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The following questions of law shall be referred to the Enlarged Board of Appeal pursuant to Article 112 (1)(a) EPC:

"1. Does it lie within the general powers of the Administrative Council pursuant to Article 33 (1) (b) EPC to change an existing rule of procedure of the Boards of Appeal which it had already enacted pursuant to special powers under Article 23 (4)?

2. If the answer to the above question is 'yes', to what extent, if any, does Article 23 (3) EPC limit the changes which the Administrative Council may so enact?"

REINECKE/Pump

(Opposition by Richter Chemie-Technik)

T752/93

July 16, 1996

Technical Board of Appeal 3.2.4

Andries, Alting van Geusau, Seitz

Opposition procedure—amended Claim 1—patent maintained
—appeal by opponent only—re-widening of Claim 1 on appeal
—reference to Enlarged Board (no)

HEADNOTE

The patent had been maintained in restricted form by the Opposition Division. On appeal solely by the remaining opponent, the Board during the oral proceedings expressed misgivings under Article 123 (2) and (3) in relation to the amended Claim 1. The proprietor thereupon filed a further amended Claim 1, wider than the maintained Claim 1 but more detailed in certain respects than originally granted Claim 1. The appellant in turn requested that the following points of law be submitted to the Enlarged Board.

"1. Is a patent proprietor who is a party to the appeal proceedings as of right (Art. 107, second sentence, EPC) and whose patent has been maintained in a restricted scope, entitled to defend his patent in a broader version even though, by not lodging an appeal, he has indicated that he is in agreement with the restricted version of the granted patent as maintained and has pronounced a partial disclaimer of a more extensive scope of protection?

2. If that is the case, until what time can the party to the appeal proceedings as of right file requests to this effect without committing an abuse of procedure?

3. If that is the case, does such an unnecessarily late filing of a set of claims give rise to an apportionment of costs?"

Held, setting aside the decision of the Opposition Division, ordering maintenance of the patent in the amended version offered during oral proceedings, and refusing reference to the Enlarged Board:

1. An amendment of the kind involved here was not to be automatically rejected since, provided that there was no infraction of Article 123, the granted version of Claim 1 was still to be regarded as the basis for amendment owing to the suspensive effect of the appeal.

2. The amendments made before the Opposition Division should have been refused as not pertinent or necessary, and also doubtful having regard to Article 123 (3).

3. The mere filing by the proprietor during opposition proceedings of an amended version of Claim 1 does not necessarily lead to a disclaimer of the more general protection.

4. There was no inconsistency in the previous case law on the question of whether or not a proprietor who is merely a party to the appeal proceedings can revert to a broader version of the claim maintained by the Opposition Division.

5. Nor did this question amount to an important point of law.

6. The subject-matter of the re-widened version of Claim 1 possessed novelty and inventive step.

Editors' Note

We are grateful to Dr R. Sieckmann of Cohausz Hase Dawidowicz & Partner, Düsseldorf for bringing this extremely interesting decision to our attention.

Provisions of Conventions discussed

EPC Articles 106; 107 (1); 123 (2) and (3)

Cases referred to

G09/92 *BMW/Non-appealing party* [1995] EPOR 169

G04/93 *MOTOROLA* (unpublished)

T61/85 *ICI/Polyester crystallisation* [1988] EPOR 20

T123/85 *BASF/Incrustation inhibitors* [1989] EPOR 476

T369/91 *PROCTER & GAMBLE/Detergent composition* [1993] EPOR 497

Indexed under

Enlarged Board of Appeal—Reference refused

Opposition procedure—Amendment of claim on appeal, re-widening

Technical subject-matter—Pump

Representation

For patentee: H. Schmitt, Freiburg

For opponent: H.B. Cohausz, Düsseldorf

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TEXT OF DECISION

Summary of Facts and Submissions

I. European patent No. 0 268 013 was granted on October 2, 1991 on the basis of European patent application No. 87 108 088.3 filed on June 4, 1987.

II. Opposition against the patent as granted was filed by three former opponents who have since withdrawn their oppositions and by the appellant (opponent 04), revocation of the patent being requested on the grounds of an absence of novelty or inventive step. In support of their submission, the opponents cited the following documents, among others:

D1: SU-A-0 684 679 (with German translation);

D2: DE-A-3 337 086; and

D3: DE-U-8 208 046.

III. By an interlocutory decision issued on June 21, 1993, with the reasoned decision being posted on August 2, 1993, the Opposition Division maintained the contested patent in amended form on the basis of the documents submitted during the oral proceedings on June 21, 1993.

IV. The appellant lodged an appeal against this decision on August 14, 1993, at the same time paying the appeal fee. The Statement of Grounds for the appeal was filed on November 11, 1993.

V. Oral proceedings were held on July 16, 1996.

(i) The appellant requested that the decision under appeal be set aside and the patent revoked or, failing that, that the points of law submitted during the oral proceedings be referred to the Enlarged Board of Appeal.

These points of law are worded as follows:

It is suggested that, in view of the inexhaustive nature of the statements in earlier Enlarged Board of Appeal Decisions G04/93¹ and G09/92,² which conflict with Decisions T369/91³ and T61/85,⁴ the following questions be referred to the Enlarged Board:

1. Is a patent proprietor who is a party to the appeal proceedings as of right (Art. 107, second sentence, EPC) and whose patent has been maintained in a restricted scope, entitled to defend his patent in a broader version even though, by not lodging an appeal, he has indicated that he is in agreement with the restricted version of the granted patent as maintained and has pronounced a partial disclaimer of a more extensive scope of protection?
2. If that is the case, until what time can the party to the appeal proceedings as of right file requests to this effect without committing an abuse of procedure?
3. If that is the case, does such an unnecessarily late filing of a set of claims give rise to an apportionment of costs (Art. 104 (1), Rule 63 (1) EPC)?

All other previous requests were withdrawn by the appellant.

(ii) During the oral proceedings, the Board having expressed misgivings about the version as maintained by the Opposition Division (Art. 123 (2) and (3) EPC), the respondent (patent proprietor) filed new Claims 1 to 10 and, in a single request, asked for the decision under appeal to be set aside and the patent maintained with these new claims.

The current Claim 1 is worded as follows:

1. A pump (S), the drive of which has an inner turning portion (4) and an outer drive portion (3) magnetically coupled therewith, the outer drive portion and inner turning portion (4) being kept hermetically separate from each other by means of a split tube which is double-walled at least axially in sections, and the split-tube wall interior (10) surrounded by the concentrically disposed tube walls (14, 21) having a display medium, an

¹ *MOTOROLA* (unpublished).

² *BMW/Non-appealing party* [1995] EPOR 169.

³ *PROCTER & GAMBLE/Detergent composition* [1993] 497.

⁴ *ICI/Polyester crystallisation* [1988] EPOR 20.

indicator (37, 37b) or the like being impinged upon in the event of damage to at least the inner double-walled wall section, as a result of which a wall leak in the double-walled split-tube section can be displayed on the outside of the device, *characterised in that* the inner turning portion (4) is separated from the outer drive portion (3) by means of a split-tube container (7) having at least one axial continuous wall interior (10), the base (49) of the split-tube container being of a double-walled design (13, 34) at least in sections, and the container-base wall interior (33) thereof communicating in a display with the wall interior (10) of the axial split tube (9), and in that a gaseous or liquid display medium or a signal film is provided as display medium in the axially continuous wall interior (10) of the split-tube container (7) and in the container-base wall interior (33), the distance (d) between the tube walls (14, 21) just allowing the gaseous or liquid display medium through.

VI. In so far as the appellant's statements in support of his request are still relevant in the light of the new documents, they can be summarised as follows:

Although the current Claim 1 met the requirements of Article 123 (2) and (3) EPC, this claim had been amended by comparison with the version of Claim 1 as maintained in the opposition proceedings so as to restore earlier features for which a partial disclaimer had been pronounced. The object of the present appeal proceedings was solely to decide whether the patent as maintained in a restricted scope could stand. The rights of the patent proprietor, who was merely a party to the appeal proceedings as of right, were therefore limited to a defence of the restricted version of Claim 1 as maintained and of the corresponding dependent claims. This therefore ruled out a return to an earlier, more general version.

If the proposed amendments to the claim as maintained by the Opposition Division were to be admitted, it was requested that the questions in the auxiliary request submitted during the oral proceedings be referred to the Enlarged Board of Appeal.

The subject-matter of the patent was novel.

From documents D1 and D2, the skilled person knew of split-tube containers which were of a double-walled design and which, according to D1, also had a display medium with an indicator to indicate any damage to the container walls.

The split tube according to D2 was also of a double-walled design in the base region and, since there had to be a fluid (air or, in the event of a leak in the plastic material, an emerging pumping medium) between the plastic inner wall and the outer metal wall, the skilled person needed only to apply the teaching of a display on the outside of the device, as known from D1, to arrive at the subject-matter of Claim 1 in an obvious manner. Furthermore, the double-walled design of upright containers or double-walled pipework in conjunction with a leakage display was already common knowledge among experts in the field.

Combining the teachings of D3 and D2 also led to the subject-matter of the patent in an obvious manner. D3 likewise described a two-walled split tube which could be designed according to D2 to reduce drive losses and yet achieve the most compact container design possible, thus leading directly to the pump as claimed in Claim 1 of the contested patent. Since the subject-matter did not involve an inventive step, the contested patent therefore had to be revoked.

VII. The respondent contradicted the appellant's submission with the following main points:

Although, in Decision G09/92, the Enlarged Board found that the patent proprietor's response to the appeal by the opponent alone was primarily restricted to defending the patent in the version on which the Opposition Division based its interlocutory decision, the Enlarged Board expressly failed to rule out the possibility of allowing amendments which were pertinent or otherwise necessary. In the present case, Claim 1 as held grantable by the Opposition Division was amended, in particular to conform to the formal requirements (Art. 123 EPC). Amendments of this kind were to be regarded as pertinent.

By contrast with what the appellant alleges, a wall interior between the plastic container on the one hand and its casing on the other was not provided in D2. Furthermore, the problem underlying D2, namely to stabilise the shape and position of the split-tube container, had nothing to do with a leakage display.

D1 was likewise unable to convey any information to lead the skilled person towards the subject-matter of the patent. The split tube known from D1 was of a double-walled design merely over an axial section and was also fitted with magnetic-flux-conducting bridges in this region, a fact which prevented there being a short distance between the split-tube walls. Neither a disclosure of nor a reference to the use of a double-walled split tube for leakage display could be inferred from D3.

Reasons for the Decision

1. The appeal is admissible.

2. Amendments

2.1 The present Claim 1 contains all the features of Claim 1 as granted. The pre-characterising clause of the claim now describes in more detail the concentric disposition of the tube walls and the split-tube interior surrounded thereby, as can be found in the description of the embodiments in the original application documents. The characterising clause of the current Claim 1 now states that a gaseous or liquid display medium or a signal film is provided as display medium in the axially continuous wall interior (10) of the split-tube container (7) and in the container-base wall interior (33), the distance (d) between the tube walls (14, 21) just allowing the gaseous or liquid display medium through.

These features are based on page 5, line 12, to page 7, line 11, and page 10, lines 1 to 4, respectively, of the description as originally filed.

Dependent Claims 2 to 10 are substantially repetitions of Claims 2 to 8 and 10 and 11 as granted.

The amendments therefore conform to the requirements of Article 123 (2) and (3) EPC.

The Board would also like to point out that Article 123 (3) EPC relates to the claims of the European patent, that is to say the wording of the patent claims *as granted*, and not to the version as maintained by the Opposition Division.

2.2 The amendments to the description (cols. 1–11) merely amount to necessary adjustments in the light of the new claims, and the correction of a few obvious errors, to which there is likewise no objection.

2.3 According to the appellant, the amendments to the version of Claim 1 held to be grantable by the Opposition Division, in particular the return to the wording of the first characterising feature of the version as granted, were not admissible in the light of the case law, including Enlarged Board of Appeal Decision G09/92⁵ (O.J. EPO 1994, 875) and Decisions T369/91⁶ and T61/85.⁷ If the amendments were to be allowed, the three points of law submitted during the oral proceedings were to be referred to the Enlarged Board.

Likewise, according to the appellant, in a case where the opponent was the sole appellant against an interlocutory decision, a patent maintained by the Opposition Division without due regard for Article 123 (2) and (3) EPC cannot continue to stand, since the necessary amendments can no longer be allowed in such a case (Enlarged Board Decision G09/92).

2.4 The Board does not consider that Decision G09/92, which incidentally already took account of Decision T369/91, constitutes a basis for a general prohibition on returning from the wording of a feature as amended in the opposition proceedings to the wording thereof in the claims as granted.

