclosure, is quite high. Furthermore, according to established case law, a figure which serves only the purpose of giving a schematic explanation of the principle of the subject-matter of the patent and not of representing it in every detail does not allow the sure conclusion that the disclosed teaching purposively excludes a feature not represented (T 170/87, catchword).

Therefore, for the reasons set out below, the main request meets the requirements of Article 54(1) and (2) EPC.

2.2 Document **D5**

2.2.1 It is undisputed that layers 12 and 13 in Figure 2 of D5 can be construed as the "sheet of fabric ... of a porous material" of claim 1.

2.2.2 The appellant argued that the edges of the gauntlet of this embodiment were moreover "free of lateral finish".

However, Figure 2 of D5 has to be read in conjunction with the accompanying text on page 4, where it is expressly stated that (emphasis added by the board): (i) in "[o]ne embodiment", the "composite sleeve/ separator ... is folded in half and then *sealed along the outer edges* .." (lines 28/29), or

(ii) "[a]lternatively, two flat sheets may be used". In this event "the bottom as well as *the edges of each tube must be sealed*" (lines 36 to 38).

This sealing of the edge(s) clearly proves that the edges are *not* "free of lateral finish", in contrast to claim 1.

With regard to Figure 2 and the passage on page 4 of D5, it is thus speculative to state that the apparently increased thickness of the seam between the rightmost tube and adjacent tube in Figure 2 proves that the sheet is superimposed at this location (and not at the lateral edge). This is by no means reflected in the accompanying text. As explained above, page 4 indicates, contrarily, that the sheet is sealed along the outer edges.

2.2.3 In the appellant's view, the embodiment of Figure 5 of D5 confirmed its reasoning. Figure 5 discloses an individual tube with overlapping edges 32 and 33. When assembling several tubes, the skilled person was "highly motivated" to place the overlapping edges at the junction of two adjacent tubes. The series of tubes was hence free of lateral finish.

However, Figures 2 and 5 of D5 are schematic drawings representing these embodiments and do not necessarily disclose every detail (see point 2.1 above).

Moreover, the degree of detail in Figures 2 and 5 of D5 is not necessarily the same, in particular because the focus is different: while Figure 2 covers embodiments with a *series* of tubes (page 4, lines 27 and 36 respectively), Figure 5 discloses a *single* tube of a series of individual tubes (page 5, lines 24 to 32).

It is thus not possible to conclude with certainty that the edges of the embodiment of Figure 2 are truly free of lateral finish when several individual tubes are assembled.

2.2.4 In the embodiment of "tubes ... formed by coextrusion of ... polymer" (D5: page 5, lines 26/27), it is firstly debatable whether the "sheet [is] seamed along parallel lines" as required by claim 1, and it is secondly not certain that the edges are "free of lateral finish".

2.2.5 Besides, the appellant argued that the skilled person was "highly motivated" to choose a certain arrangement and that they "would ... obviously interpret" a figure in a certain sense.

However, such reasoning does not relate to a direct and unambiguous disclosure, and thus to novelty, but to inventive step.

2.2.6 Consequently, D5 does not disclose in a direct and unambiguous manner that "both edges of said gauntlet are free of lateral finish" (Article 54(1) and (2) EPC).

2.3 Document **D6a**

2.3.1 The passage on page 4, line 36 to page 5, line 3 of D6a discloses among other things two manufacturing methods, i.e.:
b) double cloth weaving, and
c) joining together two sheets of non-woven felt along parallel seams or seals

The appellant held that the subject-matter of claim 1 lacked novelty in view of these methods. In particular, it argued that double cloth weaving also encompassed the "true double cloth" method, where the two fabrics were joined together without a lateral finish at the edges of the lateral tubes.

However, even if true double cloth weaving results in edges that are free of lateral finish, double cloth weaving is not limited to this specific method. Double cloth weaving also encompasses methods where the two fabrics do not form a tubular arrangement and where a seam is necessary to join the edges of the two fabrics.

The appellant has failed to provide evidence to the contrary.

2.3.2 The appellant also referred to Figure 2 of D6a which, in its view, showed a gauntlet with edges free of lateral finish.

This figure is, however, schematic and does not necessarily represent every detail (see point 2.1 above). Therefore this figure does not allow the certain conclusion that a lateral finish is absent.

2.3.3 Hence D6a does not disclose in a direct and unambiguous manner that the edges of the lateral tubes of the gauntlet are free of lateral finish (Article 54(1) and (2) EPC).

