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**Datasheet for the decision
of 13 November 2019**

Case Number: T 0706/15 - 3.5.02

Application Number: 04001720.4

Publication Number: 1465460

IPC: H05B3/74

Language of the proceedings: EN

Title of invention:
Top Plate for Cooker

Patent Proprietor:
Nippon Electric Glass Co., LTD

Opponent:
Eurokera S.N.C.

Relevant legal provisions:
RPBA Art. 13(1)
EPC R. 103(1)(a)
EPC Art. 101(3), 113(2)

Keyword:

Late-filed requests not admitted - no justification for late filing, introduction of substantive aspects not previously discussed, need to remit upon admittance likely, Board had not suggested in summons that claims amended in a certain way would be likely to be admitted

No reimbursement of the appeal fee - not equitable by reason of a substantial procedural violation



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Case Number: T 0706/15 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 13 November 2019

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 February 2015 concerning maintenance of the
European Patent No. 1465460 in amended form.**

Composition of the Board:

Chairman R. Lord
Members: F. Giesen
 W. Ungler

Summary of Facts and Submissions

- I. This appeal by the opponent lies from the interlocutory decision of the Opposition Division of the European Patent Office posted on 6 February 2015 concerning maintenance of the European Patent No. 1465460 in amended form.

- II. The Board informed the parties of their preliminary opinion in a communication pursuant to Article 15(1) RPBA annexed to summons to oral proceedings dated 22 August 2019. With a letter dated 2 October 2019 the respondent (patent proprietor) replaced all requests from their reply to the statement of grounds of appeal by a new main request and auxiliary requests 1 to 4, the claims of which comprised for the first time the glass composition of the top plate and the oxidation states of certain of its elements. With a further letter dated 14 October 2019 the respondent replaced the previous auxiliary requests 1 to 3 by amended ones.

- III. Oral proceedings before the Board took place on 13 November 2019. At the oral proceedings the respondent withdrew their main request filed with letter dated 2 October 2019. The parties and the Board agreed not to renumber the requests but that it was clear that the first auxiliary request was the highest ranking request.

The final requests of the parties were thus as follows:

The appellant (opponent) requested that the decision under appeal be set aside and the European patent be revoked. Moreover, the appellant requested that the appeal fee be reimbursed.

The respondent (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of one the first to third auxiliary requests filed with letter dated 14 October 2019, or on the basis of the fourth auxiliary request filed with letter dated 2 October 2019.

IV. Claim 1 according to the **first auxiliary request** reads as follows:

"A top plate for a cooker, formed of color crystallized glass having an Y-value (brightness) in XYZ display system in C optical source of CIE of 2.5 to 15 at a thickness of 3 mm and which allows the light from light-emitting elements of blue, green, yellow and red color to pass through, the color crystallized glass has the following composition (indicated by mass%): SiO₂ 55 to 75%, Al₂O₃ 14 to 28%, Li₂O 2,5 to 7%, MgO 0 to 4%, ZnO 0 to 5%, TiO₂ 0 to 6%, ZrO₂ 0 to 3%, V₂O₅ 0.01 to 0.5%, Na₂O 0 to 5%, K₂O 0 to 5%, Fe₂O₃ 0.001 to 0.3%, As₂O₃ 0.001 to 2.5%, CaO 0 to 5%, BaO 0 to 7% and PbO 0 to 3%, and precipitates β -quartz solid solution crystal, wherein the top plate is formed of color crystallized glass which is manufactured by heat-treating crystallizable glass having a ratio of As³⁺ (As³⁺/total As) of not more than 97 mass%."

V. Claim 1 according to the **second auxiliary request** had in addition to the features of the first auxiliary request the feature

"and to be seen from a top surface of the top plate by a visual check, while an interior structure of the cooker is shielded."

between the words "to pass through" and "the color crystallized glass".

VI. Claim 1 according to the **third auxiliary request** was directed to a

"Use of a color crystallized glass as a top plate of an electromagnetic heating (IH) cooker for shielding the internal structure of the cooker"

the color crystallized glass having the same features as that of claim 1 of the first auxiliary request.

VII. Claim 1 according to the **fourth auxiliary request** had, in addition to the features of claim 1 of the third auxiliary request, the feature that the color crystallized glass has

"a ratio of Fe^{2+} ($Fe^{2+}/total\ Fe$) of not more than 75 mass%"

VIII. The appellant's arguments in as far as they are relevant for the present decision were essentially as follows:

The first to fourth auxiliary requests were late filed and should not be admitted. A Board's preliminary opinion may always come to a different conclusion than the impugned decision, otherwise appeal proceedings would be pointless. Various objections of lack of clarity, to which the amended requests were intended to be a reaction, had already been discussed during the

opposition proceedings and were also repeated in the statement of the grounds of appeal. The respondent therefore should have filed the late filed requests already in the first instance proceedings. The late filed requests were accompanied only by cursory remarks as to where the individual features were originally disclosed but not as to where a basis for the combination of features was originally disclosed. There was also no indication of why the late filed requests met the requirements of Article 84 EPC.

