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D E C I S I O N
of 21 May 2003

Case Number: T 1062/01 - 3.2.5

Application Number: 93120184.2

Publication Number: 0607574

IPC: B41F 31/02

Language of the proceedings: EN

Title of invention:
Fountain assembly

Patentee:
FIT Group, Inc.

Opponent:
Tresu A/S

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 104(1), 123(2)
Art. 11(3) Rules of Procedure of the Boards of Appeal

Keyword:
"Novelty (yes)"
"Inventive step (main request and first, third and fourth auxiliary requests, no)"
"Addition of subject-matter (second auxiliary request, yes)"
"Different apportionment of costs (no)"
"Oral proceedings in the absence of the appellant"

Decisions cited:
T 0323/89

Catchword:
-



Case Number: T 1062/01 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 21 May 2003

Appellant: FIT GROUP, INC.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 27 July 2001
revoking European patent No. 0607574 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: W. Moser
Members: P. E. Michel
H. M. Schram
K. Poalas
S. U. Hoffmann

Summary of Facts and Submissions

- I. The appellant (patentee) lodged an appeal against the decision of the Opposition Division revoking European patent No. 0 607 574.

Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty, Article 54 EPC, and inventive step, Article 56 EPC).

The Opposition Division held that the subject-matter of claim 1 of each of the requests of the appellant was either not novel or did not involve an inventive step in view of an alleged prior use.

- II. Oral proceedings were held before the Board of Appeal on 21 May 2003.

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the following documents:

- (a) main request: patent in suit as granted; or
- (b) claim 1 filed as auxiliary request 1 on 17 April 2003; or
- (c) claim 1 filed as auxiliary request 2 on 17 April 2003; or
- (d) claim 1 filed as auxiliary request 3 on 17 April 2003; or

(e) claim 1 filed as auxiliary request 4 on 17 April 2003.

The respondent (opponent) requested that the appeal be dismissed. He further requested a different apportionment of costs.

III. Whilst the appointment of oral proceedings was requested by the appellant, it was subsequently indicated on 15 May 2003 that the appellant would not be represented at the oral proceedings appointed for 21 May 2003. With a communication issued on 16 May 2003, the Board informed the parties that, in accordance with new Article 11(3) of the Rules of Procedure of the Boards of Appeal, which entered into force on 1 May 2003, the "Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case". No reply to this communication was received.

IV. Claim 1 of the main request of the appellant reads as follows:

"A fountain assembly for applying a fluid composition uniformly to the circumferential surface of a rotating transfer roller comprising:

- (a) an elongated frame having a concave channel formed on one side of said frame along the length thereof,
- (b) a pair of doctor blades removably attached by clamping means on opposite sides of said channel and extending the length of said channel, said blades being

positionable to contact the circumferential surface of the transfer roller; and

(c) a pair of radial surface seals secured to said frame at opposite ends of said cavity, said radial surface seals being positioned to form a resilient bulkhead with the ends of said doctor blades, said radial surface seals having a complementary curved edge for forming a sealing engagement with the circumferential surface of the transfer roller; and

(d) said radial surface seals, doctor blades and concave channel forming a closed chamber when positioned against the transfer roller; and

(e) pivoting support means bearing said fountain assembly, said support means being capable of alternately swiveling said frame toward and away from said transfer roller; and

(f) means for providing a supply of a fluid composition into said channel; characterized by a plurality of washing nozzles disposed along said channel capable of spraying a washing solution to said channel; internal manifold means within said frame for directing a washing fluid to said nozzles; and means for dispensing a controlled amount of a washing solution under pressure through said manifold and said nozzles."

In claim 1 of the first auxiliary request of the appellant, the expression "at least one supply port within said frame for supplying washing solution within said internal manifold means within said frame;" is introduced after the expression "for directing a washing fluid to said nozzles;" in the characterising portion of claim 1 of the main request.

In claim 1 of the second auxiliary request of the appellant, the term "entirely" is introduced before the expression "within said frame" in the characterising portion of claim 1 of the main request.

In claim 1 of the third auxiliary request of the appellant, the expression ", and wherein said nozzles meet said internal manifold means at points within said frame" is introduced at the end of claim 1 of the main request.

Claim 1 of the fourth auxiliary request of the appellant differs from claim 1 of the first auxiliary request of the appellant by the addition of the expression "; and a rigid reinforcing brace fixed along substantially the entire length of said frame on an outer side thereof opposite said channel" at the end of the claim.

V. In the written procedure, the appellant argued essentially as follows:

The subject-matter of claim 1 according to the main request is distinguished over the prior used device in that the manifold is within the frame. In particular, the washing solution is completely within the body and does not touch the planar face of the rigid reinforcing brace, as shown in a drawing depicting an internal manifold and entitled "Autoflex Doctor Blade Chamber" filed by the appellant on 17 April 2003. No seal is therefore required between the rib and the frame.

In the prior used device, the washing solution distribution tubing is within a rib on the back of the frame and hence external of the frame.

The apparatus of the patent in suit has the advantage of more efficiently and uniformly distributing washing solution to all of the nozzles and there are no tubing to nozzle connections which may leak.

The subject-matter of claim 1 according to the first to fourth auxiliary requests is further distinguished over the prior used device by the addition of features which are new and involve an inventive step having regard to the prior art.

VI. In the written and oral procedure, the respondent argued essentially as follows:

The subject-matter of claim 1 of the main request lacks novelty in the light of the prior use as established by the witness Mr Sarazen in the oral proceedings before the Opposition Division. The term "frame" as used in claim 1 refers to the frame assembly comprising the frame and the reinforcing rib. As can be seen from Figures 6 and 8 of the patent in suit, there is no longitudinally extending passage formed within the frame. The passage connecting the cleaning solution supply port with the spray nozzles is defined between planar surfaces of the frame and the brace and manifold seals 46.

If the subject-matter of claim 1 of the main request were to be regarded as being novel, it would not involve an inventive step, since both the arrangement

of the prior art and that of the patent in suit require seals between the frame and the brace.

The arguments as to lack of novelty and inventive step also apply to the claims of the auxiliary requests, since the additional features of these requests are also known from the prior used device.

There is no disclosure in the application as filed of "at least one supply port" as specified in claim 1 of the first and fourth auxiliary requests. The passage at column 10, lines 50 to 52, refers only to a plurality of supply ports. There is also no disclosure of the term "within" as used in the expression "at least one supply port within said frame for supplying washing solution within said internal manifold means within said frame".

There is no disclosure in the application as filed of internal manifold means which is "entirely" within the frame as specified in claim 1 of the second auxiliary request.

A different apportionment of costs should be awarded in view of the late introduction of the four auxiliary requests at a stage in the appeal proceedings which did not allow the Board to issue a provisional opinion. The only request for oral proceedings came from the appellant. The situation thus corresponds to that underlying decision T 323/89 (OJ EPO 1992, 169).

Reasons for the Decision

1. *Procedural matter*

In accordance with new Article 11(3) of the Rules of Procedure of the Boards of Appeal, which entered into force on 1 May 2003, the "Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case". New Article 11(3) of the Rules of Procedure of the Boards of Appeal was published in the Official Journal (OJ) of the EPO in February 2003 (see OJ EPO 2003, 65). Furthermore, the parties were informed of its content prior to the oral proceedings (cf. point III above). The oral proceedings before the Board duly took place in the absence of the appellant and, at the conclusion of the oral proceedings, the decision of the Board was announced.

2. *Main request*

2.1 Novelty

Claim 1 of the patent in suit specifies the presence of "internal manifold means within said frame for directing a washing fluid to said nozzles".

Contrary to the submission of the respondent, the Board is of the opinion that the term "frame" as used in the claim must be construed in the light of the description to refer to the fountain body or frame 2 alone and not to the assembly comprising the frame together with the

reinforcing brace 4. There is no passage in the description of the patent in suit in which the term "frame" is used to refer to the combination of the frame and the brace.

In addition, the term "internal manifold means" is to be construed as referring to the cleaning inlet supply port, the passages leading to the spray nozzles and the longitudinally extending passage which connects the cleaning inlet supply port to the passages leading to the spray nozzles.

In the illustrated embodiment of the patent in suit, the internal manifold 44 comprises bores formed in the frame 2 which connect a cleaning solution supply port 48 to an elongate passage extending the length of the frame, which in turn is connected by further bores to spray nozzles 42 disposed in the channel 6. The elongate passage is defined between the frame 2 and the planar face of a rigid reinforcing brace 4. This construction is shown in Figure 5 of the patent in suit. Insofar as the brace merely defines a planar wall of the elongate passage extending the length of the frame, the internal manifold can be regarded as being within the frame.

It may be noted that the internal manifold 19 shown in Figure 10 of the patent in suit, and referred to by the appellant in the grounds of appeal, is for supplying a lubricant and has no connection with the cleaning solution supply system.

According to paragraph 2 of the "Reasons" of the decision of the Opposition Division, a fountain assembly described by the witness, Mr Sarazen, as set out in the minutes of the oral proceedings before the Opposition Division, and illustrated in a drawing (cf. Annex 2 of the minutes, hereinafter referred to as Annex 2), was made available to the public before the priority date of the patent in suit. This was not contested by the appellant in the appeal proceedings, and the Board sees no reason to depart from this finding.

In the prior used arrangement, the internal manifold for the washing fluid also comprises an elongate passage extending the length of the frame, and bores connecting the channel to spray nozzles. However, the elongate passage is defined between a channel formed in a reinforcing rib and a planar face of the frame as can be seen in Annex 2. In addition, the supply port 14 is formed in the reinforcing rib as shown in the lower of the two sketches forming Annex 2. The manifold of the prior used arrangement is thus not within the frame.

Owing to the absence of this feature, the subject-matter of claim 1 is novel having regard to the prior used fountain assembly.

2.2 Inventive step

The prior used arrangement comprises all the features of claim 1, apart from the feature of the manifold being within the frame, as discussed above. In this respect, reference is made to paragraph 3.1 of the "Reasons" of the decision of the Opposition Division,

setting out the correspondence between the features of claim 1 and the features of the prior used fountain assembly. However, contrary to the Board, the Opposition Division was of the opinion that the prior used arrangement comprised the feature of the manifold being within the frame as well.

It was argued on behalf of the appellant that the arrangement of the manifold within the frame avoided the use of seals between the brace and the frame. This argument is, however, not accepted, since both arrangements require seals between a metal reinforcing member and a plastics body along the length of the elongate passage.

It is also not the case that the prior used arrangement is more liable to leakage owing to the necessity of providing tubing to nozzle connections which may leak. In both the prior used arrangement and the arrangement of the patent in suit, the only connection to tubing occurs at the point at which cleaning or washing solution is supplied through tubing to the supply port.

The subject-matter of claim 1 thus does not involve an inventive step.

3. *First auxiliary request*

3.1 Amendments

As shown in Figure 4 of the application as filed, cleaning solution is supplied to the manifold through a single supply port 48. The passage in the description at column 10, lines 50 to 52, refers however to "supply

ports 48". The application as filed thus discloses the feature "at least one supply port within said frame for supplying washing solution". The reference in claim 1 to "washing solution within said internal manifold means within said frame" is substantially a repetition of the feature already present in claim 1 specifying "internal manifold means within said frame for directing a washing fluid to said nozzles" and is disclosed in particular in claim 10 of the application as filed.

The amendments to claim 1 thus satisfy the requirement of Article 123(2) EPC.

The amendments do not extend the protection conferred and are made in order to overcome a ground of opposition. The amendments made to claim 1 thus also comply with the requirements of Article 123(3) as well as Rule 57a EPC. This was not disputed by the respondent.

3.2 Inventive step

The additional feature of claim 1, according to which "the at least one supply port being within said frame" is not seen as involving an inventive step. The positioning of the supply port on either the brace or the frame is seen as being a matter of design which does not contribute to the solution of a technical problem. The person skilled in the art would choose one or other possibility according to which would be most convenient in any particular case.

The subject-matter of claim 1 thus lacks an inventive step.

4. *Second auxiliary request*

4.1 Amendments

The addition of the term "entirely" is seen as an attempt to specify an arrangement in which the internal manifold is entirely within the frame as illustrated in the drawing entitled "Autoflex Doctor Blade Chamber", attached to the submission of the appellant received on 17 April 2003.

Such an arrangement is not disclosed in the application as filed. As shown in Figure 5, the elongate passage connecting the supply port to the spray nozzles is defined between the frame 2 and the planar face of the rigid reinforcing brace 4.

The amendment to claim 1 thus introduces subject-matter which extends beyond the content of the application as filed and accordingly does not satisfy the requirement of Article 123(2) EPC.

5. *Third auxiliary request*

5.1 Amendments

The feature "and wherein said nozzles meet said internal manifold means at points within said frame", introduced at the end of claim 1 of the main request, is disclosed in the application as filed in Figure 5. This was not contested by the respondent.

The amendments to claim 1 thus satisfy the requirement of Article 123(2) EPC.

The amendments do not extend the protection conferred and are made in order to overcome a ground of opposition. The amendments made to claim 1 thus also comply with the requirements of Article 123(3) as well as Rule 57a EPC. This was also not disputed by the respondent.

5.2 Inventive step

The feature introduced at the end of claim 1 of the main request is present in the prior used arrangement as shown in Annex 2, where it can be seen that the passages connecting the nozzles 3 meet the passage 6 at points within the frame.

The subject-matter of claim 1 of the third auxiliary request thus lacks an inventive step for the reasons given above in respect of claim 1 of the main request.

6. *Fourth auxiliary request*

6.1 Amendments

The feature of claim 1 concerning the at least one supply port is disclosed in the application as filed for the reasons given above in respect of the first auxiliary request. The feature introduced at the end of claim 1 of the first auxiliary request concerning the reinforcing brace is disclosed in the application as filed in Figures 4 and 5, where it can be seen that the

rigid reinforcing brace 4 is fixed along substantially the entire length of said frame on an outer side thereof opposite the channel 6.

The amendments to claim 1 thus satisfy the requirement of Article 123(2) EPC.

The amendments do not extend the protection conferred and are made in order to overcome a ground of opposition. The amendments made to claim 1 thus also comply with the requirements of Article 123(3) EPC as well as Rule 57a EPC. This was not disputed by the respondent.

6.2 Inventive step

The feature concerning the reinforcing brace is present in the prior used arrangement as shown in Annex 2, where it can be seen that the brace 4 is fixed along substantially the entire length of the frame on an outer side thereof opposite the channel 9.

The subject-matter of claim 1 thus lacks an inventive step for the reasons given above in respect of claim 1 of the main request.

7. *Apportionment of costs*

Four auxiliary requests were filed by the appellant on 17 April 2003, each consisting of an amended claim 1. The amendments are regarded as being in response to the provisional opinion of the Board, which was issued on 4 February 2003 as an annex to the summons to attend oral proceedings. This annex indicated that "any

further submissions should be filed at least one month before the date set for oral proceedings". The submission of the auxiliary requests meets this requirement and is thus justified.

The respondent referred to the decision in case T 323/89. This decision is, however, concerned with an award of costs incurred in connection with the late citation of prior art which, with normal care, could have been cited during the opposition proceedings. This is not the present case.

The respondent further pointed out that he had not requested oral proceedings and that the appellant had indicated only shortly before the appointed date that he would not attend the oral proceedings. These circumstances did not, however, give rise to any additional costs for the respondent, who was aware at the time of travelling to the oral proceedings that the appellant would not be present.

It is therefore not appropriate to order a different apportionment of costs in accordance with Article 104(1) EPC.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for a different apportionment of costs is refused.

The Registrar:

The Chairman:

M. Dainese

W. Moser