Besides, whether a skilled person is "motivated" to choose a certain arrangement does not relate to a direct and unambiguous disclosure (and thus to novelty), but to inventive step.

2.4 The reasoning of points 2.2 and 2.3 also applies to dependent claims 2 to 5 of the main request (Article 54(1) and (2) EPC).

3. Inventive step

3.1 The invention relates to a multitubular gauntlet for lead-acid batteries.

3.2 In the appellant's view, **D6a** is the closest prior art.

Since **D6a** also relates to a multitubular gauntlet for lead-acid batteries (Figure 2, claims 1 to 3; page 1, lines 1 to 9; page 4, line 36 to page 5, line 3), it is indeed a reasonable starting point for assessing inventive step.

3.3 According to the patent in suit, the problem to be solved is to provide a gauntlet with reduced width, dead space and risk of failure (paragraph [0006]).

3.4 Claim 1 proposes to solve this problem by the gauntlet of claim 1 characterised in that the lateral tubes of the gauntlet are free of lateral finish.

3.5 The appellant argues that the problem has not been solved over the entire scope of claim 1, in particular not for wider seams between adjacent tubes.

However, it is not clear why the skilled person should choose wider seams when they omit the lateral seams. Moreover, the appellant has provided no experimental evidence or equivalent proof that the problem is not solved over the entire scope of claim 1.

There is thus no reason to consider that the problem posed has not been successfully solved.

3.6 The appellant has moreover failed to indicate anything, be it in D6a itself or in any of documents **D8** to **D11**, that might prompt the skilled person to modify the gauntlet of D6a in the claimed manner in order to solve the technical problem posed.

Regarding combination documents D8 to D11, the appellant did not indicate any specific passages. It moreover acknowledged that these documents refer to a different technical field, i.e. to seamed bags.

For these reasons, the subject-matter of claim 1 is inventive (Article 56 EPC).

3.7 The appellant alleged that the subject-matter of the remaining claims was obvious for the same reasons.

However, the appellant failed to substantiate this allegation.

Consequently, the subject-matter of claims 2 to 8 also involves an inventive step (Article 56 EPC).

Miscellaneous

4. Apportionment of costs

4.1 According to Article 104(1) EPC, each party bears the costs it has incurred, unless a different apportionment of costs is decided for reasons of equity.

4.2 Late in the afternoon preceding the oral proceedings, the appellant announced that it would not be attending the next day's oral proceedings.

The respondent, the board and the interpreters learned of this only on the morning of the oral proceedings.

4.3 The appellant has provided no reasons why it could not declare its non-attendance earlier. The board cannot see any reason either.

In fact, more than six months before the oral proceedings, the board had informed the parties of its preliminary opinion that the appeal was likely to be dismissed.

About two months before the oral proceedings, the appellant had still indicated that it intended to attend them, and even requested interpreting services.

4.4 Generally, the boards consider it highly undesirable for summoned parties to announce too late that they will not be attending oral proceedings, in particular when no reasons for this step are given. Such conduct is inconsistent both with the responsible exercise of rights and with the basic rules of courtesy (Case Law of the Boards of Appeal, 10th edn., 2022, III.R.2.2.1).

4.5 In the case at hand, the oral proceedings took place but contributed nothing new to the merits of the case.

4.6 Had the appellant informed the respondent and the board earlier, the oral proceedings could have been avoided: even if, contrary to all expectations, the respondent had not withdrawn its request for oral proceedings in view of the board's preliminary opinion, the board

could have applied the rationale of T 1467/11 (headnote and point 1 of the reasons) by deciding that the appeal be dismissed without deciding on its admissibility.

4.7 In the case at hand, significant efforts had been undertaken and costs incurred for the oral proceedings at the appeal stage:
- Interpreters had been ordered. They had familiarised themselves with the case and attended the oral proceedings.
- Both the respondent and the board had prepared and attendedthe oral proceedings.

For reasons of equity, the board thus decides that the appellant bears the respondent's costs for the appearance at and the preparation of the oral proceedings of 28 April 2023 (Article 104(1) EPC, Article 16 RPBA 2020).

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The appellant bears the respondent's costs for the appearance at and the preparation of the oral proceedings of 28 April 2023.

The Registrar: The Chairman:

C. Vodz E. Bendl

Decision electronically authenticated