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D E C I S I O N
of 24 February 2003

Case Number: T 1216/02 - 3.5.2

Application Number: 96922643.0

Publication Number: 0836756

IPC: H01R 23/68

Language of the proceedings: EN

Title of invention:
Connector, preferably a right angle connector, with integrated PCB assembly

Applicant:
BERG ELECTRONICS MANUFACTURING B.V.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 113(1), 92(2)
EPC R. 67

Keyword:
"Wrong citation sent to applicant - deceptively similar to correct one - objective substantive procedural violation - yes"
"Reimbursement of appeal fee - no"

Decisions cited:
-

Catchword:

-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1216/02 - 3.5.2

D E C I S I O N
of the Technical Board of Appeal 3.5.2
of 24 February 2003

Appellant: BERG ELECTRONICS MANUFACTURING B.V.
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Representative: Beetz & Partner
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 30 July 2002 refusing European patent application No. 96 922 643.0 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: W. J. L. Wheeler
Members: R. G. O'Connell
B. J. Schachenmann

Summary of facts and submissions

I. This is an appeal from the refusal by the examining division of European application No. 96 922 643.0 on the grounds that the subject-matter of claim 1 was not new. (Articles 52(1), 54(1) and (2) EPC).

II. On 8 July 1999 the search division of the EPO sent a supplementary European search report to the applicant, now appellant, which cited *inter alia* GB 2 083 289 A (AUGAT INC) and enclosed a purported copy of the cited document. According to the appellant the document enclosed was GB 2 083 2**98** A (AUGAT INC) entitled "Zero insertion force electrical connector". The subject-matter of the disclosure of this latter document is similar to that of the claims of the present application. In a first communication pursuant to Article 96(2) EPC the examining division objected under Article 84 EPC and cited no prior art and then in a second communication objected that *inter alia* the subject-matters of claims 1 and 3 were not new having regard to GB-A-2 083 289 and indicated that the latter document should be acknowledged to meet the requirements of Rule 27(1)(b) EPC. Following a rebuttal from the applicant which expressed the applicant's total disagreement with regard to the pertinence of GB-A-2 083 289, the examining division refused the application.

III. The appellant's arguments can be summarised as follows:

(i) *Procedural issues*

Since the wrong document received by the applicant, now appellant, also related to the technical field of

electrical connectors and in particular to the field of board connectors, ie the very same domain as the subject-matter of the present application, and was a patent application in the name of the applicant (AUGAT INC) named in the search report, the transposition of the final digits of the number of the specification went unnoticed. Even the passages cited in the search report could plausibly be read in the wrong document as relating to the presently claimed invention. The chance of the mistake being detected was further reduced by a change of representative. The examining division made a specific reference to the content of GB-A-2 083 289 for the first time in the communication prior to refusal and that was a single reference relating to "a force application structure (33)", which coincidentally had a plausible referent in the wrong document. It was only when the refusal decision was received that the suspicion dawned that the examining division and the applicant had been talking at cross-purposes. This led to the applicant procuring the correct document and hence to the filing of the present appeal.

(ii) *Substantive issues*

The appellant made no submission on the novelty of the subject-matter of claim having regard to the correct citation GB-A-2 083 289.

IV. The appellant requests that the decision under appeal be set aside and that the examination procedure be resumed to enable him to replace his response of 2 July 2002 by a response on the basis of the right document.

Reasons for the decision

1. The appeal is admissible.

2. The board has no reason to doubt the appellant's account of the events which resulted in the applicant unwittingly triggering a refusal by filing a response which was incomprehensible to the examining division. The initial mistake was made by the EPO department responsible for transmitting copies of the documents cited in the European search report to the applicant as required by Article 92(2) EPC. Furthermore it was a mistake which was difficult to detect by an unsuspecting recipient. Transposed final digits are notoriously among the most frequent sources of reading and transcription errors and the usual mechanism of error detection, viz incongruity of the subject-matter or disparity in the name of the applicant on the cited document, also failed in this case as a result of a conjunction of unfortunate coincidences. By the same token, the examining division would have required insight and intuition bordering on the paranormal to appreciate that when he framed his rebuttal, the applicant was not referring to the document correctly cited in the Article 96(2) EPC communication.

3. The board judges therefore that, albeit for reasons outwith the knowledge and control of the examining division, the refusal decision was based on evidence on which the applicant did not have an opportunity - objectively regarded - to present his comments. Such an opportunity being a fundamental procedural right under Article 113(1) EPC, its denial constitutes an objective substantial procedural violation in the examination

procedure within the meaning of Rule 67 EPC and also a fundamental deficiency within the meaning of Article 10 of the Rules of Procedure of the Boards of Appeal necessitating remittal of the case to the department of first instance. In the judgement of the board, the mention by the examining division of the correct number of the cited patent document was neither in practice nor in law apt to compensate the error which the office had made in sending a document which was deceptively similar to that actually mentioned in the European search report.

4. *Reimbursement of the appeal fee (Rule 67 EPC)*

In the judgement of the board it would have been appropriate for the appellant to facilitate further substantive examination in the event of remittal or in the event of interlocutory revision pursuant to Article 109(1) EPC by including in his statement of grounds of appeal a substantive response to the examining division's communication based on the document which, at the time of filing the appeal, he knew to be correct. Absent this degree of diligence the board does not deem it equitable that the appeal fee be reimbursed despite the fact that the appellant was obliged to file this appeal to claim his objective right to be heard; nor has reimbursement been requested.

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 first instance for further prosecution.

The Registrar: The Chairman:

G. Rauh W. J. L. Wheeler