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**Datasheet for the decision
of 19 February 2009**

Case Number: T 0383/06 - 3.2.03

Application Number: 98201026.6

Publication Number: 0869232

IPC: E04F 13/08

Language of the proceedings: EN

Title of invention:
Console assembly

Patentee:
P2H development B.V.

Opponent:
HALFEN GmbH & Co. Kommanditgesellschaft

Headword:

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Relevant legal provisions:
EPC Art. 84, 54, 111(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Clarity - main request - yes (after amendment)"
"Novelty - main request - yes (after amendment)"
"Remittal to the first instance for further prosecution"

Decisions cited:

-

Catchword:

-



Case Number: T 0383/06 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 19 February 2009

Appellant: P2H development B.V.
(Patent Proprietor) Spinelstraat 45
NL-7554 TW Hengelo (NL)

Representative: van Westenbrugge, Andries
Nederlandsch Octrooibureau
Postbus 29720
NL-2502 LS Den Haag (NL)

Respondent: HALFEN GmbH & Co. Kommanditgesellschaft
(Opponent) Liebigstr. 14
D-40764 Langenfeld-Richrath (DE)

Representative: Riedel, Peter
Patent- und Rechtsanwalts-Kanzlei
Dipl.-Ing. W. Jackisch & Partner
Menzelstrasse 40
D-70192 Stuttgart (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 24 February 2006
revoking European patent No. 0869232 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: U. Krause
Members: E. Frank
K. Garnett

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Opposition Division dated 14 February 2006 and posted on 24 February 2006, to revoke the European patent No. 0 869 232 pursuant to Article 102(1) EPC 1973.
- II. The Appellant (Proprietor) filed a notice of Appeal on 10 March 2006, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 21 June 2006.
- III. A communication pursuant to Article 15(1) RPBA was issued together with a summons to attend oral proceedings, which were duly held on 19 February 2009.
- IV. The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 7 according to the amended main request filed during the oral proceedings, alternatively on the basis of the auxiliary request filed with the grounds of appeal on 21 June 2006.

The Respondent (Opponent) requested that the appeal be dismissed.

- V. The wording of claim 1 reads as follows:

main request:

"1. Bracket assembly (1,31) to be fixed to a wall (2) or other part of a building structure to support a façade element (20), comprising a member to be fixed to said wall, a member (11) supporting the façade element

having a first horizontal section (21,37) for supporting a façade element, and a member (6,7) linking the fixing member (9) and the support member (11), wherein the linking member and the support member are provided with interacting gripping means (5,24,39,41) constructed such that the support member can be fixed in an arbitrary longitudinal position with respect to the linking member, characterized in that said gripping means (5,24,39,41) comprise a seat provided in the linking member, comprising a downward facing access opening to accommodate a projecting part (24) of said support member, said projecting part comprising a second vertical section (24) bearing on said linking member, a horizontal section (23), a first vertical section (22) which extends upwards from and adjoins said first horizontal section (21), wherein said first vertical section (2) [this should read: 22] adjoins said horizontal section (23), and said linking member bears said horizontal section (23) and said first vertical section."

auxiliary request:

"1. Bracket assembly (1,31) to be fixed to a wall (2) or other part of a building structure to support a façade element (20), comprising a member to be fixed to said wall, a member (11) supporting the façade element, and a member (6,7) linking the fixing member (19) and the support member (11), wherein the linking member and the support member are provided with interacting gripping means (5,24,39,41) constructed such that the support member can be fixed in an arbitrary longitudinal position with respect to the linking member, characterized in that said gripping means

(5,24,39,41) comprise a seat provided in the linking member, comprising a downward facing access opening to accommodate a projecting part (24) of said support member, said projecting part comprising a second vertical section (24) bearing on said linking member, a horizontal section (23) adjoining said second vertical section (24), a first vertical section (22) which extends upwards and adjoins said horizontal section (23), and said linking member bears said horizontal section (23) and said first vertical section."

VI. The following evidence has been considered for purposes of the present decision:

D2 = US 3 234 702 A

VII. As to the main request, the parties submitted essentially the following arguments:

The Respondent had no Article 123(2), (3) objections. However, the present wording of claim 1 was again vague, since it still did not cover the figure 4 to 6 embodiment of the patent in suit. It was not clear from figure 6 whether the additional sheet or plate which is shown beneath the actual "support plate 37" should be understood as the "first horizontal section" of claim 1, or the "support plate 37" itself. Moreover, either the slightly bent part enclosed by the "curvature 41" of the uppermost portion of the support member, or the vertical part of its "set-back part 43" could be seen as the "second vertical section" of claim 1. Finally, the arrangement of plates shown in figure 6 of the contested patent formed a "tubular" formation and thus neither first, second, nor more sections as was claimed

in claim 1. As to novelty, the Respondent conceded that the "H-shaped channel member 37" of the figure 5 embodiment in D2, which formed a support member for supporting the "facing material A", did not in fact disclose two horizontal sections as claimed in claim 1. However, the "U-shaped channel member 30" according to the figure 2 embodiment of D2 had a "long leg 33", which comprised an elongated "groove 36". Thus, due to this groove, at the uppermost end of the "long leg 33" a protrusion was formed, which constituted a horizontal section as described by claim 1. Moreover, the adjoining vertical portion of the "long leg 33" could be understood as a first vertical section, the "web portion 31" as a first horizontal section, and the "short leg 32" as a second vertical section of the support member claimed in claim 1. Therefore claim 1 lacked novelty over the disclosure of the figure 2 embodiment of D2.

The Appellant argued that the respective sections as defined by claim 1 of the main request could be immediately found in figures 4 to 6. In particular, although the "support plate 37" and the additional plate shown below were two parts, claim 1 did not specify that all parts were necessary. As regards the "second vertical section", claim 1 did not describe anything between this section and its claimed "horizontal" section, and no contradiction as regards figure 6 could thus be found. Moreover, as for novelty in respect of D2, no horizontal section could be seen in the end portion of "long leg 33". Apart from that, no bearing of the second vertical section, the horizontal section and the first vertical section on the linking member, i.e. on the "clip member 21", was

derivable from its figure 2 embodiment. Thus, claim 1 was new over D2.

For economic reasons, both parties at first stated a wish for the Board to make a final decision rather than remit the case to the Opposition Division. The Respondent, however, later somewhat resiled from this and submitted that further prosecution during the oral proceedings before the Board should not take place at the expense of proper consideration of its arguments, and that it intended in the oral proceedings before the Board to discuss all documents cited during the opposition proceedings when assessing inventive step of claim 1.

Reasons for the Decision

1. The appeal complies with the provisions of Articles 106 to 108 EPC and of Rule 99 EPC and is, therefore, admissible.

2. *Amendments - main request*
(Article 123(2) and (3) EPC)

Claim 1 of the main request differs from the sole request on which the decision under appeal was based in that the member (11) has been further specified as "having a first horizontal section (21,37) for supporting a façade element" in the preamble. Moreover, at the end of claim 1, the wording "... a horizontal section (23) adjoining said second vertical section (24), a first vertical section (22) which extends upwards and adjoins said horizontal section (23), ..."

has been replaced by "... a horizontal section (23), a first vertical section (22) which extends upwards from and adjoins said first horizontal section (21), wherein said first vertical section (2 [read: 22]) adjoins said horizontal section (23), ..." . These amendments are derivable in particular from column 3, lines 5 to 26 of the application (as published) and figure 2.

Furthermore, reference sign "(19)" of the fixing member in the preamble of claim 1 has been adapted to figure 2 by replacing it with number "(9)", in accordance with Rule 43(7) EPC.

No Article 123(2) and (3) objections have been raised by the Respondent, and also the Board has no reason to doubt that present claim 1 meets the requirements of the EPC in this respect.

3. *Clarity - main request*
(Article 84 EPC)

Irrespective of whether figure 6 depicts a closed hollow formation as argued by the Respondent or not, a first horizontal section is shown by the horizontal plate beneath the "support plate 37". Moreover, a first vertical section which extends upwards from and adjoins this horizontal plate is shown as the vertical wall of the "set-back part 43". This vertical wall adjoins a horizontal section, viz. the horizontal wall of the "set-back part 43". A second vertical section, which has to be a portion of the projecting part of the support member, is formed either by the upwardly directed wall portion surrounded by the "curvature 41", or by one of the vertical walls of the "curvature 41"

itself. Since also the horizontal plate is supporting the façade element, and the vertical and horizontal walls of the set-back part "43" as well as the walls of the curvature "41" are bearing on the linking member "30", the bracket assembly shown in figure 6 is not, therefore, contradictory to the subject-matter of present claim 1. Thus, in the view of the Board, notwithstanding that the figure 4 to 6 embodiment may not serve as a basis for claim 1, which is actually provided by the figure 1 to 3 embodiment, figure 6 in particular falls within the ambit of the subject-matter of claim 1.

Since there is no inconsistency between present claim 1 and the figure 4 to 6 embodiment, claim 1 thus complies with the requirements of Article 84 EPC.

4. *Novelty - main request*

(Article 100(a) EPC, see Article 54 EPC)

The document D2 (cf. column 2, lines 16 to 50) describes in its figure 2 embodiment a bracket assembly which is fixed to a "U-shaped strut 20". The "clip member 21" serves as a linking member between the "U-shaped strut 20" and the "U-shaped channel member 30", the latter supporting a "slab A". However, contrary to the Respondent's view, even if the protrusion at the upper end of the "long leg 33" was considered as a horizontal, its adjoining vertical part as a first vertical section, the "web portion 31" as a first horizontal section, and the "short leg 32" as a second vertical section, the subject-matter of present claim 1 would differ therefrom in that the second vertical section, i.e. the "short leg 32", also bears on the

linking member and is part of the projecting part which is accommodated in the seat of the linking member, i.e. in the "clip member 21". In the Board's view, irrespective of whether the skilled person would actually consider the upper end portion of the "long leg 33" as a horizontal section, or of how the respective remaining sections of the "U-shaped channel member 31" are interpreted within the meaning of claim 1, its subject-matter differs from the disclosure of the figure 2 embodiment in that in any event each of the second vertical, horizontal, and first vertical sections bears on the linking member. Novelty of claim 1 over the figure 5 embodiment of D2 has been accepted by the Respondent, since the "H-shaped channel member 37" of figure 5 comprises merely one horizontal section.

The novelty of claim 1 over the remaining known prior art was not disputed by the Respondent, and is also acknowledged by the Board. Therefore the subject-matter of claim 1 meets the requirements of Article 54 EPC.

5. *Remittal to the Opposition Division*
(Article 111(1) EPC)

The patent in suit was revoked solely on the grounds of lack of clarity of the then pending claim 1. Although the parties initially submitted that they wished a final decision to be made, the Board notes, however, that the question of inventive step of claim 1 of the main request was raised for the first time during the oral proceedings before the Board, and only novelty of claim 1 in the light of D2 had previously been discussed by the parties in writing. Since the

Respondent also indicated that it wished consideration to be given to all the remaining documents cited in the opposition procedure for the purposes of assessing inventive step, in the Board's view consideration of inventive step would have clearly extended the frame of discussion of the decision under appeal. The Board therefore intends to exercise its discretion under Article 111(1) EPC and remit the case to the Opposition Division.

Since, apart from the open question of its inventiveness, which remains to be examined, the subject-matter of claim 1 according to the main request complies with the EPC, there is no need for the Board to consider claim 1 of the auxiliary request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution on the basis of claims 1 to 7 according to the main request filed during the oral proceedings.

The Registrar

The Chairman

A. Counillon

U. Krause