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D E C I S I O N
of 10 April 2003

Case Number: T 0521/00 - 3.2.3

Application Number: 93904467.3

Publication Number: 0626886

IPC: B03C 3/38

Language of the proceedings: EN

Title of invention:

A two-stage electrostatic filter

Patentee:

TL-VENT AB

Opponent:

Purocell Holding SA

Headword:

-

Relevant legal provisions:

EPC Art. 83, 84, 100(a)(b)(c), 111(1), 114
EPC R. 55(c), 67

Keyword:

"Admissibility of opposition (yes)"
"Reimbursement of the appeal fee (no)"

Decisions cited:

T 0234/86, T 0134/88, T 0065/00, G 0009/91, G 0010/91

Catchword:

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Case Number: T 0521/00 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 10 April 2003

Appellant: Purocell Holding SA
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Respondent: TL-VENZ AB
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 26 April 2000
rejecting the opposition filed against European
patent No. 0 626 886 pursuant to Rule 56(1) EPC
as inadmissible.

Composition of the Board:

Chairman: U. Krause
Members: M. K. S. Aúz Castro
F. E. Brösamle

Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 0 626 886 B1 in respect of European patent application No. 93 904 467.3, filed on 19 February 1993, claiming priority from an earlier application in Sweden (9200515 of 20 February 1992) was published on 16 April 1997 (Bulletin 1997/16) on the basis of 19 claims, claim 1 reading as follows:

"A two-stage electrostatic filter comprising an ionization section which is disposed in an upstream part of a throughflow passage and includes an ionization chamber (29,129) in which there is mounted at least one elongated, preferably wire-like corona electrode (31, 131) which is connected to one pole of an electrical high voltage source, and a target electrode which is spaced from the corona electrode and connected to another pole of the high voltage source, a capacitor separator which is located in a downstream part of the throughflow passage and includes a first and a second group of electrode elements (32, 33; 132, 133) which are arranged side by-side in spaced-apart relationship, the electrode elements of the first group being disposed alternately with the electrode elements of said second group and intended to lie on a different potential than the electrode elements of said second group, characterised in that the ionisation chamber (29, 129) accommodates a target electrode surface (37, 137; 21, 121; 132, 133) which is disposed both upstream and downstream of the corona electrode (31, 131); and the distance of the corona electrode (31, 131) from the target electrode surface, when measured perpendicularly

to the upstream-downstream direction of the throughflow passage (28, 128) and the longitudinal direction of the corona electrode, is at least four times the distance between neighbouring electrode elements (32, 33; 132, 133)."

II. On 14 January 1998 a notice of opposition was filed, in which revocation of the patent in its entirety was requested on the grounds set out in Article 100(a), (b) and (c) EPC.

In the notice of opposition 20 documents were cited under the heading "1. Facts and Evidence". Facts were not referred to.

Under the heading "2. Novelty" D17, D18, D1 and D19 were merely cited against claim 1, furthermore in parenthesis D16 with the remark "statement as to the distances".

With regard to inventive step the allegations were also restricted to mere citations of various documents in combination with others.

The objection pursuant to Article 100(b) EPC was based on the following points:

- only the target electrodes with the reference signs 37/137 fulfil the two criteria specified in claim 1, whereas the electrodes with reference signs 21, 121; 132, 133 do not;
- all claims referring to electrodes of claim 1 which do not fulfil the criteria specified in claim 1 cannot refer to claim 1;

- claim 1 in view of no limitations specified in the description is so broadly worded that it offends against Article 100(b) EPC;
- the same objection of being too broadly worded applies to dependent claims 14, 18 and 19;
- there is no support for claim 19 in the priority application.

No arguments were presented with regard to Article 100(c) EPC.

III. By decision announced on 20 March 2000 and issued in writing on 26 April 2000 the opposition division rejected the opposition as inadmissible. In view of Article 100(a) EPC it held that there was no specific guidance as to what particular statements in the cited documents were considered to destroy novelty or to form the basis for an argument on obviousness; that furthermore there was no reasoning why the numerous documents should destroy novelty or should suggest any lack of inventive step. With regard to these grounds the notice of opposition was held to be not substantiated. The objections raised under Article 100(b) EPC were considered to concern all Articles 84 or 87 EPC with the consequence that there were no facts, evidence and arguments presented with regard to opposition ground under Article 100(b) EPC. Therefore, no opposition ground was substantiated.

