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D E C I S I O N
of 25 October 2005

Case Number: T 0873/03 - 3.2.01

Application Number: 98202906.8

Publication Number: 0884266

IPC: B66B 9/08

Language of the proceedings: EN

Title of invention:

A lift assembly

Patentee:

Otto Ooms B.V.

Opponent:

Stannah Stairlifts Ltd.

Headword:

-

Relevant legal provisions:

EPC Art. 100(c), 76

RPBA Art. 10b(1)

Keyword:

"Extension of subject-matter beyond content of parent application - all requests (yes)"

"Auxiliary requests (not admitted)"

Decisions cited:

T 0211/95

Catchword:

-



Case Number: T 0873/03 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 25 October 2005

Appellants: Otto Ooms B.V.
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Respondents: Stannah Stairlifts Ltd.
(Opponents) Watt Close
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Representative: Gibson, Steward Harry
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 30 June 2003
revoking European patent No. 0884266 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: S. Crane
Members: Y. Lemblé
G. Weiss

Summary of Facts and Submissions

- I. The appeal is directed against the decision of the Opposition Division posted 30 June 2003 to revoke the European patent No. 0 884 266 granted on divisional application No. 98 202 906.8 from the earlier European parent application No. 95 942 784.0.
- II. The Opposition Division held that the subject-matter of the European patent extended beyond the content of the earlier application as filed so that Article 100(c) EPC was prejudicial to maintenance of the patent.
- III. During the oral proceedings held on 25 October 2005 before the Board the appellants requested that the decision to revoke the patent be set aside and that the patent be maintained as granted (main request), or in the alternative in amended form according to auxiliary requests 1, 5 to 12, 15 or 16 filed on 28 September 2005 with letter of the same date or of the auxiliary requests 2 to 4, 13 and 14 submitted at the oral proceedings. They requested also the reimbursement of the appeal fee.

The respondents (opponents) requested that the auxiliary requests 1 to 16 not be admitted into the proceedings and that the appeal be dismissed.

- IV. Independent claim 1 of the main request reads as follows:

"A lift assembly comprising a rail system and a lift (18,19,20) being capable of movement along said rail system, for example a chair lift (18,19,20) for a

disabled person, whereby said lift (18,19,20) can move upwards at an angle at least along part of its path, said rail system comprising an upper guide (13) and a lower guide (12), being provided substantially above each other, whereby the perpendicular spacing between said guides (12,13) depends on the angle of inclination of said guides (12,13), whereby said lift (18,19,20) is provided with an upper guide unit (23) and a lower guide unit (22), each being rotatable with respect to the lift (18,19,20) about a substantially horizontal axis of rotation (41,42) and each engaging a guide (12,13), whereby a guide unit (22) is provided with a driven gear (37) meshing with a rack (38) and with a guide wheel (24) engaging the guide (12), whereby said guide wheel (24) and said driven gear (37) and the guide unit (22) can rotate about the same horizontal axis of rotation (42), characterized in that the rack (38) is positioned a side from the relevant guide (12), seen from above."

Independent claim 5 of the main request reads as follows:

"A lift being capable of movement along a rail system, for example a chair lift (18,19,20) for a disabled person, whereby said lift (18,19,20) can move upwards at an angle at least along part of its path, said rail system comprising an upper guide (13) and a lower guide (12), being provided substantially above each other, whereby the perpendicular spacing between said guides (12,13) depends on the angle of inclination of said guides (12,13), whereby said lift (18,19,20) is provided with an upper guide unit (23) and a lower guide unit (22), each being rotatable with respect to

the lift (18,19,20) about a substantially horizontal axis of rotation (41,42), whereby each guide unit (22,23) can engage a guide (12,13), whereby a guide unit (22) is provided with a driven gear (37) which can mesh with a rack (38) and with a guide wheel (24) which can engage the guide (12), whereby said guide wheel (24) and said driven gear (37) and the guide unit (22) can rotate about the same horizontal axis of rotation (42), characterized in that the guide wheel (24) can engage the upper side of the guide, which guide wheel (24) is positioned between the driven gear and the lift."

Independent claim 6 of the main request reads as follows:

"Method for moving a lift (18,19,20) along a rail system, for example a chair lift (18,19,20) for a disabled person, whereby said lift (18,19,20) is moved upwards at an angle, at least along part of its path, said rail system comprising an upper guide (13) and a lower guide (12), being provided substantially above each other, whereby the perpendicular spacing between said guides (12,13) depends on the angle of inclination of said guides (12,13), whereby said lift (18,19,20) is provided with an upper guide unit (23) and a lower guide unit (22), each being rotatable with respect to the lift (18,19,20) about a substantially horizontal axis of rotation (41,42) with respect to the lift (18,19,20) and each engaging a guide (12,13), whereby the lift is moved by a driven gear (37) provided on a guide unit (22) engaging a rack (38), which driven gear (37) is rotated about the same horizontal axis of rotation (42) as the guide unit (22) and a guide wheel (24) which engages the guide (12), characterized in

that the guide wheel (24) can engage the upper side of the guide (12) and that the rack is positioned aside from the relevant guide (12), seen from above."

Claim 1 of the auxiliary request 1 is identical with claim 1 of the main request.

Claim 1 of the auxiliary request 2 differs from claim 1 of the main request only in that its preamble stipulates that the rack "is positioned near the lower guide (12)" and in that the characterising part of the claim is amended as follows:

"characterized in that the rack (38) is positioned aside from the lower guide (12), seen from above."

Claim 1 of the auxiliary request 3 differs from claim 1 of the auxiliary request 2 only in that the characterising part of the claim is amended as follows: "characterized in that the rack (38) is positioned behind the lower guide (12), seen from the front side."

Claim 1 of the auxiliary request 4 differs from claim 1 of the auxiliary request 2 only in that the characterising part of the claim is amended as follows: "characterized in that the rack (38) is positioned aside from the lower guide (12), seen from above and the guide wheel engages the upper side of the lower guide (12)."

Claim 1 of the auxiliary request 13 differs from claim 1 of the main request only in that the characterising part of the claim is amended as follows:

"characterized in that supporting elements (2) interconnect said two guides (12,13), wherein said two guides are each detachably connected to said supporting elements (2), and wherein the rack (38) is positioned aside from the relevant guide (12), seen from above."

Claim 1 of the auxiliary request 14 reads as follows:

"1. A lift assembly comprising a rail system and a lift (18,19,20) being capable of movement along said rail system, for example a chair lift (18,19,20) for a disabled person, whereby said lift (18,19,20) can move upwards at an angle at least along part of its path, said rail system comprising an upper guide (13) and a lower guide (12), being provided substantially above each other, whereby the perpendicular spacing between said guides (12,13) depends on the angle of inclination of said guides (12,13), whereby said lift (18,19,20) is provided with an upper guide unit (23) and a lower guide unit (22), each being rotatable with respect to the lift (18,19,20) about a substantially horizontal axis of rotation (41,42) and each engaging a guide (12,13), wherein the lift is provided with an electric drive unit (36), whose outgoing shaft (35) coincides with the axis of rotation (42) of one of said guide units (22), whereby said one guide unit (22) is provided with a driven gear (37) meshing with a rack (38) and with a first guide wheel (24) engaging the guide (12), whereby said guide wheel (24) and said driven gear (37) and the guide unit (22), including an element (34) comprising a second guide wheel (25), can rotate about the same horizontal axis of rotation (42), whereby the first guide wheel (24) is provided in such manner as to be rotatable about the connecting shaft

(35) between the drive unit (36) and the driven gear (37) characterized in that supporting elements (2) interconnect said two guides (12,13), which guides are each detachably connected to said supporting elements (2), and the rack (38) is connected to said supporting elements (2) and is positioned aside from the relevant guide (12), seen from above."

V. The appellants' submissions can be summarised as follows:

With respect to the main request:

The man skilled in the art, who had by definition a thorough knowledge of the relevant technical field on the date of filing and in particular of document D2 (DE-A-38 19 522) would, on a reading of the parent application and especially of the passage of page 6, lines 9-12 referring to the "further aspects of the invention which may be used separately as well as in combination with each other", recognise that it disclosed several independent inventions in relation to the problem of enabling the reusability of the rail system. On a comparison of the rail system of D2, which showed a tube section 5 having a rack 20 attached to it by welding, with that disclosed in the parent application the skilled person would readily realise that separating the rack from the guide by positioning it aside and at a distance from the guide as claimed in granted claim 1 was another technically unconnected solution to the problem of enabling reusability, independently from the disclosure of the detachability of the guides to the supporting elements specifically claimed in the parent application (see T 211/95). In

the same way, positioning the guide wheel being between the driven gear and the lift as claimed in granted claim 5 was, in this type of lift assembly, a new combination of features corresponding to another teaching technically unconnected to the detachability and involving further advantages. Each of the individual features of the claims as granted could be directly and unambiguously derived from the patent application as originally filed. Reference was especially made to the passages of page 9, lines 26-34; page 11, lines 24-35 and to figure 2 of the parent application. The features relating to the detachability of the connection between the guides and the supporting elements as well as between the rack and the supporting elements were not presented as essential in the parent application and could be omitted in the granted claims. Paragraph [0005] of the patent merely mentioned further advantages (grip of the gear on the rack improved) that the person skilled in the art would readily deduce from the parent application. The subject-matter of the patent as granted did therefore not extend beyond the content of the parent application as filed (Article 76 EPC).

With respect to the auxiliary requests:

The amended description filed with the first auxiliary request was intended to overcome the objection that the introduction of paragraph [0005] in the granted documents was not derivable from the parent application.

The further auxiliary requests brought the claimed subject-matter closer to the embodiments disclosed in the parent application and were an answer to the

generalisations objected to in the granted claims. Especially claim 1 of auxiliary request 13, which contained all of the features of the characterising part of claim 1 of the parent application, overcame the objection that there was no second inventive concept disclosed outside the inventive concept of the parent application. Claim 1 of auxiliary request 14 contained all of the features of claim 1 of the auxiliary request 13 in combination with the features of claim 13 of the parent application. It should therefore be clearly admissible.

VI. The respondents countered essentially as follows:

With respect to the main request:

The subject-matter of the opposed patent extended beyond the content of the parent application as filed.

Even if it was possible for the individual integers of the granted claims to be identified as being mentioned or illustrated in the parent application as filed, it was not allowed to arbitrarily select subset of features and to determine that these could provide the basis for a separate independent invention, if there was no indication in the parent application as to the function of these features and to their advantageous nature.

The features referring to the detachability of the connection between the two guides and the supporting elements, as well as to the detachability of the connection between the rack and the supporting elements, were essential to the invention defined in the parent

application and their omission in the granted claims resulted in their subject-matter extending beyond the content of the parent application as filed (see Article 76 EPC).

With respect to the auxiliary requests:

The late filed auxiliary requests 1 to 16 should not be admitted into the proceedings. Furthermore, the multiple additions of randomly selected features to the claims of the main request failed to overcome the basic objection already made with respect to the main request. In connection with the problem of reusability of the rail system and in case a rack was used for driving the lift, the detachability of the connection between the rack and the supporting elements was essential to the invention defined in the parent application since it brought the obvious advantage of enabling the length of each rack section to equal the length of a whole number of rack teeth. Since that feature was not present in any of the auxiliary requests, they should all be dismissed.

Reasons for the Decision

1. *Admissibility of the auxiliary requests 5 to 12 and 15 to 16*

According to Article 10b(1) of the RPBA, the Boards of Appeal have discretion to admit any amendment to a party's case after it has filed its grounds of appeal, this discretion being exercised in view inter alia of the complexity of the new subject-matter, the current

state of the proceedings and the need for procedural economy.

The appellants first submitted with letter of 23 September 2005 an amended set of claims as auxiliary requests 1 to 6 before the one month time limit set by the Board in its summons to oral proceedings. These claims were filed without explanation as to the amendments made in the claims. With a further letter dated 28 September 2005 the appellants filed a new set of claims as auxiliary requests 1 to 16 in replacement of the previous set, whereby the main request and the auxiliary requests 1 to 4 remained the same and the previous auxiliary requests 5 and 6 were renumbered to auxiliary requests 13 and 14. This belated set of claims was also filed without any single comment.

During the oral proceedings the appellants again requested the filing with respect to various previous requests of an amended independent claim 5 in order to bring that claim into correspondence with the respective independent claim 1. This had been an omission on their part.

In the circumstances of the present case, the Board, considering that the issue had not changed before oral proceedings, that no convincing justification was invoked for the filing of the belated auxiliary requests 5 to 12 and 15 to 16, that the letters accompanying these requests did not contain any explanation as to the modifications made in the claims and as to which objections these multiple and extended amendments were supposed to overcome, judged it proper

not to admit these belated auxiliary requests into the proceedings.

As to the filing of amended versions of independent claim 5 at the oral proceedings, the respondents had no objections.

2. Extension beyond the content of the parent application (Articles 100(c) and 76 EPC); main request

Considering the parent application as filed (WO-A-96/20125) the wording of the characterising part of granted claim 1 "the rack is positioned a side from the relevant guide, seen from above" is to be found *expressis verbis* neither in the claims, nor in the description of the parent application documents.

It is established case law that the disclosure in the original application of a feature which is to be introduced as an amendment in a claim must be direct and unambiguous. This requirement applies equally to amendments made pursuant to Article 123(2) EPC or to the filing of a divisional application pursuant to Article 76 EPC. As explained below, the Board found that this requirement is not met in the circumstances of the present case.

The parent application WO-A-96/20125 begins with an introductory part defining the type of lift assembly to which the invention relates and explaining the way known lift assemblies of this type have been installed along a staircase (page 1, line 1 to page 3, line 3). Then comes a statement indicating the drawbacks of these known lift assemblies:

"Drawbacks of known lift assemblies are the fact that they must be made precisely to size on the basis of complicated calculations, requiring error-free measuring of the staircase, and that reuse of the system for another lift assembly is hardly possible, if at all, in the event that a rail system has to be removed from a house."

This is followed by a statement of the single object aimed at by the invention (see third paragraph of page 3), namely "to provide a lift assembly enabling reuse of the rail system, at least to a large extent."

There follows then a series of passages defining different aspects of the invention:

"According to one aspect of the invention the rail system of the lift assembly is provided with two guides, which are each detachably connected to the supporting elements of said guides. ...

According to a further aspect of the invention a supporting element for attaching each of the two guides at a fixed location may be provided with a securing element, by means of which the guide can be connected to the supporting element at a desired angle, and that in such a manner that with every desired angle a predetermined spacing between the guides is adjusted automatically. ...

According to another aspect of the invention the supporting element may be provided with two downwardly extending legs, which may each be secured to the floor and/or a staircase, for example each leg to a different step of the staircase. ..."

From none of these different "aspects of the invention" is derivable that, irrespective of whether the detachable supporting elements are present or not, there is a particular advantage involved in positioning the rack aside the guide and/or the guide wheel between the driven gear and the lift, as respectively claimed in independent claims 1 and 5 of the granted patent.

The passage of the parent application cited by the appellants (page 6, lines 9-12) and referring to the "further aspects of the invention which may be used separately as well as in combination with each other..." is too vague a statement as to affect that assessment.

The appellants also cited figures 4 and 5 and the corresponding passages of the description relative to the illustrated embodiments as a basis for the wording of the characterising part of granted claim 1. These figures show a particular form of construction of the lift drive which consists of a rack 38 positioned between the lower guide 12 and the support element 2, and secured by means of screws to a securing portion 39 of a securing element 10 which detachably connects the lower guide 12 to the support element 2. The rack has upwardly directed teeth which mesh with a gear 37 coaxial with the guide wheel 24 and driven via a shaft 35 by an electromotor 36.

The Board is unable to recognise in these figures and these passages of the description the separate technically unconnected teaching invoked by the appellants and claimed in the granted patent. In the

absence of any particular indication in the parent application, the skilled person has no reason to believe that the position of the rack relative to that of the guide has any bearing on the problem of enabling reuse of the rail system. Considering for example an hypothetical rack which would not be arranged aside the guide but directly under it, as shown in figure 2 of the prior art document D2 cited by the appellants, such a rail system would perfectly be reusable provided that, as mentioned in the parent application, the rack is detachably connected to the guide. On the other hand, a rail system where the rack is positioned aside the guide, as claimed in the granted patent, but nevertheless welded to the guide, would not be readily reusable.

In the decision T 211/95 cited by the appellants, two different problems were solved by independent features which were explicitly described in the parent application as filed. The advantages achieved by the independently claimed features were specifically stated, thereby giving a skilled person some direction as to the fact that another invention may be formed thereby. The circumstances of the present case are different.

Thus, the Board sees in the devised formulation of the characterising part of granted claim 1 an attempt to posteriorly create an inventive concept which is neither disclosed in its own right, nor hinted at, in the parent application as filed.

Moreover, a specifically selected constructional feature taken in the particular context of a particular embodiment of the rail system cannot be elevated to a

general principle which is claimed in broader terms, if there is no support for such a generalisation in the parent application as filed.

The Board therefore judges that the subject-matter of the granted patent extends beyond the content of the parent application as filed (Article 100(c) EPC). The main request must therefore be refused.

3. *Extension beyond the content of the parent application; auxiliary requests*

The provision of a rack near the lower guide and a gear meshing therewith for driving the lift along the rail system is cited as a possible option in the introductory part of the parent application (see second paragraph of page 5). Within this context, the rack is however always mentioned as being detachably secured to the supporting elements: this finding applies for the relevant parts of the description (page 9, 26-32; page 11, lines 24-35) as well as for the relevant claim of the parent application (see claim 9). In the light of the problem of enabling the reusability of the rail system and in the context of a rack which is positioned aside from a guide, the detachability of the connection between the guides and the supporting elements and/or between the rack and the supporting elements is presented as being essential in the parent application and there is no hint that such a detachable connection may be dispensed with. Its omission in the respective claim 1 according to the auxiliary requests results therefore in their subject-matter extending beyond the content of the parent application as filed. Since the limitations introduced in the claims of all of the

auxiliary requests do not contain that essential feature, the subject-matter claimed in these requests extends beyond the content of the parent application.

It follows that the auxiliary requests also must be refused (Articles 100(c) and 76 EPC).

4. *Reimbursement of appeal fees*

Rule 67 EPC stipulates as a condition for the reimbursement of the appeal fee that the appeal be allowable, i.e. that it be successful. Since this is presently not the case, the appeal fee cannot be reimbursed.

Order

For these reasons it is decided that:

- The appeal is dismissed.
- The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

A. Vottner

S. Crane