According to Decision G09/92, in a case where the opponent is the sole appellant against an interlocutory decision to maintain the patent in amended form, the patent proprietor is primarily restricted to defending the patent in that wording. Amendments proposed by the patent proprietor as a party to the appeal proceedings as of right (Art. 107, second sentence, EPC) may be rejected by the Board at that time if they are neither pertinent nor necessary, in other words not occasioned by the appeal. The Board cannot construe this as a general prohibition.

The Board would like to point out that, although a non-appellant patent proprietor is a party to the proceedings as of right (Art. 107, second sentence, EPC), he does not have the same status as other non-appellant parties since he is the only party to the proceedings as of right (Art. 107, second sentence, EPC) who can propose amendments to the claims. Decisions G09/92 and G04/93⁸ outline the situation where a Board can reject proposed amendments of this kind from a non-appellant patent proprietor. Proposed amendments which, as in the present case (see point V(ii)), are based on the version as maintained and take account of the appeal lodged, in particular the significant bars to patentability alleged, can therefore be deemed admissible by the Board and are not to be automatically rejected.

5 *BMW/Non-appealing party* [1995] EPOR 169.

6 *PROCTER & GAMBLE/Detergent composition* [1993] EPOR 497.

7 *ICI/Polyester crystallisation* [1988] EPOR 20.

8 *MOTOROLA* (unpublished).

Although the patent proprietor (that is to say, the respondent) must primarily defend the version as maintained, he should nevertheless be able to correct any defective amendments identified in the further course of the procedure. This not only means permitting an amendment in the form of a necessary restriction of the independent claim as maintained in the opposition proceedings, but, subject to the same requirements (that is to say, the amendment must be pertinent and necessary), it also means permitting an amendment in the form of an extension of the claim as maintained and as submitted to the Board, particularly in order to avoid infringing Art. 123 (2) and (3) EPC. An amendment of this kind is not, therefore, to be automatically rejected, always provided that the protection conferred by the claim produced by such an amendment does not extend the protection conferred by the claim as granted (Art. 123 (3) EPC) since, while the appeal proceedings are in progress, the version as granted is still to be regarded as the basis for amendment (if necessary and pertinent) owing to the suspensive effect of the appeal (Arts. 106 (1) and 123 (3) EPC).

In the present case, an amendment which was made during the opposition proceedings and which the patent proprietor considered and intended to be identical in substance to the corresponding amended part of the version as granted and, on that ground alone, should have been refused by the Opposition Division as not pertinent or necessary, and which, furthermore, was also doubtful within the terms of Art. 123 (3) EPC, was reversed in the appeal proceedings. The other amendments made in the appeal proceedings were concerned with the “display medium” features added during the opposition proceedings. On the one hand, these amendments remedied the possible combinations of the display media stated, which were defective within the terms of Art. 123 (2) EPC, but, on the other hand, they left in the claim the “display medium” feature which had been added during the opposition proceedings.

These amendments to the version as maintained thus related only to features to which the appellant objected in the appeal proceedings on the basis of Art. 123 (2) and (3) EPC. Only the features objected to (the first characterising feature and the second- and third-to-last characterising features) were amended so as to eliminate the objections put forward in the appeal.

The features were not simply deleted but adjusted, not only to reverse an extension of protection beyond the version as granted, as alluded to by the appellants, in other words to restrict the version as maintained, but also to alter a restriction of the version as granted from one which was not allowable under Art. 123 (2) EPC to a similar but allowable restriction which also amounted to a restriction of the version as maintained. The position of the sole appellant has not therefore deteriorated; nor is it clear, therefore, which features now allegedly appear in the claim even though, as the appellant believes, they have been disclaimed. In the Board's view, amendments of this kind are therefore undoubtedly “pertinent” and even “necessary” and cannot be rejected by the Board on the basis of point 16 of Decision G09/92.

The mere filing of an amended Claim 1 in the opposition proceedings does not, as the appellant alleged, always and automatically result in a disclaimer by the patent proprietor in respect of more general versions of the claim. Board of Appeal case law does not provide for this (see, e.g., T123/85,⁹ O.J. EPO 1989, 336). Furthermore, as stated above, in the present case there can be no question of a feature inserted in Claim 1 during the opposition proceedings having simply been deleted, and no clear and unequivocal disclaimer is in evidence. Since, in the Board's view, the present claim has also been further restricted by comparison with the claim as maintained, the Board cannot indorse the appellant's conclusions based on the argument of a "disclaimer".