Seven substantial procedural violations had been committed by the Opposition Division, justifying the reimbursement of the appeal fee.

(1) The decision under appeal was not sufficiently reasoned, since due to a reference to a communication dated 18 December 2012 no unambiguous reason but only a vague reference was given regarding the appellant's objections under Articles 100(b) and 83 EPC.

(2) It was a substantial procedural violation by the Opposition Division to refer to the reasoning concerning Article 84 EPC in the discussion of an objection under Article 83 EPC in the decision.

(3) The appellant's argument that any amendment containing the term "which allows light from light-emitting elements of blue, green, yellow and red color to pass through" would have had to comprise a number of further features to satisfy the requirements of Article 123(2) EPC was ignored in the decision under appeal.

(4) The decision was not sufficiently reasoned. In refuting the appellant's argument that the feature concerning the top plate to allow light of various

colors to pass through was a parameter in the sense of the Guidelines F-IV, 4.11, the Opposition Division had failed to recite the conditions mentioned in the Guidelines and explain why each and every one of these conditions were met.

(5) The Opposition Division failed to provide reasons why it considered the distinction between "can be slightly seen" and "can be seen" in the description of the opposed patent to be clear.

(6) The decision was self-contradictory in multiple parts, in particular regarding the definition of "blue light" and "the like colors" so that the appellant had to appeal "simply to obtain a consistent reasoning".

(7) The wording of the decision might be construed as meaning that the appellant had waived a particular objection concerning a lack of insufficient disclosure although they had not.

IX. The respondent's arguments in as far as they are relevant for the present decision were essentially as follows:

The first to fourth auxiliary request should be admitted. The Board had issued a preliminary opinion which disagreed with the positive decision of the Opposition Division. The negative opinion was the reason for filing the amended requests. The Board suggested in the preliminary opinion features that the claim should have and those features, such as the glass composition and the oxidation states, were added in the amended requests. The opinion given by the Board dealt with topics that had not been an issue of discussion before the Opposition Division and hence there had been

no need to file the late filed requests earlier. The independent claim according the first auxiliary request only added the subject-matter of a granted claim and a passage from the description containing preferred ranges to the claim on which the impugned decision was taken. Therefore, the requirements of Article 84 EPC and those of Article 123(2) EPC were met.

There had not been any substantial procedural violation by the Opposition Division.

Reasons for the Decision

1. The appeal is admissible.
2. Admissibility of the requests
 - 2.1 The first to fourth auxiliary request are not admissible for the following reasons.
 - 2.2 According to Article 12(2) RPBA, the reply to the statement of grounds shall contain the respondent's complete case. According to Article 13(1) RPBA any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject matter submitted, the current state of the proceedings and the need for procedural economy.

2.3 The requests should have been filed in the first instance proceedings and no convincing justification for the time of filing was offered.

The pending requests were filed only after the Board had communicated its preliminary opinion in a communication pursuant to Article 15(1) RPBA annexed to the summons to oral proceedings. Contrary to the respondent's impression, in this communication, the Board did not introduce any new aspects but confined themselves to giving an opinion on matters that had already been discussed either in the first instance proceedings or which were part of the appellant's case as set out in the statement of grounds of appeal, such as the clarity of the functional definitions or the expression "pass through". When establishing their case at the beginning of the appeal proceedings, the respondent had to expect that a Board of Appeal, which is an independent judicial review instance not bound by the decision to be reviewed, may have a view on the case that differs from that of the Opposition Division. Postponing the filing of requests to address objections by the appellant until after the Board indicated that it considers some of these objections to be convincing is not justified.

In addition to this, the respondent did not provide any explanation as to why the new requests were not filed in the first instance proceedings. Since the matters to be discussed at the oral proceedings had been contentious throughout the entire proceedings, the pending requests should have been filed in the first instance proceedings. The appeal proceedings are not a continuation of the opposition proceedings, but are first and foremost proceedings concerned with a judicial review of the decision under appeal.

