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**Datasheet for the decision
of 26 June 2007**

Case Number: T 0677/05 - 3.2.07

Application Number: 99111917.3

Publication Number: 0967179

IPC: C03B 5/225

Language of the proceedings: EN

Title of invention:

Apparatus for refining molten glass under reduced pressure and method of its construction

Patentee:

ASAHI GLASS COMPANY LTD.

Opponent:

Schott Glas

Headword:

-

Relevant legal provisions:

EPC Art. 107

Keyword:

"Transfer of assets pertaining to opposition - not proven"
"Appellant party to proceedings resulting in appealed decision
- no"

Decisions cited:

G 0004/88, G 0002/04, T 0656/98, T 0956/03

Catchword:

-



Case Number: T 0677/05 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 26 June 2007

Appellant: Schott AG
Hattenbergstraße 10
D-55122 Mainz (DE)

Representative: Herden, Andreas F.
Blumbach - Zinngrebe
Patentanwälte
Alexandrastraße 5
D-65187 Wiesbaden (DE)

Respondent: ASAHI GLASS COMPANY LTD.
(Patent Proprietor) 12-1, Yurakucho 1-chome,
Chiyoda-ku
Tokyo 100-8405 (JP)

Representative: Müller-Boré & Partner
Patentanwälte
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 29 March 2005
rejecting the opposition filed against European
Patent No. 0967179 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
E. Lachacinski

Summary of Facts and Submissions

I. Opposition was filed by Schott Glas against European patent No. 0 967 179.

In its decision issued 29 March 2005 the opposition division decided to reject the opposition.

II. The appellant (Schott AG) filed an appeal against that decision on 13 May 2005.

III. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent (proprietor) requested that the appeal be rejected as inadmissible.

IV. The Board issued a communication dated 10 October 2005 pointing out that the appeal had been filed in the name of Schott **AG**, whereas the name of the opponent was Schott **Glas**. With its response of 2 December 2005 the appellant filed an extract of a commercial register ("Handelsregister") without comment as to the relevance of its contents.

V. Oral proceedings were held before the Board on 26 June 2007.

VI. In a communication dated 7 February 2007 accompanying the summons to the oral proceedings the Board set out its provisional opinion. Amongst other matters the Board noted that a division of assets of the opponent appeared to have occurred putting the admissibility of the appeal in question.

- VII. With its letter dated 29 May 2007 the appellant supplied further extracts from company registers and stated that Schott Glas was completely merged into Schott AG on 1 July 2004 with the deletion of Schott Glas from the register on the same day.
- VIII. With its fax of 19 June 2007 the appellant indicated that it would not attend the oral proceedings and asked for the decision of the Board to be based on its written submissions.
- IX. On 25 June 2007 the Board sent a fax to the parties indicating that the extracts from the company register already supplied by the appellant left doubts regarding the transfer of all the assets of Schott Glas to Schott AG. The Board further pointed out that the evidence for the stated transfer of assets was filed after the time limit for filing an appeal, referring in this respect to T 656/98 (OJ EPO 2003, 385) and T 956/03 (not published in OJ EPO).
- X. The relevant arguments of the appellant may be summarised as follows:
- (i) The appeal is admissible. Schott AG is the legal successor to Schott Glas as shown by the central company register ("Bundesanzeiger (Zentralhandelsregister) Nr. 135") from 22 July 2004, whereby Schott Glas was deleted from the register and its business was merged with that of Schott AG. The merger came into force on 1 July 2004 upon the deletion of Schott Glas from the company register.

In addition, the extracts from the company register ("Handelsregister") of the Mainz district court show that Schott Glas had been part of the Carl-Zeiss-Stiftung and was completely merged into Schott AG. Schott Glas was deleted from the register and does not exist anymore.

In a parallel case T 184/05 the competent Board, based on the same documents as in the present case, came to the conclusion that sufficient evidence had been provided for the transfer of the opponent status from Schott Glas to Schott AG to be acknowledged.

XI. The relevant arguments of the respondent may be summarised as follows:

- (i) The appeal is not admissible since the appellant is not the opponent.

When the assets of Schott Glas were transferred to Schott AG some assets were not transferred as evidenced by the extracts from the company registers supplied by the appellant. Following Enlarged Board of Appeal Decision G 4/88 (OJ EPO 1989, 480) an opposition can only be transferred along with the relevant assets. It remains unknown which assets were transferred along with Schott Glas and which were retained by the Carl-Zeiss-Stiftung, to which Schott Glas belonged, so that it cannot be concluded that they were the assets in the interest of which the opposition was filed. Also, the Carl-Zeiss-Stiftung itself had

maintained such an interest in vacuum refining vessels (the subject of the present patent) as evidenced by PCT patent application number WO 02/3509 A1.

Even if the relevant assets were proven to be transferred, the proof of this transfer has been supplied too late, i.e. outside the time limit for filing an appeal. In the Enlarged Board of Appeal Decision G 2/04 (OJ EPO 2005, 549) it was indicated that at any point in time there should be no doubt regarding who may validly exercise procedural rights and to whom correspondence should be addressed (see point 1.3 of the decision reasons). This should apply to establishing who is the appellant. Thus it was not established within the time limit for appeal which party was entitled to exercise procedural rights as appellant.

Reasons for the Decision

1. Admissibility of the appeal

- 1.1 In accordance with Enlarged Board of Appeal Decision G 4/88 (OJ EPO 1989, 480) "An opposition pending before the European Patent Office may be transferred or assigned to a third party as part of the opponent's business assets together with the assets in the interests of which the opposition was filed." (see order).

Based on that decision the Board has to ascertain whether the business assets in the interests of which

the opposition was filed were transferred along with Schott Glas to Schott AG.

- 1.2 The first relevant entry is No. HRA 2724 in the company register ("Handelsregister") of the Mainz district court concerning Schott Glaswerke which states: "Die Carl-Zeiss-Stiftung, Heidenheim an der Brenz und Jena, hat ... im Wege der Ausgliederung zur Aufnahme gemäß §§ 161, 123 Abs. 3 Nr.I UmwG den zu dem Stiftungsunternehmen SCHOTT GLAS gehörenden Teil ihres Vermögens - mit Ausnahme bestimmter Vermögensgegenstände - als Gesamtheit gegen Gewährung von Aktien auf die SCHOTT AG - bisher: Schott Spezialglas AG - als übernehmenden Rechtsträger übertragen." The date of the entry is 1 July 2004.

In a second entry No. HRB 8555 in the company register of the same Mainz district court concerning Schott AG there is a similar statement with an entry date of 28 June 2004.

The central company register ("Bundesanzeiger (Zentralhandelsregister)") Nr. 135 from 22 July 2004 has a similar statement.

In all three entries it is indicated that Schott Glas was transferred to Schott AG as a whole ("als Gesamtheit") with however the exception of certain assets ("mit Ausnahme bestimmter Vermögensgegenstände"). As such, the entry contradicts itself in referring to the transfer as a whole though with unspecified exceptions. The entry does not therefore allow the conclusion that there was no doubt that the totality of the assets of Schott Glas was transferred. The question therefore arises as to which assets were not transferred.

There is no indication in any of these entries as to which were the non-transferred assets. Also, the appellant has made no reference to these non-transferred assets in its submissions and has supplied no evidence that would allow the Board to establish which were the non-transferred assets.

It therefore remains unknown as to which assets were transferred to Schott AG and which were not.

1.3 As already indicated above the Enlarged Board of Appeal in its decision G 4/88 (*supra*) made it a requirement for the transfer of an opposition that all the assets in the interests of which the opposition was filed should be transferred. In the absence of information regarding which assets were transferred with Schott Glas to Schott AG it cannot be established whether the assets in the interests of which the opposition was filed belonged to the transferred assets.

1.4 The appellant referred to a co-pending appeal before Board 3.2.07, though in a different composition to the present Board, arguing that the transfer had been accepted in that case. Aside from the fact that no final decision has been given in that case, the facts of that case are different to the present case since in that case there are joint opponents (Schott Lithotec AG and Schott Glas) and joint appellants (Schott Lithotec AG and Schott Glas with a reference to Schott AG as successor to Schott Glas). No conclusion can thus be drawn from that case.

1.5 Since the evidence supplied by the appellant regarding the transfer of assets from Schott Glas to Schott AG is

insufficient to prove that the assets pertaining to the opposition in question were actually transferred it is not necessary to consider any possible effect of the timing of the filing by the appellant of the evidence supporting the transfer.

1.6 The Board concludes therefore that the procedural position of opponent Schott Glas cannot be transferred as requested to Schott AG so that Schott Glas remains as opponent.

1.7 Since Schott AG was not a party to the opposition proceedings resulting in the decision under appeal it was not entitled to file an appeal against that decision pursuant to Article 107 EPC (first sentence).

Its appeal is therefore not admissible.

Order

For these reasons it is decided that:

The appeal of Schott AG is rejected as inadmissible.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders