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**Datasheet for the decision
of 23 October 2012**

Case Number: T 1028/10 - 3.2.03

Application Number: 05025114.9

Publication Number: 1659340

IPC: F24C 7/00, F24B 1/18

Language of the proceedings: EN

Title of invention:
Artificial open fire

Applicant:
Dimplex North America Limited

Headword:
-

Relevant legal provisions:
EPC Art. 54

Keyword:
"Novelty (no)"

Decisions cited:
-

Catchword:
-



Case Number: T 1028/10 - 3.2.03

DECISION
of the Technical Board of Appeal 3.2.03
of 23 October 2012

Appellant: Dimplex North America Limited
(Applicant) 1367 Industrial Road
Cambridge
Ontario N1R 7G8 (CA)

Representative: Moore, Barry
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 9 November 2009
refusing European patent application
No. 05025114.9 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: U. Krause
Members: C. Donnelly
E. Kossonakou

Summary of Facts and Submissions

- I. The appeal lies from the decision of the examining division made according to the state of the file, posted on 9 November 2009, refusing the European Patent application No. EP-A-05025114.9.
- II. The applicant (hereinafter "the appellant") filed a notice of appeal on 19 January 2010 and paid the fee the same day. The grounds of appeal, together with three auxiliary requests, were filed on 9 March 2010.
- III. During the examination procedure, the examining division made reference to the following documents in its communications:
- D1: GB-A-416 358;
D2: US-A-3978598;
D3: US-A-2002/152655;
D4: GB-A-2264555;
D5: GB-A-370618.
- IV. In its communication of 4 September 2009 (Annex to the summons to oral proceedings), the examining division argued that since the original claim 1 related to the body for simulating an entire combustible fuel element, the features of claim 1 filed with letter of 30 March 2009 were used in a different context in contravention of Article 123(2). The division also indicated that if the amendments infringing Article 123(2) EPC were not taken into consideration the subject-matter of claim 1 would not meet the requirements of Article 54 EPC with respect to both D1 and D2. Furthermore, even if claim were reformulated to overcome the objection under

Article 123(2) the requirements of Article 56 would not be met.

- V. In a communication dated 30 April 2012, pursuant to Article 15(1) RPBA annexed to the summons to oral proceedings, the Board informed the appellant of its provisional opinion. In particular, the Board indicated that claim 1 of the main request did not appear to meet the requirements of Article 84 EPC and drew the appellant's attention to the relevance of D5 for the assessment of novelty and inventive step of the first auxiliary request.
- VI. By letter of 19 September 2012 the appellant informed the Board that it would not attend the oral proceedings scheduled for 23 October 2012. It further confirmed that the main, first and second auxiliary requests as on file were maintained, but withdrew the third auxiliary request.
- VII. Oral proceedings were held on 23 October 2012 in the absence of the appellant.
- VIII. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request consisting of the claims submitted with letter of 30 March 2009; alternatively on the basis of auxiliary request 1 or 2 as filed together with the statement setting out the grounds of appeal.

IX. Claim 1 of 30 March 2009 reads:

"A simulated fuel bed (20) for simulating a solid combustible fuel in a fire, the simulated fuel bed (20) comprising:

at least one cavity (30);

at least one light source (32) positioned inside said at least one cavity (30) and configured to direct light therefrom;

an exterior surface (34);

at least one light-transmitting part (36) extending between said at least one cavity (30) and the exterior surface (34);

the at least one light-transmitting part (36) being positioned in a path of said light from the at least one light source (32) whereby light from said at least one light source (32) is transmittable through the at least one light-transmitting part (36) to the exterior surface (34) for simulating glowing embers of the combustible fuel,

characterised in that

the fuel bed (20) consists of a plurality of simulated combustible fuel elements (22), each simulated combustible fuel element (22) comprising a body (28), the body (24) being coloured and formed for simulating an entire discrete piece of combustible fuel and the respective fuel elements (22) being arranged to imitate fuel pieces in a fuel bed of a natural fire;

and in that

said plurality of simulated combustible fuel elements (22) comprises at least one light-producing simulated combustible fuel element (26), the or each light-producing simulated fuel element (26) comprising: at least one said cavity (30) containing at least one said

light source (32); and at least one said light transmitting part (36) between said at least one cavity (30) and the exterior surface (34) of the fuel element (22) body."

Claim 1 according to the first auxiliary request reads:

"A simulated fuel bed (20) for simulating a solid combustible fuel in a fire, the simulated fuel bed (20) comprising:

a plurality of simulated solid combustible fuel elements (22,26), each simulated solid combustible fuel element (22,26) comprising a body (24), wherein the entire body (24) of each simulated fuel element is coloured and formed to resemble the entire exterior surface of an actual piece of combustible fuel and the simulated fuel elements (22,26) being arranged to imitate a natural fire;

wherein at least one of the simulated solid combustible fuel elements (22,26) is a light producing simulated solid combustible fuel element (26), the light producing element having at least one cavity (30) including one or more fuel light sources (32) therein, and

one or more light transmitting parts (36) extending between said at least one cavity (30) and the exterior surface (34) of the fuel element (26), such that light from the fuel light source (32) is transmittable through the light-transmitting part (36) to the exterior surface (34) for simulating glowing embers of solid combustible fuel."

Claim 1 according to the second auxiliary request reads:

"A simulated fuel bed (20) for simulating a solid combustible fuel in a fire, the simulated fuel bed (20) comprising:

a plurality of simulated solid combustible fuel elements (22,26), each simulated solid combustible fuel element (22,26) comprising a body (24), wherein the entire body (24) of each simulated fuel element is coloured and formed to resemble the entire exterior surface of an actual piece of combustible fuel and the simulated fuel elements (22,26) being arranged in a pile (25) to imitate a pile of wooden logs or a pile of coals in a natural fire;

wherein at least one of the simulated solid combustible fuel elements (22,26) is a light producing simulated solid combustible fuel element (26), the light producing element having at least one cavity (30) including one or more fuel light sources (32) therein, and

one or more light transmitting parts (36) extending between said at least one cavity (30) and the exterior surface (34) of the fuel element (26), such that light from the fuel light source (32) is transmittable through the light-transmitting part (36) to the exterior surface (34) for simulating glowing embers of solid combustible fuel

wherein the at least one light producing simulated fuel element (26) is positioned in the pile (25) with other solid combustible fuel elements (22)."

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

D5 is no more relevant than D1 or D2 since it too relates to a shell type simulation arrangement.

D5 describes a non-illuminated shield member representing fuel and does not disclose a fuel element having a light transmitting part. The shield member of D5 (see page 1, lines 46 to 47) is effectively a semi-circular shield of fire-clay which houses and supports a light bulb. The shield member is then placed on a supporting surface of e.g. members/fuel pieces and light from the light bulb is projected on to the supporting surface to give that surface a glowing appearance. In the arrangement of D5 the light bulb does not give the shield member itself a glowing appearance since light is not transmitted through the shield member and the shield member is not made from a light transmitting material.

Further passages in the description supporting this interpretation can be found at page 1, lines 14 to 21; page 1, lines 33 to 37; page 1, lines 45 to 58 and page 1, lines 86 to 106.

Reasons for the Decision

1. The appeal is admissible.
2. Novelty
 - 2.1 The independent apparatus claims of the main and first auxiliary requests essentially relate to the same subject-matter. The principal difference between the two lying in that the main request has been cast in the two-part form. Accordingly, the following comments relate to both requests.
 - 2.2 The examining division considered that D1 and D2 both anticipate claim 1 of the main request. However, the Board agrees with the applicant that D1 and D2 relate to the shell type of simulation described and criticised in the review of the prior art made in the application. For this reason, the most relevant art is considered to be disclosed in D5 since this document describes the fabrication of individual simulated fuel elements and their use to build up an imitation fire.
 - 2.3 Even though the word "shell" is used to describe the individual simulated elements this does not mean that D5 also relates to the shell type of simulated fire in which a single "shell" simulates a plurality of fuel elements making up the imitation fire. Indeed, D5 specifically states that: "The present invention differs from this previous proposal in that the lamps are actually mounted in and carried by the artificial logs so that the logs can conveniently be moved about and set in different relative positions as desired. Convenience in moving the units combined with a far

more realistic effect is thus obtained." (see page 3, lines 35 to 41).

2.4 Also, the appellant's assertion that the glow effect of the simulated fire in D5 is only produced by light projected onto another surface and there is no disclosure of a simulated fuel element having a light transmitting part which gives the element itself a glowing appearance cannot be accepted. As pointed out in the summons to oral proceedings, a preferred embodiment of the simulated fuel element of D5 comprises a coloured screen of glass or other suitable material through which a white light is transmitted, whereby the "glow" is effected (see page 1, lines 58 to 62). In order to produce this glow effect it is implicit that the glass screen must be positioned between the cavity containing the light source and the exterior surface. The appellant has not commented on this particular passage in D5.

2.5 Furthermore, the wording of claim 1 according to all the requests only requires that light from the light source is "transmittable through the at least one light-transmitting part to the exterior surface for simulating glowing embers of the combustible fuel". Since in a natural fire glowing embers break off and become separate from the initial solid fuel element forming a bed, this specification is not restricted to a requirement that the element itself is given a glowing appearance, but also includes providing a glowing appearance to other surfaces.

2.6 The Board also considers that the shield elements described in D5 are bodies which are "coloured and

formed for simulating an entire discrete piece of combustible fuel" (main request) as well as ones "wherein the entire body of each simulated fuel element is coloured and formed to resemble the entire exterior surface of an actual piece of combustible fuel" (first and second auxiliary requests) since only a subjective requirement "for simulating" or "to resemble" a piece of combustible fuel is specified. A semi-circular shield of fire-clay with a corrugated surface and which is painted or otherwise treated to represent fuel as suggested in D5 (see page 2, line 62 to 67) meets this requirement.

2.7 In view of the above comments D5 is seen to describe:

a simulated fuel bed (see figure 1) for simulating a solid combustible fuel in a fire, the simulated fuel bed comprising:

- at least one cavity (see figures 1 and 2);
- at least one light source (c) positioned inside said at least one cavity and configured to direct light therefrom;
- an exterior surface;
- at least one light-transmitting part (see page 2, lines 74 to 79 "a coloured screen of glass or other suitable material") extending between said at least one cavity and the exterior surface;
- the at least one light-transmitting part being positioned in a path of said light from the at least one light source (c) whereby light from said at least one light source (c) is transmittable through the at least one light-transmitting part to the exterior surface for simulating glowing embers of the

combustible fuel (see page 1, lines 58 to 62 and page 2, lines 74 to 79), and wherein the fuel bed consists of a plurality of simulated combustible fuel elements (a) each simulated combustible fuel element (a) comprising a body, the body being coloured and formed for simulating an entire discrete piece of combustible fuel (see page 2, lines 62 to 67) and the respective fuel elements (a) being arranged to imitate fuel pieces in a fuel bed of a natural fire (see page 3, lines 1 to 5); and wherein said plurality of simulated combustible fuel elements comprises at least one light-producing simulated combustible fuel element (a), the or each light-producing simulated fuel element (a) comprising: at least one said cavity containing at least one said light source (c); and at least one said light transmitting part between said at least one cavity and the exterior surface of the fuel element (a) body.

- 2.8 D5 also describes a simulated fuel bed (see figure 1) for simulating a solid combustible fuel in a fire, the simulated fuel bed comprising:
a plurality of simulated solid combustible fuel elements (a) each simulated solid combustible fuel element (a) comprising a body, wherein the entire body of each simulated fuel element is coloured and formed to resemble the entire exterior surface of an actual piece of combustible fuel (see page 1, lines 45 to 48) and the simulated fuel elements being arranged to imitate a natural fire;

wherein at least one of the simulated solid combustible fuel elements is a light producing simulated solid combustible fuel element, the light producing element

having at least one cavity (see figures 1 and 2) including one or more fuel light sources (c, see page 1, lines 95 to 98) therein, and

one or more light transmitting parts extending between said at least one cavity and the exterior surface of the fuel element (a), such that light from the fuel light source (c) is transmittable through the light-transmitting part to the exterior surface for simulating glowing embers of solid combustible fuel (see page 1, lines 58 to 62 and page 2, lines 74 to 79).

2.9 Thus, the subject-matter of claim 1 according to the main and first auxiliary requests is not new and does not meet the requirements of Article 54 EPC.

2.10 Second auxiliary request

2.11 The subject-matter of claim 1 according to the second auxiliary request only differs from that of claim 1 according to the first auxiliary request by the features of:

"the simulated fuel elements (22,26) being arranged in a pile (25) to imitate a pile of wooden logs or a pile of coals in a natural fire"; and

"wherein at least one light producing simulated fuel element (26) is positioned in the pile (25) with other solid combustible fuel elements (22)."

2.12 However, these features are also known from D5 as disclosed for example at page 2, line 112 to page 3, line 5.

2.13 Thus, the subject-matter of claim 1 according to the second auxiliary request is also not new and does not meet the requirements of Article 54 EPC.

3. Since the requirements of Article 54 EPC are not met there is no need for the Board to take position on the question of conformity with Articles 84 and 123(2) EPC.

4. In its letter of 19 September 2012 the appellant also requested that should the Board consider the main, first and second auxiliary requests not to be allowable, since the decision under appeal incorrectly relied upon documents D1 and D2, the case be remitted to the examining division for further prosecution. The Board cannot accede to this request since the appellant has not only had adequate occasion to comment on the contents of D5 and the related objections raised by the Board, but also to file amended requests. Furthermore, the appellant decided not to attend the oral proceedings which it had requested and during which it could have further explained its case and possibly presented further requests.

4.1 Thus, there is no reason for the examination proceedings to be prolonged by remittal to the examining division.

Order

For these reasons it is decided that:

The appeal is dismissed.

Registrar:

Chairman:

D. Hampe

U. Krause