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**Datasheet for the decision
of 7 June 2021**

Case Number: T 0167/17 - 3.2.07

Application Number: 09002589.1

Publication Number: 2070657

IPC: B25C1/08

Language of the proceedings: EN

Title of invention:
Combustion-type power tool

Applicant:
Koki Holdings Co., Ltd.

Headword:

Relevant legal provisions:

EPC R. 106
RPBA 2020 Art. 13(2)

Keyword:

Amendment after summons - exceptional circumstances (no)
Obligation to raise objections - objection dismissed

Decisions cited:

T 1297/16, T 0716/17

Catchword:



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Case Number: T 0167/17 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 7 June 2021

Appellant: Koki Holdings Co., Ltd.
(Applicant) 15-1, Konan 2-chome
Minato-ku
Tokyo
1086020 (JP)

Representative: Strehl Schübel-Hopf & Partner
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 21 June 2016
refusing European patent application No.
09002589.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman V. Bevilacqua
Members: K. Poalas
E. Kossonakou

Summary of Facts and Submissions

- I. The applicant (appellant) lodged in due time and form an appeal against the decision of the Examining Division refusing European patent application No. 09 770 482.9 which is a divisional application of the European patent application No. 05 252 430.3 published as EP 1 588 804 A2.
- II. The Examining Division held that claim 1 filed with letter dated 26 April 2016 violated the requirements of Article 76(1) EPC.
- III. In the statement setting out the grounds of appeal, the applicant requested that the decision under appeal be set aside and a patent be granted on the basis of one of the main request and the auxiliary requests 1 to 3, whereby
- claim 1 of the the main request was identical to claim 1 underlying the impugned decision and
 - auxiliary requests 1 to 3 were filed for the first time with the statement setting out the grounds of appeal.
- IV. With its communication according to Article 15(1) RPBA the Board expressed its preliminary opinion that with respect to the main request the appellant had not convincingly demonstrated that the requirements of Article 76(1) EPC were met, that the auxiliary requests 1 to 3 were not to be admitted into the proceedings and that thus the present appeal was likely to be dismissed.

- V. With its submissions dated 27 May 2021 the appellant filed eight claim requests denominated as:
- main request A (MRA), auxiliary request 1A (AR1A), auxiliary request 2A (AR2A), auxiliary request 3A (AR3A), clearly identifying all of these requests as being new and
 - main request B (MRB), auxiliary request 1B (AR1B), auxiliary request 2B (AR2B) and auxiliary request 3B (AR3B), submitting that these requests correspond to those filed with the statement setting out the grounds of appeal, and argued about the admissibility and allowability of all requests.

VI. Oral proceedings before the Board took place on 7 June 2021.

At the oral proceedings the applicant requested that

- the decision under appeal be set aside and
- a patent be granted on the basis of one of the claim requests filed with its submissions dated 27 May 2021 in the following order:

MRA, AR1A, AR2A, AR3A, MRB, AR1B, AR2B and AR3B.

At the end of the oral proceedings the appellant requested a change of the order of the claim requests as follows: MRB, AR1B, AR2B, AR3B, MRA, AR1A, AR2A and AR3A.

Further details of the oral proceedings can be found in the minutes thereof. At the conclusion of the oral proceedings the present decision was announced.

VII. Independent claim 1 of MRA reads as follows:

"A combustion-type power tool comprising:
a housing (2);

a cylinder head (11) disposed at one end of the housing and formed with a fuel ejection port and an inlet port;
a cylinder (20) secured to an inside of the housing;
a piston (23) slidably disposed in the cylinder and reciprocally movable in an axial direction of the cylinder, the piston dividing the cylinder into an upper cylinder space above the piston and a lower cylinder space below the piston;
a driver blade (23a) connected to the piston to be movable therewith;
a combustion-chamber frame movably provided in the housing, the combustion-chamber frame having one end abutable on and separable from the cylinder head, a combination of the combustion-chamber frame, the cylinder head and the piston defining a combustion chamber;
a fan (19) disposed in the combustion chamber;
a motor (18) having an output shaft (18b) coupled to the fan;
a motor holder (13) that accommodates the motor (18);
and
an elastic member (15) disposed in a gap formed between the motor (18) and a bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor".

Independent claim 1 of AR1A reads as follows:

"A combustion-type power tool comprising:

a housing (2);

a cylinder head (11) disposed at one end of the housing and formed with a fuel ejection port and an inlet port;

a cylinder (20) secured to an inside of the housing;

a piston (23) slidably disposed in the cylinder and reciprocally movable in an axial direction of the cylinder, the piston dividing the cylinder into an

upper cylinder space above the piston and a lower cylinder space below the piston;
a driver blade (23a) connected to the piston to be movable therewith;
a combustion-chamber frame movably provided in the housing, the combustion-chamber frame having one end abutable on and separable from the cylinder head, a combination of the combustion-chamber frame, the cylinder head and the piston defining a combustion chamber;
a fan (19) disposed in the combustion chamber;
a motor (18) having an output shaft (18b) coupled to the fan;
a motor holder (13) that accommodates the motor (18), the outer peripheral surface of the motor holder (13) contacting an inner wall of a motor holder receiving portion (11a);
and
an elastic member (15) disposed in a gap formed between the motor (18) and a bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor".

Independent claim 1 of AR2A reads as follows:

"A combustion-type power tool comprising:
a housing (2);
a cylinder head (11) disposed at one end of the housing and formed with a fuel ejection port and an inlet port;
a cylinder (20) secured to an inside of the housing;
a piston (23) slidably disposed in the cylinder and reciprocally movable in an axial direction of the cylinder, the piston dividing the cylinder into an upper cylinder space above the piston and a lower cylinder space below the piston;
a driver blade (23a) connected to the piston to be

movable therewith;

a combustion-chamber frame movably provided in the housing, the combustion-chamber frame having one end abutable on and separable from the cylinder head, a combination of the combustion-chamber frame, the cylinder head and the piston defining a combustion chamber;

a fan (19) disposed in the combustion chamber;

a motor (18) having an output shaft (18b) coupled to the fan;

a motor holder (13) that accommodates the motor (18), the cylinder head (11) being formed with a motor holder receiving portion (11a) which has an inner wall in surface contact with the outer peripheral surface of the motor holder (13);

and

an elastic member (15) disposed in a gap formed between the motor (18) and a bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor".

Independent claim 1 of AR3A reads as follows:

"A combustion-type power tool comprising:

a housing (2);

a cylinder head (11) disposed at one end of the housing and formed with a fuel ejection port and an inlet port;

a cylinder (20) secured to an inside of the housing;

a piston (23) slidably disposed in the cylinder and reciprocally movable in an axial direction of the cylinder, the piston dividing the cylinder into an upper cylinder space above the piston and a lower cylinder space below the piston;

a driver blade (23a) connected to the piston to be movable therewith;

a combustion-chamber frame movably provided in the

housing, the combustion-chamber frame having one end abutable on and separable from the cylinder head, a combination of the combustion-chamber frame, the cylinder head and the piston defining a combustion chamber;

a fan (19) disposed in the combustion chamber;

a motor (18) having an output shaft (18b) coupled to the fan;

a motor holder (13) that accommodates the motor (18), the cylinder head (11) being formed with a motor holder receiving portion (11a) in which the motor holder (13) is slidably movable disposed;

and

an elastic member (15) disposed in a gap formed between the motor holder (13) and the motor holder receiving portion (11a) in an axial direction of the output shaft (18b) of the motor, the elastic member (15) being elastically deformable when the motor holder (13) slidingly moves relative to the motor holder receiving portion (11a)".

Independent claim 1 of MRB reads as follows:

"A combustion-type power tool comprising:

a housing (2);

a cylinder head (11) disposed at one end of the housing;

a cylinder (20) disposed in the housing;

a piston (23) slidably disposed in the cylinder;

a driver blade (23a) connected to the piston;

a combustion-chamber (26) provided in the housing;

a fan (19) disposed in the combustion chamber;

a motor (18) having an output shaft (18b) coupled to the fan;

a motor holder (13) for supporting the motor (18);

a bottom portion of the cylinder head (11) surrounding

a portion of the output shaft (18b);
and
an elastic member (15) disposed in a gap formed between the motor (18) and the bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor."

Independent claim 1 of AR1B reads as follows:

"A combustion-type power tool comprising:
a housing (2);
a cylinder head (11) disposed at one end of the housing;
a cylinder (20) disposed in the housing;
a piston (23) slidably disposed in the cylinder;
a driver blade (23a) connected to the piston;
a combustion-chamber (26) provided in the housing;
a fan (19) disposed in the combustion chamber;
a motor (18) having an output shaft (18b) coupled to the fan;
a motor holder (13) for supporting the motor (18), the outer peripheral surface of the motor holder (13) contacting an inner wall of a motor holder receiving portion (11a);
a bottom portion of the cylinder head (11) surrounding a portion of the output shaft (18b);
and
an elastic member (15) disposed in a gap formed between the motor (18) and the bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor."

Independent claim 1 of AR2B reads as follows:

"A combustion-type power tool comprising:
a housing (2);

a cylinder head (11) disposed at one end of the housing;
a cylinder (20) disposed in the housing;
a piston (23) slidably disposed in the cylinder;
a driver blade (23a) connected to the piston;
a combustion-chamber (26) provided in the housing;
a fan (19) disposed in the combustion chamber;
a motor (18) having an output shaft (18b) coupled to the fan;
a motor holder (13) for supporting the motor (18), the cylinder head (11) being formed with a motor holder receiving portion (11a) which has an inner wall in surface contact with the outer peripheral surface of the motor holder (13);
a bottom portion of the cylinder head (11) surrounding a portion of the output shaft (18b);
and
an elastic member (15) disposed in a gap formed between the motor (18) and the bottom portion of the cylinder head (11) in an axial direction of the output shaft (18b) of the motor."

Independent claim 1 of AR3B reads as follows:

"A combustion-type power tool comprising:
a housing (2);
a cylinder head (11) disposed at one end of the housing;
a cylinder (20) disposed in the housing;
a piston (23) slidably disposed in the cylinder;
a driver blade (23a) connected to the piston;
a combustion-chamber (26) provided in the housing;
a fan (19) disposed in the combustion chamber;
a motor (18) having an output shaft (18b) coupled to the fan;
a motor holder (13) for supporting the motor (18);

a bottom portion of the cylinder head (11) surrounding a portion of the output shaft (18b), the cylinder head (11) being formed with a motor holder receiving portion (11a) in which the motor holder (13) is slidably movable disposed;

and

an elastic member (15) disposed in a gap formed between the motor holder (13) and the motor holder receiving portion (11a) in an axial direction of the output shaft (18b) of the motor."

Reasons for the Decision

Amendment of the appellant's appeal case filed with its submissions dated 27 May 2021 - admittance, Article 13(2) RPBA 2020

1. The appellant's appeal case forming the basis of the present proceedings according to Article 12(1) and (2) RPBA 2007 (which remained essentially unaltered in the revised version of the RPBA 2020) consisted of the four claim requests filed together with the statement setting out the grounds of appeal.
2. With its submissions dated 27 May 2021 and received on 28 May 2021, i.e. 10 days before the scheduled oral proceedings, the appellant amended their appeal case by filing four further claim requests based on the corresponding claims 1 of the claim requests filed with the statement setting out the grounds of appeal together with some of the features mentioned under section 7.2 of the Board's communication.

In addition, the rank of the main request and of the auxiliary requests filed with the statement setting out the grounds of appeal (renamed MRB, AR1B, AR2B, AR3B) was changed, in that they were ordered after the newly filed requests.

Original auxiliary request 1 (renamed AR1B) was modified by insertion of a missing preposition ("of").

Original auxiliary request 3 (renamed AR3B) was amended by insertion of an additional feature ("receiving portion (11a)").

3. These amendments to the appellant's appeal case were made after notification of the summons to oral proceedings before the Board. They can only be taken into account by the Board under the provisions of Article 13(2) RPBA 2020, which implements the third level of the convergent approach applicable in appeal proceedings and imposes the most stringent limitations on appeal submissions which are made at such an advanced stage of the proceedings. Such amendments shall, in principle, **not be taken into account** unless there are **exceptional circumstances**, which have been justified with **cogent reasons** by the party concerned.
4. The appellant argued in this respect that the Article 76(1) EPC objections in section 7.2 and 7.8, first part, of the Board's provisional opinion have been raised for the first time in the entire proceedings. As a consequence, the appellant had no reason or opportunity to present any of the amendments introduced into the MRA, AR1A, AR2A, AR3A at an earlier stage. This should qualify as an exceptional situation, as their right to be heard with respect to the new

objections could only be exercised effectively, if they were allowed to introduce the amendments at this late stage of the appeal procedure.

Since claim 1 of MRB was identical to claim 1 of the main request filed with the statement setting out the grounds of appeal and to claim 1 rejected in the impugned decision, claim 1 of AR1B was identical to claim 1 of auxiliary request 1 filed with the statement setting out the grounds of appeal apart from the insertion of a missing article, claim 1 of AR2B was identical to claim 1 of auxiliary request 2 filed with the statement setting out the grounds of appeal, claim 1 of AR3B was identical to claim 1 of auxiliary request 3 filed with the statement setting out the grounds of appeal apart from the correction of a clerical error, the claim requests MRB, AR1B, AR2B and AR3B were to be admitted, so the appellant, in any case into the proceedings. Divergence between the claim requests MRA, AR1A, AR2A and AR3A on the one hand and the claim requests MRB, AR1B, AR2B and AR3B on the other hand was intended to serve procedural economy.

5. The appellant's argument that the Board's comments in section 7 of its communication under Article 15(1) RPBA 2020 represent exceptional circumstances within the meaning of Article 13(2) RPBA 2020 is not convincing.
- 5.1 In the impugned decision the examining division found that the appellant's then sole request did not meet the requirements of Article 76(1) EPC because feature F1 ("the cylinder head being formed with a motor holder receiving portion in which the motor holder is slidably movably disposed") of the originally filed claim 1 of the parent application is missing and feature F2 ("an elastic member disposed in a gap formed in the axial

direction between the motor holder and the motor holder receiving portion") of the originally filed claim 1 of the parent application had been replaced by feature F3 ("the elastic member is disposed in a gap formed between the motor and the bottom portion of the cylinder head").

- 5.2 In the statement setting out the grounds of appeal the appellant presented arguments as to why the omission of feature F1 and the replacement of feature F2 through feature F3 meet the requirements of Article 76(1) EPC.
- 5.3 In its preliminary opinion, the Board highlighted all differences between claim 1 of the main request and originally filed claim 1 of the parent application. It then commented on and evaluated the arguments presented by the appellant regarding the examining division's objections under Article 76(1) EPC, before concluding that the appellant had not convincingly demonstrated that the requirements of Article 76(1) EPC are met.
- 5.4 The appellant's argument as set out in point 4 above, that this presentation/evaluation of the Board raised new objections and represents exceptional circumstances in the sense of Article 13(2) RPBA 2020 is not convincing. The Board merely explained, in detail and by highlighting all relevant aspects, why it was of the preliminary opinion that the examining division had not erred in finding that the main request did not meet the requirements of Article 76(1) EPC, thus effectively repeating the exact same objection.
- 5.5 Accordingly the Board concluded that the appellant had not justified with cogent reasons why there were exceptional circumstances justifying this late change of case and decided that all the claim requests filed

with the submissions dated 27 May 2021 were not to be admitted into the proceedings under Article 13(2) RPBA 2020.

Objection under Rule 106 EPC

6. Following the announcement of the Board's decision not to admit any of the claim requests into the proceedings, the appellant raised an objection under Rule 106 EPC concerning the rejection of MRB as follows (text also annexed to the minutes of the oral proceedings):

"We object to the rejection of our main request B, filed as our then only request with our response of July 17, 2015, to the summons of November 24, 2015, for oral proceedings in the examination procedure. The rejection of this request is a procedural defect in the sense of Rule 106 EPC for the following reasons:

1. The admissibility of the main and auxiliary requests has to be assessed in the order of requests as indicated by us at the beginning of today's oral proceedings. Therefore, the Board of Appeal has assessed the admissibility of the main request B after the admissibility of the main request A and the auxiliary requests 1A to 3A has already been denied. At that moment, main request B is the only request on the table.

2. In particular, there is no higher-ranking request at that moment. Main request B is the highest-ranking request and the state and order of the remaining main and auxiliary requests B are the same as in the beginning of the appeal procedure, when the main request B (then simply main request) was clearly

admissible. The rejection can therefore not be based on any change of order of our requests.

3. Moreover, as no higher-ranking request has been admitted into the appeal procedure in the moment of the assessment of the admissibility of the main request B, there is no reference point for assessing convergence or divergence of main request B, so that the request cannot possibly be considered non-convergent with respect to any (non-existing) higher-ranking request.

The Board's discretionary rejection of the main request B as inadmissible is not within the range of the Board's discretion anymore and is rather based on a fundamentally flawed exercise of discretion defying, as set out above, basic logical and procedural rules. As a result, the very basis of the appealed decision, the set of claims of main request B, and therefore the basis of the entire appeal procedure are affected.

The applicants are adversely affected by the Board's rejection of main request B, as their right to be heard with respect to the objections in the appealed decision and to those of the Board's preliminary opinion is taken from them."

7. This objection was raised after a long and detailed discussion of the circumstances of the case and of the timing and scope of the amendments introduced. The appellant's right to be heard has therefore been fully exercised.
8. In the course of this discussion the appellant argued exhaustively his point of view that the Board assessed the admissibility of MRB after the admissibility of MRA and AR1A-AR3A had been denied, which corresponded to a

moment in time in which MRB was the only request on the table, since no higher-ranking request existed at that moment any more. As MRB was filed with the statement of grounds and was identical to the one underlying the impugned decision, at least MRB was clearly admissible.

The appellant also argued that the change of rank of MRB can have no impact on the assessment of its admissibility, so that the Board's discretionary rejection of MRB as inadmissible was no longer within the range of the Board's discretion but rather based on a fundamentally flawed exercise of discretion defying basic logical and procedural rules. The applicants' right to be heard with respect to the objections in the appealed decision and to those of the Board's preliminary opinion would thus be taken from them.

9. The Board does not agree for the following reasons, which were explained in every detail also at the oral proceedings.
10. Article 13(2) RPBA 2020 expressly refers to an(y) amendment of the party's appeal case. The present party's/appellant's appeal case presented after notification of the summons to oral proceedings consisted of eight claim requests in the above-mentioned specific order, which order was discussed and maintained at the beginning of the oral proceedings.
11. The Board concurring with the finding under section 4.1 of T 1297/16 and under section 9, seventh paragraph of T 716/17, considered that by introducing new claim requests and by changing the order of the claim requests already on file, the appellant put himself in a situation in which the provisions of Article 13(2) RPBA 2020 were to be applied as for the filing of a

completely new set of claim requests.

12. Since the Board took the view that the appellant had not justified with cogent reasons why the circumstances were exceptional in the present appeal and that the claim requests filed with the submissions dated 27 May 2021 were not to be admitted into the proceedings under Article 13(2) RPBA 2020, see point 5.4 above, the appellant's argument that the admissibility of MRB and AR1B-AR3B should be acknowledged because these requests cannot possibly be considered non-convergent (an aspect incidentally addressed in the course of the admissibility discussion) with respect to any (allegedly non-existing) higher-ranking request becomes obsolete.

13. The Board finds that all aspects of the case were thoroughly discussed at the oral proceedings. The appellant's attention was drawn at the outset on the importance of the requests' order of presentation. The admissibility of each and all requests was discussed in detail in respect of both the issue of principle under Article 13(2) RPBA 2020 and of incidental problems present in each of the requests. Therefore, the appellant's right to be heard has been fully exercised, and the appellant's objection under Rule 106 EPC **is dismissed** as announced during oral proceedings.

Reordering of the appellant's requests

14. When asked to confirm its requests at the end of the oral proceedings, the appellant requested a change in the order of its claim requests as follows: MRB, AR1B, AR2B, AR3B, MRA, AR1A, AR2A and AR3A.

15. As already clarified and discussed during the oral proceedings (see also point 12 above), such a reordering of requests which were already discussed and not admitted because they were late-filed and not justified by exceptional circumstances (Article 13(2) RPBA 2020) would not overcome the reasons for non-admittance, could not lead to a different conclusion as to the admissibility thereof and would therefore serve no purpose.

A mere reordering of requests which were already discussed and not admitted would also not be possible since, when the appellant asked that their requests be reordered, there were no requests in the proceedings at all which could be reordered.

Conclusion

16. Since none of the appellant's claim requests has been admitted, the appeal is to dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

V. Bevilacqua

Decision electronically authenticated