Furthermore, the Board had not, in any objective way, suggested in their preliminary opinion that the addition of the glass composition and oxidation states would lead to an allowable claim set and had especially not implied that such a hypothetically amended claims would be admitted. In point 2 of their communication dated 22 August 2018, the Board had come to the conclusion that the feature regarding the light of various colors being allowed to pass through the plate was in essence merely the statement of the underlying problem, and in point 3 the Board came to the preliminary conclusion that the description of the top plate in terms of its glass composition and oxidation states was neither unduly limiting nor unconcise. The communication stated therefore simply, that a claim formulation in terms of the problem to be solved was not allowable, but nothing more than that. As can be seen from this, no objective implications concerning the admissibility of claims amended to that effect resort from the Board's preliminary opinion.

- 2.4 The requests are an amendment to the respondent's case, which involves complex new subject-matter and does not sufficiently respect the requirement of procedural economy.

The late filed requests were accompanied only with a short explanation of where the glass composition was individually disclosed in the description of the A1-publication but there was no explanation as to where the combination of features to which the amended claims were now directed was originally disclosed. Admittance of the request would thus have entailed a potentially complex discussion in this respect.

The new requests contain for the first time during the proceedings features that specify the glass composition of the top plate originally disclosed only in the description. This aspect had not been discussed in substance in the opposition proceedings or up to that point in the appeal proceedings. Admittance of the request would have entailed a complex technical discussion which would have had to take place for the first time during oral proceedings before the Board and which might very likely have led to a remittal of the case to enable adequate discussion to take place. Admitting this request would not have respected the nature of the appeal proceedings as a judicial review of the decision under appeal but would have been a continuation of the first instance proceedings.

Moreover, the Board had expressed in point 3, last paragraph of the communication dated 22 August 2018 that the claim had no apparent objective restriction on the transmittance at a given wavelength. The late filed requests all still contained independent claims having the feature "which allows the light from light-emitting elements of blue, green, yellow and red color to pass through". Therefore the late-filed claims did not deal in substance with all the objections that were already known to the respondent at the time of filing them.

2.5 Under these circumstances, the Board exercised its discretion according to Article 13(1) RPBA not to admit the first to fourth auxiliary requests into the proceedings.

3. Legal consequence of non-admittance of the requests
 - 3.1 Due to the non-admittance of the late-filed requests there is no version of the patent in the proceedings which was approved by the patent proprietor within the meaning of Article 113(2) EPC on which the patent could be maintained. In the absence of any version of the patent meeting the requirements of Article 113(2) EPC the patent has to be revoked according to Article 101(3) (b) EPC.

4. Request for reimbursement of the appeal fee - Alleged substantial procedural violations
 - 4.1 No substantial procedural violation occurred in the first instance proceedings. Thus, the request for reimbursement of the appeal fee is to be refused (cf. Rule 103(1) (a) EPC).
 - 4.2 In essence, the appellant objected to the level of detail with which the Opposition Division had dealt with the appellant's submissions without showing convincingly how their right to be heard or the requirements which a decision must fulfil or any other procedural provision were violated.

Especially the alleged violations (1), (2) and (4) as numbered in point VIII. of the Facts and Submissions concern the level of detail at which the decision dealt with arguments which had been submitted in writing or during oral proceedings. The required level of detail is to be judged on a case by case basis. In the present case, the appellant was clearly in a position to understand the reasons and to reply to them substantively in their statement of grounds. In that

regard it is also to be noted that a decision may refer to an earlier communication instead of repeating the text literally in the decision itself. The reference contained in the impugned decision (cf. Reasons no. 4.1) is as such clear and the text referred to provided a sufficient reasoning.

Regarding the alleged violations (3), (5), (6) and (7) the appellant failed to demonstrate how any of these affected either their right to be heard or any other procedural provision. The alleged procedural violations rather concern matter which was not relevant for the tenor and outcome of the decision under appeal.

The Opposition Division had considered paragraph [0036] as a basis in the original application documents for the amendment, whereas the appellant's argument referred to other passages. In such a situation it might be sufficient to provide the reasons for the Division's conclusions without dealing with further passages of the application documents.

Furthermore, the issue of clarity of terms or wording used in the description of a patent is not a substantive requirement that needs to be examined in opposition proceedings, therefore the Opposition Division did not have to address the appellant's comments in that regard.

That the decision under appeal was so self-contradictory that the appellant had to appeal is merely a sweeping unspecific statement which the Board, upon reading the impugned decision, simply cannot confirm.

It is also clearly irrelevant how the wording of a decision might be subjectively perceived by the

appellant. When read objectively the decision under appeal does not imply that any objection was waived and hence not dealt with.

5. Therefore, the Board accedes to the request of the appellant to revoke the patent, but not to that for reimbursement of the appeal fee, nor to the requests of the respondent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated