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D E C I S I O N
of 25 June 1993

Case Number: T 0043/93 - 3.2.4

Application Number: 84901108.5

Publication Number: 0138876

IPC: A47C 9/00

Language of the proceedings: EN

Title of invention:

A chair having supporting members for the posterior and the shins, respectively, of a chair occupant

Patentee:

Opsvik, Peter

Opponent:

Horsie GmbH
Brandenstein, Erwin
Kondator AB
Cromex Möbelhandel Gesellschaft mit beschränkter Haftung

Headword:

-

Relevant legal provisions:

EPC Art. 56, 123(2)

Keyword:

"Public prior use not proved"
"Persons consulted to give an expert advice on a prototype (not members of the public)"
"Inventive step (after amendment: yes)"

Decisions cited:

T 0270/90, T 0472/92

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0043/93 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 25 June 1998

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 2 November 1992
revoking European patent No. 0 138 876 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. Andries
Members: M. Ceyte
J.-P. Seitz
M. Hatherly
M. Lewenton

Summary of Facts and Submissions

- I. The appellant is proprietor of European patent No. 0 138 876 (application No. 84 901 108.5).

Claim 1 as granted reads as follows:

"A chair adapted to support a person in a kneeling-like, sitting position, which comprises: a generally upwardly facing posterior support (2), a shin support (1) spaced from and disposed at a level below the level of the posterior support (2); and a ground-engaging base (13); characterised by a substantially vertical supporting column (10); by the fact that the posterior and shin supports (2 and 1) are interconnected by an elongate frame (3) carrying the shin and posterior supports at spaced locations therealong, so that the shin and posterior supports are rotatably mounted on the supporting column (10); and by means (9, 12) for simultaneously adjusting the height of the posterior and shin supports (2 and 1) so that the posterior and shin supports (2 and 1) move in unison upon adjustment of their height, the height adjusting means being mounted on the column (10)."

- II. The patent was opposed by the other parties (opponents I to III) on the ground of lack of patentability.

Notice of Intervention pursuant to Article 105 EPC was filed by the respondent.

The opposition was in essence based

- (i) on an alleged prior public display of a prototype chair called hereafter "Codesign" chair, as inter alia evidenced by

- A11: a first affidavit of Mr P. L. Peach dated 4 August 1986
- A12: a second affidavit of Mr P. L. Peach dated 5 September 1986
- A13: a first affidavit of Mr M. Cuffe dated 17 September 1986
- A14: a second affidavit of Mr M. Cuffe dated 26 September 1986
- A15: an affidavit of Mr A. Howie dated 9 September 1986
- A21: schematic representation of the "Codesign" prototype annexed inter alia to the second affidavit of Mr Peach (A12)

(ii) on the disclosure in documents

A5: EP-A-0 018 812
A7: FR-A-1 325 811
A8: US-A-3 008 764
A20: US-A-3 891 270

III. In its decision of revocation dispatched on 2 November 1992, the Opposition Division held that the public prior display of the Codesign chair was convincingly established and that the claimed subject-matter was not inventive over this prior use and document A7.

IV. On 31 December 1992, the appellant (patent proprietor) lodged an appeal against this decision, with the appeal fee being paid at the same time.

The statement of the grounds of appeal was filed on 8 March 1993.

In the course of the proceedings the opponents I, II and III withdrew their opposition.

V. In a communication, the Board inter alia expressed its doubts as to the public availability of the Codesign chair. It also suggested that documents A7 or A20 can be combined with document A5 in order to arrive at the subject-matter claimed in granted claim 1.

VI. Oral proceedings before the Board were held on 25 June 1998 in the presence of the appellant and the respondent (intervener).

The respondent requested that the appeal be dismissed.

The appellant requested that the decision under appeal be set aside, and that the patent be maintained as follows:

As a main request: the patent as granted.

As first and second auxiliary requests: on the basis of claim 1 filed during the oral proceedings before the Board.

As a third auxiliary request: on the basis of the set of claims 1 to 8 and columns 1 to 4 of the amended description, both filed during the oral proceedings before the Board together with Figures 1 to 13 as granted.

VII. Claim 1 of the auxiliary request No. 1 reads as follows:

"A chair adapted to support a person in a kneeling-like, sitting position, which comprises: a generally upwardly facing posterior support (2), a shin support (1) spaced from and disposed at a level below the level

of the posterior support (2); a ground-engaging base (13); a substantially vertical supporting column (10); the posterior and shin supports (2 and 1) being interconnected by an elongate frame (3) carrying the shin and posterior supports at spaced locations therealong, so that the shin and posterior supports are rotatably mounted on the supporting column (10); and means (9, 12) for simultaneously adjusting the height of the posterior and shin supports (2 and 1) so that the posterior and shin supports (2 and 1) move in unison upon adjustment of their height, the height adjusting means being mounted on the column (10) characterized in that the frame (3) is an elongate frame extending from the posterior support (2) to the shin support (1) symmetrically with respect to each of the posterior support and shin support."

Claim 1 of the auxiliary request No. 2 reads as follows:

"A chair adapted to support a person in a kneeling-like, sitting position, which comprises: a generally upwardly facing posterior support (2), a shin support (1) spaced from and disposed at a level below the level of the posterior support (2); a ground-engaging base (13); a substantially vertical supporting column (10) extending from the base to the posterior support (2) and an elongate frame (3) carrying the shin and posterior supports at spaced locations therealong characterised by the fact that the shin and posterior supports with their interconnecting frame (3) are rotatably mounted on the supporting column (10); in that means (9, 12) are provided for simultaneously adjusting the height of the posterior and shin supports (2 and 1) so that the posterior and shin supports (2 and 1) move in unison upon adjustment of their height; in that the height adjustment means are mounted on the column (10); and in that the shin support (1) is

mounted on the elongate frame (3) by resilient means (6) between the shin support and a transverse member (4) of the inclined frame (3) to yield and to permit resiliently-resisted pivoting of the shin support relative to the elongate frame (3)."

Claim 1 of the auxiliary request No. 3 corresponds to claim 1 of the auxiliary request No. 2 with the exception that the wording "and to permit resiliently-resisted pivoting of the skin support relative to the elongate frame" at the end of claim 1 of the auxiliary request No. 2 has been deleted.

VIII. In support of his requests, the appellant (patent proprietor) made the following submissions:

- (i) It is not established beyond any doubt that the Codesign chair was made available to the public. This prior use can thus not be considered as part of the prior art
- (ii) as regards claim 1 of the main request:
documents A7 and A20 do not at all relate to the kneeling/sitting (or standing/sitting) device with which the claimed invention is concerned. One important difference is that the feet of the user are in the claimed invention in contact with the ground while the shins of the user are resting against the shin-supporting surface.

Not only does document A7 differ from the claimed kneeling/sitting device in providing a foot-rest rather than a shin support, it has also a back rest which is characteristically missing from the claimed chair. The same applies to document A20.

Furthermore in document A20 there is no elongate frame; even if in document A7 there is an elongate frame, this frame does not carry the posterior support and the footrest bar. Therefore, there is no suggestion in these prior art documents of the claimed arrangement according to the main request.

- (iii) As regards claim 1 of auxiliary request No. 1, the Board has expressed the view that document A7 alone can be combined with document A5 to provide the claimed result. This presupposes that document A7 is an obvious one to combine with document A5. However the presence of the back rest in document A7 *per se* rules out such obviousness to combine. Furthermore the above document A7 fails to show shin and posterior supports carried by an elongate frame. Therefore even if it were obvious to combine the documents A5 and A7 such a combination would not lead the skilled person to the claimed invention.
- (iv) The purpose of the additional feature in claim 1 of the auxiliary requests No. 2 or No. 3 is to adjust the angular position of the shin support, when the height of the claimed chair is changed, so as to allow a more comfortable kneeling/sitting posture.

The skilled person would have not considered the teaching given in document A8, since the problem solved by the resilient means shown in this citation and that solved by the claimed resilient means are not comparable.

IX. The above submissions were contested by the respondent (intervener) as follows:

- (i) As regards the alleged public prior use, it made in essence the following submission:

In section 5 of his first affidavit dated 17 September 1986 (A13), Mr Cuffe stated that:

"The prototype chair referred to in paragraph 9 of the Peach Affidavit was kept in my office at Codesign. A number of people would have observed that chair as it was not hidden from view in my office and I made no attempt whatsoever to make any secret of its existence or to impose conditions of confidentiality on persons seeing the chair. Accordingly, a number of customers, potential customers and other visitors would have viewed that chair."

This is a very clear rejection of any bar of confidentiality.

Furthermore, in section 11 of his second affidavit (A12) Mr Peach stated that the CoDesign chair was shown to a number of persons and he specifically mentioned Mr Howie and Ms McFee.

From the foregoing there is no doubt that a large, unlimited and unrestricted group of persons without any confidentiality obligations saw the prototype chair. Therefore the CoDesign chair has to be considered as publicly displayed i.e. as part of the prior art under Article 54(2) EPC.

- (ii) For the skilled person trying to impart mobility to the chair shown in document A5, in which the chair user assumes a standing/sitting posture, it is obvious to replace the footrest bar of the office chair according to document A7 by the shin support of document A5, so as to arrive at the claimed standing/sitting device according to the main request.

- (iii) Claim 1 of the auxiliary request No. 1, requires in addition to the features of claim 1 of the main request that the elongate frame extends symmetrically with respect to each of the posterior support and shin support. Such a feature is already known from document A7, so that when combining documents A5 and A7 the skilled person would inevitably come to the claimed result.

- (iv) The purpose of the additional feature claimed in claim 1 of the auxiliary requests No. 2 or 3 is to ensure that the supporting members yield to a certain extent upon the positioning of the shins on the chair. This additional feature is suggested in document D8 which addresses in essence the same problem. The introduction of this technical feature was therefore something that was obvious to adopt.

Reasons for the Decision

1. The appeal is admissible.
2. *Prior public use*
 - 2.1 It is established jurisprudence of the Boards of Appeal (see e.g. T 270/90 OJ EPO, 1993, 725) that the same standard of proof based on the balance of probabilities should be in principle used for all objections covered by Article 100 EPC.

Moreover as held in the decision T 472/92 OJ EPO, 1998, 161 in cases involving the issue of prior public use, where practically all the evidence in support of an alleged prior public use lies within the power and knowledge of the opponent the latter has to prove his case up to the hilt (see section 3.1 of the reasons).

For the following reasons the evidence submitted is insufficiently weighty to meet the above standards:

- 2.2 The first issue to be decided is what exactly has been displayed and in this respect the Board has serious doubts as to the actual structure of the Codesign prototype:

Firstly, the drawing A21 depicting such a chair was made from **memory** by Mr Peach, well after the alleged prior use which occurred during late 1981 or early 1982. Indeed, as stated in section 10 of his second affidavit dated 5 September 1986 (A12), the drawing was specifically prepared for attachment to this affidavit.

This is further confirmed by section 9 of this affidavit, which states "despite diligent search, neither the original drawings nor the chair actually produced can be found".

Mr Peach further stated in his second affidavit (section 10) that the features portrayed in the drawing (A21) were substantially the same as those in the original drawings prepared in 1981/1982 from which the prototype was built.

The CoDesign chair of this drawing has clearly no lifting and lowering mechanism. However Mr Peach submitted that the CoDesign chair did exhibit this feature (section 13). In view of this inconsistency, the Board is already unable to draw the conclusion that the CoDesign chair which was designed was equipped with a lifting and lowering mechanism, so that a precise and unequivocal structure of the CoDesign prototype chair is not disclosed.

2.3 Furthermore, the circumstances surrounding this prior use (issue of accessibility by members of the public) are not clearly established:

2.3.1 It is not in dispute that the Codesign chair was a prototype chair **which had to be brought into completion**, before being purchased.

In his second affidavit Mr Peach submitted the following (section 11)

"The prototype chair was actually displayed to a number of persons. These included Mr Alan Howie, an ergonomist and Ms Barbara Mc Fee, who at the time was employed at the School of Occupational Health at the University of Sidney. I recall that it was also shown to a number of other people, in order to assess possible interest in the chair."

In view of their qualifications, it is to be assumed that these two, specifically defined persons were consulted in order to give an expert advice on the prototype chair.

Mr Howie seemed at that time to be employed by Shell Australia Limited but as stated in section 5 of his affidavit (A15), "Mr Cuffe sought my advice regarding the suitability of the chair from a consumer point of view."

Thus it follows that Mr Howie was consulted because he was an ergonomist and not because he was an employee of the Shell company or a potential purchaser of the prototype chair. The fact that Mr Howie was employed by Shell Australia Limited cannot therefore, in itself, displace the presumption that Mr Howie was not a member of the public but a consultant who had to give an expert advice on the CoDesign chair which normally implies an implicit obligation of confidentiality. It is common practice that a firm before bringing a device on the market or before filing a patent application seeks the advice of experts in order to bring the new device into completion.

It is observed that these expert advices are of great interest for the firm involved, so that they are not surprising.

2.3.2 Mr Cuffe stated in section 5 of his first affidavit (A13) that "a number of people would have observed that chair as it was not hidden from view in my office... . Accordingly, a number of customers, potential customers and other visitors would have viewed that chair.". The term "would" used with a past participle describes an hypothetical event: Mr Cuffe is not sure that these people actually saw the Codesign chair. This evidence is also far too vague to permit the Board to draw the conclusion that members of the public saw the prototype chair, let alone that specifically identified people saw it.

The first affidavit (A13) of Mr Cuffe confirms furthermore in section 5 that the prototype chair was kept in Mr Cuffe's office at CoDesign. The affidavit (A15) of Mr Howie makes it clear in section 3 that Mr Cuffe's office was the design office of Codesign. It appears, therefore, that the status of Mr Cuffe's office was not simply a reception area for visitors but was the design office where new designs were drawn up and in which matter of a confidential nature would normally be expected, particularly since furthermore a special room apparently existed for already realized prototype furniture (see A14: second affidavit of Mr Cuffe; section 5).

2.4 Accordingly the Board finds that the alleged prior public display of the CoDesign chair is not established let alone it being proven up to the hilt as required by the above decision T 472/92.

In consequence, the attack on the patentability of the claimed subject-matter based on this alleged prior use fails.

3. Main request

3.1 Claim 1 as granted is based in its precharacterising portion on the ergonomic chair disclosed in Figure 13 of document A5 called hereinafter the "Balans chair". Such a chair is adapted to support a person in a kneeling-like, sitting position with supports for the posterior and shins of the user. The shins support is disposed at a level below the level of the posterior support. The known Balans chair of this document is freely positioned on or fixedly mounted on a floor or attached to vertical surfaces (see description: column 1, first paragraph).

The problem to be solved by the subject-matter of claim 1, when starting from document D5 is in essence to provide a "chair having a maximum of mobility while the person occupying the chair assumes a kneeling-like sitting position" (see description: column 4, last paragraph).

This problem is in essence solved by the features stated in the characterising part of claim 1.

3.2 Document A7 concerns an office chair including the following features:

- (i) a posterior support
- (ii) a foot support
- (iii) a supporting column on a four star base
- (iv) an elongate frame carrying the posterior and foot supports, so that the foot and posterior supports are commonly rotatable mounted on the supporting column, and

- (v) a lifting and lowering mechanism mounted on the column, for simultaneously adjusting the height of the posterior and foot supports.

One object which is said to be achieved in document A7 is that a person seated in the office chair should be able to turn the seat without the feet disengaging the foot support (see the second last paragraph on page 1). A further object to be achieved is that the height of the seat and the foot rest should be easy to adjust (see the paragraph bridging pages 1 and 2).

For the skilled person confronted with the problem of imparting mobility to the known Balans chair shown in Figure 13 of document A5, there is a clear suggestion to apply the teaching given in document A7, since the office chair disclosed therein is also provided with two supports, a posterior support and a foot support and since these two supports are rotatably and vertically moveable in unison on the supporting column.

- 3.3 The appellant submitted that document A7 is not at all concerned with the class of kneeling/sitting (or standing/sitting) device with which document A5 is concerned, and that one important difference is that throughout document A5 the feet of the user are in contact with the ground while the shins of the user are resting against the shin-supporting surface. Thus it was not obvious to combine documents A5 and A7 and the presence of the back rest in A7 per se rules out such obviousness to combine.

That submission disregards the facts that firstly the starting point of the claimed invention is the Balans chair shown in document A5, in which the feet of the user lie on the ground while the shins are in contact with the shin support, and secondly the claimed chair is defined independently of a foot-floor contact.

Starting from this Balans chair, there is no doubt that the problem to be solved by the claimed teaching is to render this kind of standing/sitting device mobile. The skilled person would necessarily be incited to solve this problem with the aid of document A7 since this citation shows intentionally an office chair which is **rotatably** and **vertically moveable** and which is provided like the Balans chair with two supports, one for the posterior and the other for the feet. It was therefore obvious to adapt the chair according to A5 in respect to rotatability and vertical moveability in accordance with document A7, so as to arrive at the chair claimed in claim 1.

The appellant did not give evidence as to the existence of a technical prejudice leading the skilled person away from the claimed invention.

3.4 Therefore in the Board's judgement, the subject-matter of claim 1 as granted (main request) does not involve an inventive step (Article 56 EPC). In consequence, the main request must fail.

4. *Auxiliary request No. 1*

Claim 1 of this auxiliary request is restricted over claim 1 as granted (main request) by stipulating that the frame is an elongate one extending from the posterior support to the shin support symmetrically with respect to each of the posterior support and the shin support.

The additional feature is per se already known from the above document A7 (see page 2, résumé; and page 1 right hand column, lines 14 to 16) and is used for the same

purpose as in the claimed invention. Indeed from the symmetrical arrangement shown in document A7, a skilled person would realise that this disposition would allow a user of the chair to enter the chair from either side easily.

As stated in section 3 hereinabove, there was a clear suggestion having regard to the technical problem to be solved, to combine the teaching of document A7 with that of document A5. Consequently, it was also obvious to provide the Balans chair shown in document A5 with an elongate frame extending symmetrically with respect to each of the posterior support and shin support so that the chair user has the possibility of entering from either side. It is observed that chairs and especially office chairs usually show symmetry with respect to a vertical plane; a symmetrical disposition is indeed a common arrangement in office chairs.

Consequently, the subject-matter of claim 1 according to the auxiliary request No. 1 fails to involve an inventive step as required by Article 56 EPC. Therefore the auxiliary request No. 1 must fail.

5. *Auxiliary request No. 2*

5.1 Claim 1 requires, in addition to the features of claim 1 of the main request, a first transverse member on the frame and resilient means interposed between the first transverse member and shin support "to yield and to permit resiliently-resisted pivoting of the shin support relative to the elongate frame."

The appellant submitted that the above quoted feature meets the requirement of Article 123(2) EPC, since it is based on the disclosure of Figures 8, 11 and 14 showing the resilient bushes 6 and since the description refers to this feature between line 61 of column 1 and line 1 of column 2.

This passage reads as follows:

"In order to provide that the supporting members to a certain extent yield upon the positioning of the shins of the chair user, elastic means 6, e.g. rubber blocks are located between the transverse member 4 and the support 1."

5.2 Contrary to the appellant's submissions, there is no disclosure in the application as filed and especially in the above cited passage, of the claimed resiliently resisted pivotal of the shin support relative to the elongate frame. Furthermore, considering Figures 8, 11, 14 showing the resilient bushes, it is doubtful that the skilled person in the absence of any further indications in the European patent application as filed, would conclude that these resilient bushes allow a "resiliently-resisted pivoting of the shin support" as claimed in claim 1.

5.3 The Board therefore concludes that the added feature had not been described either explicitly or implicitly in the European patent application as filed and is thus not admissible having regard to Article 123(2) EPC. In consequence, the auxiliary request No. 2 must also fail.

6. *Auxiliary request No. 3*

- 6.1 Claim 1 of the auxiliary request No. 3 corresponds to claim 1 of the auxiliary request No. 2 with the exception that the wording "and to permit resiliently-resisted pivoting of the shin support relative to the elongate frame" at the end of claim 1 of the auxiliary request No. 2 has been deleted.

The present claim 1 requires in essence, in addition to the features of claim 1 as granted, a first transverse member on the frame and resilient means interposed between the first transverse member and the shin support.

There are no formal objections under Article 123(2) EPC to the amended claim 1, since these additional features are in essence disclosed in original claim 6.

- 6.2 Since novelty of the subject-matter of claim 1 is given and was furthermore not disputed, it remains solely to be examined whether the subject-matter of claim 1 involves an inventive step. In this respect it should be noted that the user of the Balans chair shown in Figure 13 of document A5 as well as of the chair according to the European patent occupies a kneeling/sitting (or standing/sitting) position; the feet of the user lie on the ground while the shins are against the shin-supporting surface.

The shin and posterior supports according to the invention are mounted on a vertical supporting column which is a common arrangement in office chairs, this supporting column being usually provided with a lifting and lowering mechanism, so that the posterior and shin supports can be adjusted to desired height. If the chair is lowered the feet of the user will normally be

held at ground level while the shins should remain in contact with the shin supporting surface. In order to allow best user comfort having regard to the fact that the feet will be held at ground level, it is necessary either to rely on a fixed optimum height of the shin support above the ground or to angularly adjust the position of the shin support, the posterior and shin supports being in that case vertically moveable in unison upon adjustment of the height.

The second alternative for allowing best user comfort is achieved according to the present invention by providing resilient means between the shin support and a transverse member of the elongate frame.

- 6.3 Document A8 relates to a common chair having a seat and a back rest member. Four chair legs support the seat member. A frame extends from under the seat to support the back rest. Resilient members are interposed between the back rest and a transverse member which is secured to the frame.

Contrary to the respondent's view, the provision of the claimed resilient members cannot be considered as suggested solely on the grounds that such a feature was disclosed in publication A8 in the same technical field. It is also necessary to examine whether this prior art gave the skilled person an indication for applying this measure in the present case.

The purpose of the resilient members shown in document A8 is to enable the back rest a reasonable degree of freedom to position itself to conform to the angular disposition of a person's back as one sits in the chair (see paragraph bridging columns 2 and 3 of this document). Thus, whether one sits straight or leans back in the chair, the back rest will assume a position to comfortably support one's back.

In contrast, the problem solved by the claimed resilient members interposed between the shin support and a first transverse member of the elongate frame is to enable a change in the angular position of the shin supporting device, when the standing/sitting device is adjusted in height, so as to allow the chair user to find a comfortable position in this new height adjustment, the feet being held at ground level while the shins remain in contact with the shin supporting device.

It follows that the problem solved by the resilient means in the claimed standing/sitting device and in the known traditional chair of document A8 differ fundamentally from one another. Thus the skilled person would not have considered the teaching of document A8 for solving the problem at hand.

- 6.4 Therefore the Board concludes that there is no suggestion in document A8 as to the provision of resilient means associated with the shin support to enable the necessary change of the angular disposition of the shin support, as the claimed standing/sitting device is lowered or lifted.

In the remaining prior art documents A5, A7, A20 there is likewise no disclosure or suggestion of this teaching.

Consequently, in the Board's judgement, the subject-matter of claim 1 according to the auxiliary request No. 3 involves an inventive step within the meaning of Article 56 EPC.

- 6.5 The subject-matter of claim 1 therefore is patentable within the meaning of Article 52(1) EPC.

Dependent claims 2 to 8 which concern particular embodiments of the invention claimed in claim 1 are likewise allowable.

The adapted description and drawings take account of the requirements of the EPC.

5.6 The Board is thus of the opinion that the grounds for opposition do not prejudice the maintenance of the patent in the amended form according to the auxiliary request No. 3.

Order

For these reasons it is decided that:

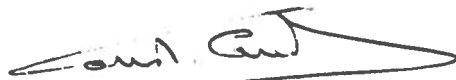
1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent in the following version:
 - claims 1 to 8 of the auxiliary request No. 3 as filed during oral proceedings,
 - description: columns 1 to 4 filed during the oral proceedings,
 - Figures 1 to 13 as granted.

The Registrar:



N. Maslin

The Chairman:



C. Andries