Moreover, it would not be equitable, nor is it justified under the EPC, to bar the respondent from disassociating himself from a version of Claim 1 which the Board held was defective within the terms of Article 123 (2) or (3) EPC.

Apart from the fact that Enlarged Board of Appeal Decisions G09/92 and G04/93 already took account of Decision T369/91 (O.J. EPO 1993, 561) and the legal position expounded therein has therefore been superseded, T369/91 is concerned with a direct request to return to the version as granted. That is not the case here, since the version as maintained was initially defended and the amendments arose from that defence. T369/91 therefore has no bearing on this case.

The same applies to Decision T61/85, also cited by the appellant but concerned with the procedure up to grant and a totally different situation.

2.5 As the deliberations of points 2.3 and 2.4 show, given the existence of Enlarged Board Decisions G09/92 and G04/93, in this case there is no question of inconsistency in the case law on the question of whether a patent proprietor who is merely a party to the appeal proceedings as of right may defend his patent in a broader, amended version; nor is that the situation here. Furthermore, in the Board's view, this is not an important point of law, and it therefore sees no reason to grant the appellant's auxiliary request that questions be referred to the Enlarged Board.

3. Novelty

...

4. Inventive step

...

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is referred back to the first instance with the order to maintain the patent in the following version:

⁹ BASFI/Incrustation inhibitors [1989] EPOR 476.

Claims:

1 to 10 in accordance with main request, as submitted during the oral proceedings on July 16, 1996;

Description and drawings:

as submitted during the oral proceedings on June 21, 1993 (cols. 1-11 and Figs. 1-9).

3. The request that questions be referred to the Enlarged Board of Appeal is rejected.

Aktenzeichen: T 0752/93 - 3.2.4
Patent Nr.: 0 268 013
Patentinhaberin: Reinecker, Heyko
Einsprechende: 04) Richter Chemie Technik GmbH

PROTOKOLL

über die öffentliche mündliche Verhandlung
der Technischen Beschwerdekammer 3.2.4
am 16. Juli 1996

Zusammensetzung der Kammer:

Vorsitzender: C. Andries
Mitglieder: P. Alting Van Geusau
J. P. Seitz

Beginn der mündlichen Verhandlung: 09.10 Uhr
Schluß der mündlichen Verhandlung: 12.15 Uhr

Es wurden überreicht: Von Beschwerdeführerin
(Einsprechende 04):

1) Hilfsantrag:

Vorlage an die Große Beschwerde-
kammer (Anlage 1)

Von Beschwerdegegnerin
(Patentinhaberin):

2) Hauptantrag:

Ansprüche 1 bis 10 (Anlage 2).

Für die Beschwerdeführerin (Einsprechende 04) war anwesend:
Dr. R. Sieckmann, bevollmächtigt aufgrund Vollmacht vom
5. Juni 1996, ausgewiesen durch Ausweis.

Für die Beschwerdegegnerin (Patentinhaberin) war anwesend:
Herr H. Börjes-Pestalozza, Rechtsanwalt, ausgewiesen durch
Ausweis und in Begleitung von Dr. R. Krämer (Geschäftsführer,
Hermetic-Pumpen GmbH).

Der Vorsitzende eröffnete die mündliche Verhandlung.

Er trug den wesentlichen Inhalt der Akten vor.

Anschließend erhielten die Beteiligten das Wort.

Die Sach- und Rechtslage wurde mit ihnen erörtert.

Die Beschwerdeführerin (Einsprechende 04) beantragte die
Aufhebung der angefochtenen Entscheidung und den Widerruf des
europäischen Patents Nr. 268 013, und als Hilfsantrag die
während der mündlichen Verhandlung eingereichten Fragen der
Großen Beschwerdekammer vorzulegen (siehe Anlage 1).

Die Beschwerdegegnerin (Patentinhaberin) beantragte, die
Aufhebung der angefochtenen Entscheidung und die Aufrecht-
erhaltung des Patents mit den während der mündlichen
Verhandlung eingereichten Patentansprüchen 1 bis 10.

Sodann erklärte der Vorsitzende die sachliche Debatte für
beendet.

Nach Beratung der Kammer verkündete der Vorsitzende folgende
Entscheidung:

- 1) Die angefochtene Entscheidung wird aufgehoben.
- 2) Die Angelegenheit wird an die erste Instanz mit der
Anordnung zurückverwiesen, das Patent mit folgender
Fassung aufrechtzuerhalten: