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14

Aktenzeichen / Case Number / N° du recours : T 194/86 - 3.2.1

Anmeldenummer / Filing No / N° de la demande : 79 301 942.3

Veröffentlichungs-Nr. / Publication No / N° de la publication : 0 009 399

Bezeichnung der Erfindung: Improvements in or relating to shower fittings

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : D21F 1/34, B05B 13/04, B05B 3/14,
E03C 1/06

ENTSCHEIDUNG / DECISION

vom / of / du 17 May 1988

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /

Titulaire du brevet :

Albany Engineered System Europe Ltd

Einsprechender / Opponent / Opposant :

Paul Hammelman Maschinenfabrik GmbH

Stichwort / Headword / Référence : Shower fittings/Albany

EPU / EPC / CBE Articles 52(1), 54(2), 56

Kennwort / Keyword / Mot clé : "Prior use"

Leitsatz / Headnote / Sommaire

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Case Number : T 194/86 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 17 May 1988

Appellant : Paul Hammelmann Maschinenfabrik GmbH
(Opponent) Zum Sundern 13-17
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Respondent : Albany Engineered System Europe Ltd.,
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Representative : Pike, Harold John
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Decision under appeal : Decision of the Opposition Division of the European
Patent Office dated 10 March 1986 rejecting
the opposition filed against European patent
No. 0 009 399 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : P.E.M. Delbecque

Members : C.T. Wilson
O.P. Bossung

Summary of Facts and Submissions

- I. European patent No. 0 009 399 was granted on 11 July 1984 with one claim on the basis of European patent application No. 79 301 942.3. The claim is worded as follows:

"A show fitting comprising a first tubular member adapted to be connected to a source of fluid, the first member having a series of spray jets mounted in its wall, the jets being aligned and spaced along the length of the first member, a second tubular member within which the first member is located and mounted for reciprocatory movement relatively thereto, a support means at each end and at spaced intervals between the ends, and driving means for reciprocating the first member, the wall of the second member having a longitudinal slot aligned with the spray jets characterised in that the spray jets are wholly contained within the second tube fluid discharged from the jets emerging from the second member via the longitudinal slot therein."

- II. The patent was opposed in due time and form on 6 April 1985. The Opponent requested revocation of the patent on grounds of lack of novelty and of inventive step. In support of his request, the Opponent cited among others:

Drawing Nr. 0 00890.094-30 dated 1972,
in particular "Section B-B"

of the opponent and alleged that a spraying apparatus shown in that drawing formed part of the state of the art.

- III. The Opposition Division rejected the opposition in a decision dated 10 March 1986. According to the decision the subject-matter of the main claim was novel since the outer rectilinear U-sectional jet-protecting means according to

the drawing (even if regarded as belonging to the prior state of the art) could not be regarded as destroying the novelty of the slotted tubular member. Moreover, this drawing disclosed a completely different solution to the problem posed in the present patent, and would not therefore have led the person skilled in the art to the solution characterised in the present claim, the subject-matter of which therefore involves an inventive step over that document. The other cited documents deal with shower fittings which do not go beyond a fitting according to the preamble of the claim.

- IV. The Opponent filed an appeal against this decision on 10 March 1986, at the same time paying the appropriate fee. The Statement of Grounds filed on 2 May 1986 relies upon new facts to support what is essentially a new ground of opposition: namely, an alleged prior use by way of sale of apparatus in accordance with a new drawing Nr. 00.00891.0187-31 dated 4 April 1977 enclosed with the Statement and an invoice of 26 May 1977. A witness, Herr Konrad Nordhorn, responsible for the construction and delivery of the shower fitting was also referred to, but no evidence was ever received from him.
- V. The Respondent (Patentee) requested in his reply received on 16 September 1986 a preliminary decision from the Board on the following two points before they (the Respondents) are called upon to consider the relevance of the alleged prior use apparatus to the present claim:
- i) should the appeal, being based on a completely new document be allowed to proceed; and
 - ii) is further evidence required to demonstrate that the apparatus cited by the Appellants was, in fact, part of the state of the art.

VI. In a communication dated 19 December 1986 the Board proposed the following course:

- (1) Within two months of the date of notification of that communication the Appellant shall file all the evidence on which he intends to rely in this appeal in support of the new alleged prior use of apparatus in accordance with drawing 00.00891.0187-31 dated 04.04.77, in writing.
- (2) Following the filing of such evidence, the Respondent shall within four months file all his observations in reply to the appeal.
- (3) Following stages (1) and (2) above, the Board will proceed to examine the appeal and to decide upon it, in accordance with Articles 110 and 111 EPC. The Board will at that stage also decide upon the admissibility of the facts and evidence put forward by the Opponent in support of the new ground of opposition.

VII. The Appellant and Respondent duly replied, and both parties requested that should the new facts and evidence be admitted into the appeal procedure, the case be remitted to the Opposition Division for a decision in relation to such new ground of opposition.

The Appellant stated that the new alleged prior use had been introduced since the Opposition Division surprisingly decided that the U-sectional jet-protecting means according to the first alleged prior use did not comprise a slotted tube.

The Respondent remained of the opinion that the alleged prior use had not been proven.

VIII. At the oral proceedings held on 17 May 1988, both parties reconfirmed their arguments.

On being informed that the Board after intermediate deliberation did not consider that the prior use alleged in the appeal proceedings had been proven, and that they similarly did not consider the prior use alleged during the Opposition proceedings to be proven, the Representative of the Appellant advanced no further arguments in favour of the first alleged prior use, but maintained that the subject-matter of the single claim was lacking in inventive step in the light of the disclosures particulant of US-A-2 945 628 and US-A-2 097 337.

IX. The Appellant requests cancellation of the impugned decision and revocation of the European patent No. 9399. The Respondent requests dismissal of the appeal and maintenance of the patent as granted.

Reasons for the Decision

1. The appeal is admissible.
2. In order to establish whether the arrangement in accordance with drawing 0 000891.0187-31 has been used in such a way that it has been made available to the public and therefore can be considered to form part of the state of the art, the following general principles must be considered:-
 - (i) the date on which the alleged prior use occurred,
 - (ii) exactly what was used, and

- (iii) under what circumstances the alleged use occurred, e.g. place of alleged use, possible secrecy agreements.

All three of the above points must be proven. Mere assertions, no matter how believable they may be, are not generally sufficient.

In the present case, the invoice dated 26 May 1977 for one hundred internal tubes and one hundred guide tubes in accordance with the cited drawings, which tubes the Representative of the Appellant maintained were for installation in a split tube forming part of the felt washing suction press, is not considered by the Board to prove, neither alone nor in combination with any other evidence, points (ii) and (iii) above, so that the prior use is unproven, and cannot be considered to be comprised in the state of the art.

3. Applying the same considerations to the alleged prior use cited in the Opposition proceedings, the Board considers this alleged use also to be not proven, and therefore not to be comprised in the state of the art.
4. The subject-matter of the single claim is also novel and contains an inventive step over the state of the art as demonstrated in the printed patent specification and revealed in the Examination procedure. The reasons for this finding by the Board are the same as those set out in an earlier decision of this Board, T 69/82 of 27 September 1983 (not published), on an Appeal against the Decision of the Examining Division refusing the European patent application on which the present patent is based, namely that none of the cited documents disclose spray jets wholly contained within the slotted second tube, so that the sprayed fluid emerges through the slot. Moreover, none of

the documents suggests such an arrangement and an historical review of the technical development of shower fittings shows that the present invention moves away from a standard design using projecting spray jets dating from as far as 1937.

5. The Opponent has suggested that if the present claim is maintained it will prevent the public from using short jets known for example from US-A-2 945 628 in the shower fitting known from US-A-2 097 337 and this would be contrary to the intention of general patent law.

Whilst the Board agrees that a fundamental principle of any and every patent system is that no patent should be granted which prevents any person from continuing to do what he has always done, no evidence has been filed in the present case to show that anyone had ever used the admittedly known short jets in the admittedly known shower fitting of US-A-2 097 337. The present claim is therefore unobjectionable in this respect, and the arguments of the Appellant are not persuasive.

6. Since the new facts and evidence put forward by the Opponent in support of the new grounds of opposition do not destroy the novelty nor the inventiveness of the subject-matter of the claim, the Board need not consider further the question of admissibility.

Order

For these reasons, it is decided that:

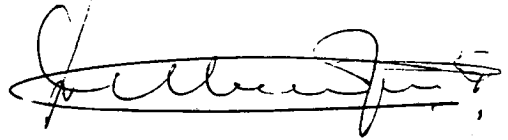
The appeal is dismissed.

The Registrar:



F.Klein

The Chairman:



P.E.M. Delbecque