- IV. On 6 June 2000 the opponent (appellant) lodged an appeal against the above decision and paid the prescribed fee simultaneously. The statement setting out the grounds of appeal was received on 25 August 2000.
- V. With the summons to oral proceedings held on 10 April 2003 the board informed the parties of its preliminary assessment of the case confirming the opposition division's evaluations.
- VI. The arguments of the appellant submitted in writing and orally and referring only to the opposition grounds of lack of novelty and lack of sufficient disclosure can be summarised as follows:

- (a) With regard to novelty it has primarily to be pointed out that decision T 0234/86 in its point 2.3 considered a document of 6½ type written pages short. Given the shortness of the document it was concluded that there was no need to indicate where precisely the claimed disclosure was made.

In the case under consideration all the cited documents are also short. D17 is a short document of 8 pages, likewise is D18 with its Figure 3.1 from which the skilled person understands at once that it represents an electrostatic filter.

In D1 the printed pages correspond to 5 to 6 type written pages and the man skilled in the art will find all the relevant features, perhaps without those concerning the distance. In D19, also a

short document, some features of the claimed invention might be missing, but this has no bearing on the admissibility of the opposition.

D16, only one page long, indicated implicitly that the device was put on the market and can be understood without further argumentation.

To sum up all documents are short and pertinent, perhaps not completely novelty destroying.

- (b) As far as the opposition ground of Article 100(b) EPC is concerned the opposition division has confused examination of the admissibility of the opposition and the examination of the opposition ground as to substance. The reasoning in the decision regarding Articles 83 and 84 EPC is in fact an assessment that the ground pursuant to Article 100(b) EPC is not convincing and hence has nothing to do with admissibility.

The opposition division has thus performed a substantial procedural violation.

Furthermore it is disagreed with the assessment of the opposition division that the first two points of the objections pursuant to Article 100(b) EPC (see above point II) concern Article 84 EPC rather than Article 83 EPC for the following reasons:

the target electrode surface defined by claim 1 **only** includes the electrodes 37; the description, see EP-B1-0 626 886, states in column 15, lines 16 to 19 that the electrodes 37 are only **optional**; and the target electrode surfaces as claimed by

claims 3 to 5 include electrodes 21 and 33, even though they were **excluded** from the target electrode surface of claim 1. Due to these contradictions, the skilled person is completely at a loss how to perform the invention.

Finally, it is referred to decision T 0065/00 point 2.1.3 where it is stated that "it is ... irrelevant whether the arguments brought forward by the opponent refer to Articles 84 or 83 EPC. For admissibility of the appeal (correctly "opposition" instead of "appeal") it is sufficient "that the arguments are such that an arguable case is established."

In the present case an arguable case has also been established with regard to Article 100(b) EPC.

VII. The appellant requested that the decision under appeal be set aside and that the opposition be deemed admissible as well as reimbursement of the appeal fee.

The respondent did not participate in the appeal proceedings and did not forward any request. It was also not represented in the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. The admissibility of the opposition being an indispensable procedural requirement for any substantive examination of the opposition submissions

has to be checked *ex officio* in every phase of the opposition and ensuing appeal proceedings.

In the case under consideration the appellant had based its opposition on Article 100(a) EPC - lack of novelty and inventive step, as well as on Article 100(b) EPC - insufficient disclosure and Article 100(c) EPC inadmissible extension. It did not challenge the opposition division's findings that it had not substantiated the grounds pursuant to Article 100(a) and (c) EPC as required by Rule 55(c) EPC according to which the notice of opposition must indicate the facts, evidence and arguments in support of the respective opposition ground.

3. With regard to lack of novelty pursuant to Article 100(a) EPC the appellant yet argued that claim 1 of the patent in suit was easily understandable and the documents cited against claim 1 would be immediately understood by the proprietor and the opposition division as novelty destroying. No further argumentation would be needed.

- 3.1 The board cannot follow this line of argumentation.

The question here is not whether the proprietor of the patent and the opposition division can for themselves evaluate whether a cited document is novelty destroying. The question is rather whether the appellant complied with the requirement of Rule 55(c) EPC when basing its opposition on Article 100(a) EPC. The notice of opposition must under all circumstances contain an indication of facts, evidence and arguments related to the alleged opposition ground. Only then arises the question whether the proprietor and the

opposition are in a position to understand, without undue burden, the case that is being made against the opposed patent in the notice of opposition. Since in the case under consideration apart from the enumeration of documents no indication of facts, evidence and arguments with regard to lack of novelty was presented, the starting point was already missing and thus the question whether an arguable case had been established by the appellant could not even arise.

3.2 Finally, decision T 0234/86, on which the appellant relies is not pertinent here for the following reason: in the case which led to this decision, four documents were cited against the opposed patent and with regard to all documents it was indicated what the opponent considered to be known, from which document. With regard to three documents it was also indicated where precisely in the document the claimed disclosure was to be found. Only with regard to one document the place of the claimed disclosure was not indicated and this was considered not to be necessary given the shortness of the document. The conclusion that with regard to three documents there was a complete substantiation is drawn by the board from the fact that the patentee criticised only one document as not immediately recognisable as appropriate. Had there been more he would not have left them out.

Therefore, the case of T 0234/86 cannot be compared to the one under consideration because in T 234/86 the opposition ground pursuant to Article 100(a) EPC was substantiated whereas here this was not the case.

Thus the board concurs with the opposition division that the grounds pursuant to Article 100(a) EPC are not substantiated.

4. It remains to be evaluated whether the alleged opposition ground of insufficient disclosure pursuant to Article 100(b) EPC has been substantiated in the notice of opposition.

4.1 The appellant has invoked decision T 0065/00, point 2.1.3 where it is stated that for the admissibility of the opposition, it is sufficient that the arguments are such that an arguable case is established it being irrelevant whether the arguments brought forward by the opponent refer to Article 84 EPC or Article 83 EPC. This board admits that this statement would cover the case under consideration, but cannot concur with it. According to this board the mere establishment of an arguable case would not comply with Rule 55(c) EPC which requires that the indication of facts, evidence and arguments be presented in support of the alleged opposition grounds. This provision should not be undermined by lowering its requirements all the more on account of the fact that the Enlarged Board has stressed its significance in Decision G 009/91 (OJ EPO 1993, 408) and Opinion G 0010/91 (OJ EPO 1993, 420). This board rather follows decision T 0134/88, where in point 3 it is found that allegations which cannot be subsumed under one of the opposition grounds have to be left out of consideration.

4.2 This question is, however, no longer of pertinent importance, since the board has been convinced by the arguments of the appellant, that the appellant's

allegation in its notice of opposition, point 3, that "all claims referring to the electrodes of claim 1 and specifying electrodes placed only upstream or downstream of the corona wire and perpendicular to the air flow cannot refer to claim 1" constitutes an argument in support of the opposition ground pursuant to Article 100(b) EPC and is not merely an objection that reference signs have been used incorrectly in the claims and that by disregarding them pursuant to Rule 29(7) EPC the claims would become understandable.

The allegation that due to the contradiction between claim 1 and claims 3 to 5 the invention cannot be performed is an argument which could establish an obstacle to the maintenance of the patent, if it were true.

- 4.3 Therefore, the substantiation with regard to Article 100(b) EPC has to be acknowledged which renders the opposition as a whole admissible. A concept of partial admissibility of oppositions is not foreseen in the EPC.
5. Since the opposition has been rejected as inadmissible and thus no examination of the requirements as to substance has yet been performed by the opposition division, the board considers it appropriate to remit the case for further prosecution, in agreement with the request of the appellant (Article 111(1) EPC, second sentence).

In the further proceedings the opposition division, apart from examining whether indeed there is no sufficient disclosure of the invention in question, will have to examine whether to consider also one or

the other opposition ground alleged by the appellant but not substantiated because they are, *prima facie*, relevant. (See decision G 0009/91 and Opinion G 0010/91, *supra* point 16).

6. The appellant, furthermore, requested reimbursement of the appeal fee. Pursuant to Rule 67 EPC reimbursement of the appeal fee shall be ordered where an appeal is deemed allowable if such reimbursement is equitable by reason of a substantial procedural violation.

As already explained in the communication, no substantial procedural violation in the first instance proceedings can be detected by the board. The opposition division subsumed the appellant's allegations with regard to Article 100(b) EPC wrongly under Article 84 EPC which constitutes an error in judgement and not a procedural violation.

Already for this reason the request cannot succeed.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of the first instance for further prosecution.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

A. Counillon

U. Krause