

Publication in the Official Journal Yes / ~~Yes~~

File Number: T 635/88 - 3.2.3  
Application No.: 81 200 587.4  
Publication No.: 0 063 184  
Title of invention: Feeding fence for cattle stables

Classification: A01K 1/062, A01K 1/08

D E C I S I O N  
of 28 February 1992

Proprietor of the patent: De Erven G. de Boer B.V.  
Opponent: Müller & Eilbracht B.V.

Headword: Opponent-Identifiability/De Erven G. de Boer B.V.  
EPC Article 99(1), Rules 55(a), 56(1)(2)  
Keyword: Inadmissibility of opposition

Headnote

Headnote follows



Case Number : T 635/88 - 3.2.3

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.3  
of 28 February 1992

**Appellant :** Muller & Eilbracht B.V.  
(Opponent) P.O. Box 1080  
NL 2260 BB Leidschendam (NL)

**Respondent :** De Erven G. de Boer B.V.  
(Proprietor of the patent) Jupiterweg 17  
NL-8938 AD Leeuwarden (NL)

**Representative :** 't Jong, Bastiaan Jacobus  
OCTROOIBUREAU ARNOLD & SIEDSMA  
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NL-2502 EN 's-Gravenhage (NL)

**Decision under appeal :** Decision of the Formalities Officer acting for  
the Opposition Division of the European Patent  
Office dated 14 October 1988 finding the notice  
of opposition filed against European patent  
No. 0 063 184 to be inadmissible pursuant to  
Rule 56(1) EPC.

**Composition of the Board :**

**Chairman :** C.T. Wilson  
**Members :** J.- C. Saisset  
F. Brösamle

## Summary of Facts and Submissions

- I. European patent No. 0 063 184 was granted on the basis of European patent application No. 81 200 587.4 and its grant was published in the European Patent Bulletin on 16 April 1986.
- II. By letter dated 31 July 1986 filed on 1 August 1986 Mr P. EILBRACHT, from MULLER & EILBRACHT B.V., a Dutch consultancy firm in the field of industrial property, filed an opposition against this patent.
- III. With letter dated 26 January 1987 the patent proprietor's representative submitted that:
- MULLER & EILBRACHT B.V. was acting on behalf of METAALINDUSTRIE Tj. SPINDER B.V., Harkema, Netherlands;
  - after unsuccessful licence negotiations, SPINDER had been summoned by the patent proprietor before a Dutch court on 4 August 1986 for infringement initially on the Dutch patent 178 474 and subsequently on the present European patent;
  - during the negotiations SPINDER was assisted and represented by Mr P. EILBRACHT. In support of this contention he produced a copy of a part of the pleading note dated 4 August 1986 of Spinder's lawyer. On page 9 of this note it is stated that the defendant had filed an opposition against a European patent published on 16 April 1986 with notice of opposition dated 31 July 1986 filed at the EPO.
- IV. By letter dated 14 April 1987, Mr EILBRACHT maintained that MULLER & EILBRACHT was acting on its own, according to Article 99 EPC.

- V. In his reply dated 26 May 1987, the patent proprietor's representative referred to many decisions of the Boards of Appeal according to which a notice of opposition filed by a "professional representative" under his own name, while acting on behalf of another person, is not admissible. He concluded that no difference should be made when a notice of opposition is filed by any other person not being a professional representative. He produced also a copy of a telex from Mr P. EILBRACHT from 26 June 1986 showing that MULLER and EILBRACHT were looking after the interests of Spinder.
- VI. With communication dated 20 April 1988 the Formalities section informed the parties that the opposition was inadmissible due to the lack of identification of the real opponent within the nine month period prescribed in Article 99(1) EPC.
- VII. On 20 June 1988, Mr. P. EILBRACHT filed with his observation a certificate from the Dutch patent office where it is declared that the opposition filed in this case by MULLER & EILBRACHT B.V. has been entered in the Register of this Patent Office and also announced in the European patent bulletin and in the Netherlands patent bulletin.
- VIII. In a decision dated 14 October 1988 based on Article 99(1) and Rule 56(1) EPC, the Formalities Officer acting for the Opposition Division of the EPO rejected the notice of opposition as inadmissible. The reason given was that Mr EILBRACHT filed the opposition on behalf of Spinder.
- IX. On 14 December 1988, MULLER & EILBRACHT B.V. represented by Mr P. EILBRACHT, lodged an appeal against this decision and duly paid the fee.

X. In the Statement of Grounds received on 14 February 1989 the Appellant maintains all arguments already put forward in its opposition paper and points out that, in the opposition proceedings:

- the sole opponent was the company MULLER & EILBRACHT B.V. which is a legal person having its residence in one of the Contracting States of the EPC;
- according to Article 133 EPC such legal person shall not be compelled to be represented by a professional representative within the meaning of Article 134 EPC;
- consequently MULLER & EILBRACHT B.V. may be represented by M. P. EILBRACHT, one of its Directors acting as a natural person and in his capacity as the legal representative.

Moreover, the Appellant underlined that:

- any person who fulfils the requirements of being an opponent domiciled within the Contracting States may at his discretion file an opposition in his own name;
- MULLER & EILBRACHT B.V. did so and consequently it does not matter whatever relationship there would exist or not between the opponent and whatever other person for judging the admissibility of an opposition.

XI. In his reply dated 8 March 1989, the patent proprietor's representative upholds that it is quite unlikely that a firm like MULLER & EILBRACHT B.V. being "International Consultants and brokers in industrial property" would file an opposition on their own accord because unless a clear interest of that consultancy firm itself is shown, it can be assumed that an opposition filed under these conditions is in fact in the interest and therefore on behalf of a third party. Specially in the present case, the copy of the pleading note of Spinder's lawyer referring to the

Notice of Opposition filed by MULLER & EILBRACHT B.V. on 31 July 1986 reveal that there is no support for the independence of that consultancy firm.

- XII. In a communication dated 13 September 1990, the Board, noting that a legitimate doubt exists about the real Opponent's identity, and that this doubt does not comply with Rule 55(a) EPC, asked MULLER & EILBRACHT B.V. on the basis of Article 117(g) EPC, for a sworn statement in writing pointing out that this firm is acting in its own name and not on behalf of anyone else. The Board underlined that, if the sworn statement was not filed within a two month delay, they could consider that the doubt remains and that the Opposition was not admissible.
- XIII. By letter dated 19 September 1990 the patent proprietor's representative submitted that the sworn statement should not only point out that MULLER & EILBRACHT is "presently" acting in its own name and not on behalf of anyone else, but also that this was the case at the time that the notice of Opposition was filed.
- XIV. In its answer dated 13 November 1990 MULLER & EILBRACHT B.V. contested the relevancy of the pleading note (see above section III last paragraph). They maintain that they have filed a legally correct opposition before the EPO and since they are not "professional representatives" in the sense of the EPC, none of the rules and/or directives for professional representatives are applicable at all. Then, arguing that the Board should consider them as any other normal opponent, they denied any and all applicability of Article 117(g) EPC, in particular since the Official Certificate of the Dutch Patent Office dated 21 June 1988 and filed on 15 July 1988 during the opposition proceedings, marks them as an admissible regular opponent. They consider that the demand of the Board relating to the

sworn statement in writing is legally inadmissible under the Patent Convention and under any legal system because under international law nobody can be denied his free right to oppose any patent application if he so desires. Finally, they state that they could make such a sworn statement, but they did not in fact file any sworn statement.

- XV. Because a question had been submitted to the Enlarged Board of Appeal relating to the responsibility of the Technical Boards of Appeal for the examination of Appeals from the decisions which, as in the present case, have been taken by formalities officer on behalf of EPO's Examining or Opposition Division, it was announced to the parties, by communication dated 12 June 1991, that the Board would not proceed further with the present case until the Enlarged Board of Appeal had taken this decision in the case G 2/90. In this decision dated 4 August 1991 (see G 2/90 OJ EPO 1992 ...) the Enlarged Board decided that the Technical Boards are responsible for such appeals. Consequently, the present Board of Appeal proceeds further with the case.

#### Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is admissible.
2. Article 99(1) EPC clearly states that any person may give notice of opposition to the European Patent Office to the European patent granted. "Any person" is to be construed in line with Article 58 EPC as meaning any natural person, any legal person or any body equivalent to a legal person by virtue of the law governing it. In this instance, it is established that MULLER & EILBRACHT B.V. is a legal person.

3. Under Article 133(3) EPC, natural or legal persons having their residence or principal place of business within the territory of one of the Contracting States may be represented in proceedings established by the EPC by an employee, who need not be a professional representative but who must be authorised in accordance with the Implementing Regulations.

It is not disputed that the firm MULLER & EILBRACHT has its residence or principal place of business in the Netherlands which is one of the Contracting States and that Paul EILBRACHT is one of its Directors.

Therefore, the Board accepts that Mr Paul EILBRACHT is acting in his capacity as being the authorised representative of the firm MULLER & EILBRACHT B.V. within the meaning of Article 133(3) EPC.

4. Nevertheless the Respondent (who is also the patentee) objects, that in the present case, the firm MULLER & EILBRACHT B.V. (duly represented by Mr Paul EILBRACHT as demonstrated above) is not acting in its own name but on behalf of METAALINDUSTRIE Tj SPINDER B.V. He also points out that, in his view, such "International consultants and brokers in industrial property" have no interest in opposing patent rights.
5. Accordingly, the questions to be answered in order to decide whether the opposition was admissible or not are:
  1. Is, in opposition proceedings before the EPO, a lack of interest in opposing patent rights a ground of inadmissibility of the opposition?



2. Is a firm of "International consultants and brokers in industrial property" legally entitled to file an opposition against a European patent before the EPO in its own name? and, if the answer is yes,
  3. Is the opposition admissible even if a legitimate doubt remains relating to the real opponent's identity?
6. As regard the first question the Board notes that the Appellant did not explain, during the appeal proceedings, what interest he had in opposing the patent, but, contrary to the assertions of the Respondent, the European Patent Convention does not require any particular interest to start opposition proceedings, (see e.g. Dr SINGER in "Europäisches Patentübereinkommen" p. 377, point 3). Therefore, the lack of interest in opposing a patent cannot be considered as a ground of inadmissibility.
7. Point 2 above makes it clear that, by virtue of Article 99(1) EPC a firm which, like MULLER & EILBRACHT B.V., is a legal person is legally entitled to file an opposition, so that the answer to the second question is also yes.
- However, in the opinion of the Board, the positive answer to the second question assumes that the "any person" of Article 99(1) EPC has been clearly identified. That is to say that the "any person" giving notice of opposition is really acting in his own name and not on behalf of a third party.
8. Decision T 10/82 (OJ EPO 1983 p. 407) states that a professional representative, within the meaning of Article 134 EPC, is not entitled to give his own name as opponent when he is acting for a client. However, in the

present case the firm MULLER & EILBRACHT B.V. is not a representative, neither within the meaning of Article 134 EPC nor of Article 133 EPC, but a legal person within the meaning of Article 99(1) EPC (see above point 2).

8.1 Nevertheless, decision T 10/82 is reasoned with two combined elements of fact:

1. The person who has given his name as opponent was a professional representative within the meaning of Article 134 EPC;
2. This person was acting on behalf of his client.

8.2 In the Board's view, the first fact cannot call into question the admissibility of an opposition, (see Article 99(1) EPC, "any person"). In "Europäisches Patentübereinkommen" indeed Dr SINGER underlines on p. 376 that professional representatives may give notice of opposition in their own name and this is not contested by the EPO's jurisprudence. Clearly, the main ground of decision T 10/82 is that the alleged opponent was not acting in his own name but on behalf of his client.

8.3 If a professional representative is allowed to lodge an opposition in his own name that is because Article 99(1) EPC confers this power upon "any person" and, in this way, there is no reason to reject an opposition filed by a "consultancy firm in the field of industrial property" acting also in its own name. Article 99(1) EPC gives to any person a personal action at law for opposing a patent and, in this case, what must be prohibited is the action at law instituted by a person acting with the personal action at law of someone else. This is the legal reason why decisions like T 10/82 rejected the opposition filed in his own name by a person who had, during the

proceedings, admitted that he was actually acting on behalf of his client (see in particular T 25/85 OJ EPO 1986, 81 and T 219/86 OJ EPO 1988, 254). Such a person was considered, in the Boards' view, as a man of straw.

8.4 In decision GR 01/84 (OJ EPO 10/85, 299) the Enlarged Board of Appeal explains that the attempt to employ a "man of straw" as the opposing party, may reduce the proceedings to a sham, since the "man of straw" is no real third party, but the puppet of this party. They underline that, if the "connection between the real opponent and his puppet is not known to the European Patent Office and the general public, possibilities of deceit and abuse of the opposition procedure for ulterior purpose, e.g. delaying procedure in other jurisdictions, exist". Many decisions such as T 222/85 OJ EPO 88, 128 or T 219/86 OJ EPO 1988, 254 pointed out that oppositions must be filed and pursued in good faith so as to avoid procrastination and uncertainty.

8.5 Following this analysis the Board considers that in order to make the opposition admissible, no legitimate doubt must exist relating to the identity of the real opponent, so that the answer to the third question posed in point 5 above must be no.

9. In the present case the documents produced by the patentee (see point III and V above) prove that business connections exist between MULLER & EILBRACHT B.V. and SPINDER B.V. and, in particular, that Tj SPINDER B.V. at least intended to present at the Dutch Court Hearing the notice of opposition filed on 1 August 1986 by MULLER & EILBRACHT B.V. before the EPO, as being filed by itself.

9.1 Nevertheless the firm MULLER & EILBRACHT has maintained throughout the opposition and the appeal proceedings that

it is only acting in its own name and not on behalf of Tj SPINDER B.V. It consequently appeared that a serious doubt existed about the real opponent's identity and that this doubt did not comply with Rule 55(a) EPC. In such circumstances the Board considered that it was for the Appellant to contribute to dispelling the doubt.

9.2 For this reason, using the provisions of Article 117(g) EPC, the Board asked the Appellant for a sworn statement in writing, pointing out that the firm MULLER & EILBRACHT B.V. is acting in its own name and not on behalf of anyone else, but this request was not complied with, on the grounds that such a demand is legally inadmissible under any legal system.

9.3 However, the Board notes that the EPO's jurisprudence (see above point 7 and 8) which stated that the EPO and the Respondent are entitled to know without doubt the real opponent's identity is also the jurisprudence of at least some Contracting States. Thus, in the Federal Republic of Germany for example, the decision X ZB 24/88 of the Bundesgerichtshof 10 Th. Senate dated 7 November 1989 and published in the OJ OEB 1990, 377, states that opposition filed against a patent is inadmissible if despite a reasonable appraisal of the notice of opposition and the other documents available to the patent office during the opposition period doubt remains as to the identity of the opponent.

10. In the present case it had been established from the beginning of the opposition proceedings that such a doubt exists (see above point 8). The opportunity was given to the Appellant to dispel the doubt (see above points XII and 9.2) but he refused to avail himself of this possibility (see above point XIV and 9.2). Therefore, the Board considers that the doubt relating to the real

opponent's identity remains and consequently decides that  
the opposition is not admissible.

Order

For these reasons, it is decided that:

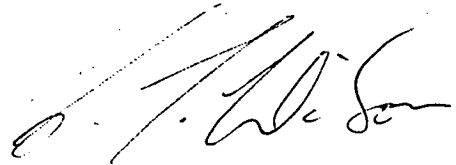
The appeal is dismissed.

The Registrar:

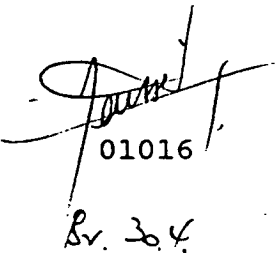
The Chairman:



N. Maslin



C.T. Wilson



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