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D E C I S I O N
of 27 September 1995

Case Number: T 0550/92 - 3.2.3

Application Number: 84107107.9

Publication Number: 0129257

IPC: F28D 15/00, F23L 15/04, F23D 13/42

Language of the proceedings: EN

Title of invention:
Heat exchanger

Applicant:
BABCOCK-HITACHI KABUSHIKI KAISHA

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 111(1)

Keyword:
"Ground of refusal removed"
"Remittal to the first instance"

Decisions cited:
-

Catchword:
-



Case Number: T 0550/92 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 27 September 1995

Appellant:

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Decision under appeal:

**Decision of the Examining Division of the European
Patent Office dated 5 February 1992 refusing
European patent application No. 84 107 107.9
pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: C. T. Wilson
Members: J. du Pouget de Nadaillac
M. Añz Castro

Summary of Facts and Submissions

- I. The present appeal is directed against the decision dated 5 February 1992 of the Examining Division of the EPO refusing European patent application No. 84 107 107.9 (Publication No.: EP-A-0 129 257). During the examination proceedings this application has been limited to the embodiment corresponding to the originally filed Figures 6, 9 and 9a. The above mentioned contested decision concerns Claims 1 to 3 sent with the Applicant's letter received on 21 May 1991.
- II. During the examination proceedings, the Examining Division had objected that Claim 1 contained subject-matter which extended beyond the content of the application as filed (Article 123(2) EPC), since three different flows had originally been disclosed in Figure 9 together with the description, which indicated that the original Figure 9 was based on original Figure 6. Claim 1 should be restricted to three fluids, namely the heating fluid G1 and the two fluids G2 and G3. On 30 January 1990, a proposal of the Examining Division for the amendment of Claims 1 to 3, in order to meet the above objection, was sent to the Applicant; however, the Applicant did not accept this proposal and filed another set of claims on 21 May 1991 which led to the contested decision.
- III. The Appellant (Applicant) filed an appeal on 2 April 1992 and payed the appeal fee on the same day. The Grounds of Appeal were received on 3 June 1992. Oral proceedings were asked as auxiliary request.

IV. On 10 July 1995 the Appellant was summoned to oral proceedings. With a communication accompanying the summons, the Board gave its provisional opinion of the case, namely that the subject-matter of Claim 1, as filed on 21 May 1992, was not covered by the specification as originally filed (Article 123(2) EPC).

V. In his reply dated 12 September 1995, the Appellant filed new Claims 1 to 3 corresponding to those proposed by the Examining Division on 30 January 1990 and requested the grant of a patent on the basis of these new claims. He also withdrew his request for oral proceedings and suggested to return the case to the first instance for further prosecution. Therefore, the oral proceedings were cancelled.

VI. Claim 1 reads as follows:

"1. A heat pipe exchanger incorporating a heat pipe apparatus, said heat pipe apparatus comprising:

 evaporative pipe groups (16) disposed within a duct (15) through which a heating fluid (G1) flows,

 first condenser pipe groups (20) disposed within a duct (19) through which a fluid (G2) to be heated flows, spaced from said evaporative pipe groups,

 first passage means (18) for connecting said evaporative pipe groups (16) with said first condenser pipe groups (20) and for circulating therethrough a working medium; and

 second condenser pipe groups (20) disposed within a duct through which another fluid (G3) to be heated flows, separated from said first condenser pipe groups (20),

a sub-passage (29) for connecting a lower header (30) of another condenser pipe group (26) with duct (19) of said first or second condenser pipe groups (20); and gas separator means (28) provided at an upper part of said first or second condenser pipe groups (20) for discharging non-condensable gas outside (Figure 9)."

Reasons for the Decision

1. The appeal is admissible.
2. Since the wording of the claim contested by the decision under appeal has been cancelled, the only stated ground of refusal has been removed. With the filing of these new claims, the Appellant has shown his readiness, on the one hand, to no longer apply for a European patent containing claims as refused by the Examining Division and, on the other hand, to apply for a patent containing claims as previously proposed by the Examining Division. Moreover, he has requested that the case be returned to the first instance for further prosecution. Under these circumstances, the Board has decided to exercise the power conferred to it by Article 111(1) EPC to refer the matter back to the Examining Division, in order that it should decide whether the amended claims, the description and drawings meet the other requirements of the EPC.
3. In this respect, the Examining Division should particularly consider whether, from the wording of present Claim 1, it is apparent or not that the sub-passage is the only connecting means for the working medium between both condenser pipe groups. A parallel

arrangement between these condensers does not seem to be clearly excluded (see the second case of the sketches submitted with the Appellant's letter dated 28 October 1988). The corresponding feature of Claim 1 seems also to cover the third case.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further examination on the basis of the claims filed on 12 September 1995.

The Registrar:



N. Maslin

The Chairman:



C. T. Wilson

J.N.
R.C.