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**Datasheet for the decision
of 29 January 2016**

Case Number: T 0303/15 - 3.2.01

Application Number: 09165707.2

Publication Number: 2113458

IPC: B64D23/00, A63G31/00, A01K73/02

Language of the proceedings: EN

Title of invention:
Wind tunnel skydiving simulator

Patent Proprietor:
Skyventure International (UK) Ltd.

Opponent:
STM SAVUNMA TEKNOLOJILERI MÜHENDISLIK VE
TICARET ANONIM SİRKETİ

Headword:

Relevant legal provisions:
RPBA Art. 12(4)

Keyword:
Fresh case based on new documents filed in appeal -
not admitted

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0303/15 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 29 January 2016

Appellant:
(Opponent)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 2 December 2014
rejecting the opposition filed against European
patent No. 2113458 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: Y. Lemblé
S. Fernández de Córdoba

Summary of Facts and Submissions

I. The appeal of the Opponent is directed against the decision of the Opposition Division to reject the opposition against European Patent No. 2 113 458.

The patent was opposed under Art. 100 a) EPC 1973. In its decision the Opposition Division held that the subject-matter of the patent as granted met the requirement of novelty and inventive step having regard to the prior art cited by the Appellant/Opponent.

II. In its written statement setting out the grounds of appeal, the Appellant referred to the prior art document E04: US-A-6 083 110 of the opposition proceedings and, for the first time, to the following documents:

E05: US-A-1 811 364,
E06: US-A-3 484 953,
E07: GB-A-2 062 557,
E08: US-B-7 524 189,
E09: US-A-4 457 509,
E10: US-B-7 153 136,
E11: US-A-4 578 037,
E12: US-A-1 940 790,
E13: US-A-5 655 909,
E14: EP-A-1 330 150,
E15: US-B-6 813 152,
E16: US-A-5 299 914.

III. Oral proceedings were held on 29 January 2016.

The Appellant (Opponent) did not appear, as announced by email dated 28 January 2016. It requested in writing that the decision under appeal be set aside and that the patent be revoked.

The Respondent (Patent Proprietor) withdrew the request that the appeal be rejected as inadmissible and requested that the appeal be dismissed.

IV. The wording of claim 1 as granted is the following (delimitation of features by the Board):

A vertical wind tunnel skydiving simulator comprising:

- a) a recirculating airflow plenum having a generally rectangular configuration;
- b) a vertical flight chamber (10, 1503, 1701, 2202) capable of floating at least one human housed within a first vertical side member of the generally rectangular configuration of the airflow plenum;
- c) a fan assembly (3);

characterized in

- d) **that** the fan assembly (3) comprises a plurality of fans (40, 41) in a side-by-side arrangement mounted horizontally in a top member of the airflow plenum;
- e) **that** the flight chamber (10, 1503, 1701, 2202) is located on the inlet side of the fan assembly (3);
- f) wherein a top member return duct (30), the first vertical side member, and a second vertical side member return duct (5) of the airflow plenum each have a divergent wall segment to expand a flow of recirculating air while maintaining a generally laminar airflow.

V. The Appellant's submissions may be summarised as follows:

The opposition division came to the conclusion that the opposition was rejected. This opinion was not shared and the contention defended in the opposition file and

cited in the section "Reason For The Decision", point 3.2 of the opposition decision, was maintained. It was said in point 3.3 of the decision of the Opposition Division that no evidence were submitted to support the arguments. Therefore, new documents were filed with the grounds of appeal in support of the above-mentioned contention. These documents disclosed the features of the claims and it was clear for a person skilled in the art that these features did not involve an inventive step for a person skilled in the art.

As regards the features a) and b), they were present in the recirculation systems of E06, E09 and E07.

As regards feature d), the idea of a fan assembly containing more than one juxtaposed fans was previously disclosed in Fig. 2 and claims 7 and 8 of E07.

As regards feature e), the fact whether the fans were placed on the inlet or outlet side of the flight chamber in a closed loop system did not make any difference technically. Moreover, the air blown from the fans in a closed loop reached the flight chamber in any case. Likewise, no matter where the fans were placed in a closed loop vertical wind tunnel, even if the fans were placed right below the flight chamber, the suction end of the fans would face against the flight chamber under any circumstances.

As regards the feature f), it was known from claim 4, 5, 6 and 7 of E12. The diverging walls and their effect on the airflow were already explained in E07, so these features of claim 1 were well-known. The effect of divergence on the airflow was explained in E11 (see col. 1, line 60 to col. 2, line 4). There were diverging walls mentioned at many points also in E05. Feature f) could be easily derived by a person skilled in the art when taking E12, E07, E11 and E05 into consideration. In the light of all of the above given explanations, claim 1 did not meet the inventive step

criteria, when E06, E09, E07, E12, E11 and E05 were taken into consideration.

VI. The counter arguments of the Respondent may be summarized as follows:

The newly cited prior art documents should not be admitted into these proceedings in accordance with Article 12 (4) RPBA (Rules of Procedure of the Boards of Appeal). The Appellant had brought an entirely fresh case, not linked to the reasoning in the contested decision and introducing a large number of new documents E05 to E16 in the grounds of appeal. This was contrary to the aim of opposition-appeal proceedings, which was to obtain a judicial review of the decision reached in the administrative opposition proceedings (see, for example, G 9/91, G 10/91). The Appellant had not provided any reasons for not having been able to submit the cited documents in the first instance. It was therefore requested not to admit those documents, which had not been already mentioned in the notice of opposition. Without the late-filed documents, the appeal lacked any basis and clearly was unsubstantiated. In this respect it was also to be noted that the only document (E04) that had been submitted within the opposition period was not at all commented by the Appellant. Further it was noted that documents E08 (published April 28 2009), E10 (published Dec. 26 2006) and E15 (published Nov. 2 2004) had publication dates after the priority date of the patent in suit and were thus not prior art. For this further reason the newly cited documents were not to be admitted into the present proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. According to Article 12(4) RPBA, the Board of Appeal has the discretionary power to hold inadmissible facts, evidence and requests which could have been presented in the first instance proceedings.
 - 2.1 It is noted that the filing of documents E05 to E16 cannot be regarded as a reaction to the decision of the Opposition Division, as argued by the Appellant, who referred to point 3.3 of the decision where a lack of evidence is mentioned. In point 3.3 of the contested decision it is stated that the opponent "did not present any evidence of a simulator with a fan assembly comprising a plurality of fans in a side-by-side arrangement mounted horizontally in a top member of an airflow plenum", i.e. that the Opponent did not present any evidence in support of feature d) of claim 1. As regards this feature, the Appellant only referred to document E07 but failed to explain why this document discloses feature d). In fact, the Appellant merely submitted, referring to Figs. 1 and 2 and claims 7 and 8 of E07, that this document discloses "the idea of a fan assembly containing more than one juxtaposed fans" and that "there is not any technical difference in placing the fans in the upper tunnels or in the lower tunnels in a closed loop vertical wind tunnel". The Appellant thus failed to take into account the whole implication of feature d), which not only requires juxtaposed fans in upper or lower tunnels of a closed loop vertical tunnel, but specifically requires a side-by-side arrangement mounted horizontally in a top member of an airflow plenum. In fact, in Fig. 1 and 2

of E07, the fans 22 are placed vertically in bottom chambers 21 of the apparatus.

Accordingly, the filing of documents E05 to E016 for the first time with the statement of grounds of appeal amounts to the making of an entirely fresh case which is not justified by the circumstances in opposition proceedings. Moreover, the Board takes the view that this fresh case is not prima facie relevant in the sense that, if admitted, it might lead to a negative conclusion as regards inventive step. In this respect, it must be noted that none of these documents discloses feature d) which was considered by the Opposition Division as a feature contributing to inventive step.

Accordingly, in application of its discretionary power pursuant to Article 12(4) RPBA, the Board decided not to admit documents E05 to E16 into the appeal proceedings.

- 2.2 The statement of grounds of appeal does not contain any argument or comment based on document E04, which is the sole among the documents cited in appeal that was also considered by the Opposition Division. Accordingly, the Board sees no reason to revise the conclusion of the Opposition Division that the subject-matter of claim 1 involved an inventive step when starting from document E04 as the nearest prior art.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated