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**Datasheet for the decision
of 23 July 2021**

Case Number: T 2683/17 - 3.2.01

Application Number: 05818557.0

Publication Number: 1827346

IPC: A47C19/04

Language of the proceedings: EN

Title of invention:
BED LIFTING SYSTEM

Patent Proprietor:
Koorey, John

Opponent:
ATL Production

Headword:

Relevant legal provisions:
EPC Art. 52(1), 54, 56, 84, 123(2), 123(3)
RPBA Art. 12(4)
RPBA 2020 Art. 12(3)

Keyword:

Main request withdrawn before the opposition division not admitted

Amendments - added subject-matter (no)

Claims - clarity (yes)

Novelty - (yes)

Inventive step - (yes)

Late-filed auxiliary requests not admitted in the first instance proceedings

Late-filed facts could have been filed in first instance proceedings (yes)

Decisions cited:

T 0452/91, G 0003/14

Catchword:



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Case Number: T 2683/17 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 23 July 2021

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 November 2017 concerning maintenance of the
European Patent No. 1827346 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeals filed by the patent proprietor and by the opponent are directed against the interlocutory decision of the opposition division to maintain the European patent No. 1 827 346 in amended form.

In its decision the opposition division held that the main request did not comply with the requirements of Article 123(2) EPC, did not admit the late filed 1st and 2nd auxiliary requests, and found that the patent as amended according to the 3rd auxiliary request filed at the oral proceedings met all the requirements of the EPC. In particular, the opposition division concluded that the subject-matter of independent claim 1 of the 3rd auxiliary request was novel over the cited prior art in the meaning of Article 54 EPC and involved an inventive step in the meaning of Article 56 EPC in view of the following prior art:

D4 : US 5 490 298 A

in combination with

D2 : US 5 758 372 A, or with

D11: US 4 276 665 A

- II. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), as a first auxiliary measure according to anyone of the 1st to 4th auxiliary requests filed with the statement of the grounds of appeal or, further subsidiarily, according to anyone of the previous requests deprived of the

dependent claims 6 and 8 to 10.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

III. Summons to oral proceedings were issued on 25 May 2020. With a communication under Article 15(1) RPBA dated 08 June 2020, the Board informed the parties of its preliminary, non binding assessment of the appeals.

With letters dated 29 May and 17 June 2021 both appellants informed the Board that they did not intend to attend the oral proceedings scheduled on 22 July 2021 and requested the Board to issue a written decision based on the arguments forwarded in writing by the parties.

With a further communication dated 09 July 2021, the Board informed the parties that the oral proceedings scheduled on 22 July 2021 were cancelled.

IV. Claim 1 of the patent as granted according to the main request reads as follows:

"A bed lifting system for lifting a bed, the system comprising:

a bed lifting mechanism (10) wherein the bed lifting mechanism comprises:

a base (12) for location on the floor;

a support (14) for location at and engagement with an underside of the bed;

an actuator for operation between the base (12) and support (14) to move the support (14) away from or towards the base (12) and thereby raise or lower the bed; and

a switch (50, 60) remotely located from the bed lifting mechanism (10), the switch (50, 60) being adapted to enable selective and remote actuation of the bed lifting mechanism;

characterized in that the support (14) is provided with a plurality of discrete and spaced-apart lands (40) on which the bed underside can rest and be supported in use wherein the position of the lands is adjustable, each land (40) being connected to a respective arm (42) that is slidably mounted with respect to the support (14) for lateral movement with respect to the support (14)."

Claim 1 according to the 1st auxiliary request corresponds to claim 1 of the main request filed on 13 July 2017 underlying the decision under appeal and reads as follows:

"A bed lifting system for lifting a bed, the system comprising:

a bed lifting mechanism (10) wherein the bed lifting mechanism comprises:

a base (12) for location on the floor;

a support (14) for location at and engagement with an underside of the bed, the support having hollow support frame members;

an actuator for operation between the base (12) and support (14) to move the support (14) away from or towards the base (12) and thereby raise or lower the bed; and

a switch (50, 60) remotely located from the bed lifting mechanism (10), the switch (50, 60) being adapted to enable selective and remote actuation of the bed lifting mechanism;

characterized in that the support (14) is provided with a plurality of discrete and spaced-apart lands (40) on which the bed underside can rest and be supported in use wherein the position of the lands is adjustable, each land (40) being connected to a respective arm (42) that is slidably mounted with respect to the support (14) for lateral movement with respect to the support (14) by the arm (42) telescopically sliding with respect to the hollow support frame members."

Claim 1 according to the 2nd auxiliary request corresponds to claim 1 of the 1st auxiliary request filed on 13 July 2017 and reads as follows:

"A bed lifting system for lifting a bed, the system comprising:

a bed lifting mechanism (10) wherein the bed lifting mechanism comprises:

a base (12) for location on the floor;

a support (14) for location at and engagement with an underside of the bed, the support having hollow support frame members;

an actuator for operation between the base (12) and support (14) to move the support (14) away from or towards the base (12) and thereby raise or lower the bed; and

a switch (50, 60) remotely located from the bed lifting mechanism (10), the switch (50, 60) being adapted to enable selective and remote actuation of the bed lifting mechanism;

characterized in that the support (14) is provided with a plurality of discrete and spaced-apart lands (40) on which the bed underside can rest and be supported in use wherein the position of the lands is adjustable, each land (40) being located at an end of a respective arm (42) that is slidably mounted with respect to the support (14) for lateral movement with respect to the support (14) by the arm telescopically sliding within the hollow support frame members."

Claim 1 according to the 3rd auxiliary request corresponds to claim 1 of the 2nd auxiliary request filed on 13 July 2017 and reads as follows:

"A bed lifting system for lifting a bed, the system comprising:

a bed lifting mechanism (10) wherein the bed lifting mechanism comprises:

a base (12) for location on the floor;

a support (14) for location at and engagement with an underside of the bed, the support having hollow support frame members;

an actuator for operation between the base (12) and support (14) to move the support (14) away from or towards the base (12) and thereby raise or lower the bed; and

a switch (50, 60) remotely located from the bed lifting mechanism (10), the switch (50, 60) being adapted to enable selective and remote actuation of the bed lifting mechanism;

characterized in that the support (14) is provided with a plurality of discrete and spaced-apart lands (40) on which the bed underside can rest and be supported in use wherein the position of the lands is adjustable, each land (40) being connected to and located at an end of a respective arm (42), wherein the arm (42) is slidably mounted with respect to the support (14) for lateral movement with respect to the support (14) by the arm telescopically sliding within the hollow support frame members."

Claim 1 according to the 4th auxiliary request corresponds to claim 1 of the 3rd auxiliary request underlying the decision under appeal on which basis the patent has been maintained and reads as follows:

"A bed lifting system for lifting a bed, the system comprising:

a bed lifting mechanism (10) wherein the bed lifting mechanism comprises:

a base (12) for location on the floor, comprising a plurality of members of hollow or channel section;

a support (14) for location at and engagement with an

underside of the bed, the support having a plurality of hollow support frame members comprising hollow support frame forward and rearward end members;

wherein each of the support (14) and base (12) comprises a rectangular frame having a dimension that corresponds to a width and length dimension less than that of the bed to be lifted,

an actuator for operation between the base (12) and support (14) to move the support (14) away from or towards the base (12) and thereby raise or lower the bed; and

a switch (50, 60) remotely located from the bed lifting mechanism (10), the switch (50, 60) being adapted to enable selective and remote actuation of the bed lifting mechanism;

characterized in that the support (14) is provided with four discrete and spaced-apart lands (40) on which the bed underside can rest and be supported in use wherein the position of the lands is adjustable, each land (40) being connected to and located at an end of a respective arm (42) that is adjustably lengthened or shortened, depending on bed width, for lateral movement with respect to the support (14) by the arm telescopically sliding within the hollow support frame forward and rearward end members."

Reasons for the Decision

1. The Board notes that the appellants did not reply to the communication according to Article 15(1) RPBA issued on 08 June 2020 by the Board and therefore does not see any reasons for deviating from its preliminary assessment of the case which is hereby confirmed:

APPEAL OF THE APPELLANT (PATENT PROPRIETOR)

Main Request: Patent as granted

2. The request to maintain the patent as granted filed with the reply to the notice of opposition has been replaced over the course of the opposition proceedings by a new main request filed on 13 July 2017 which is the one underlying the decision under appeal (see "*Fact and submission*", point 6.). The request to maintain the patent as granted is thus deemed to have been withdrawn in the first instance proceedings.
 - 2.1 Since the statements of grounds of appeal were filed before the date of entry into force of the revised version of the RPBA (RPBA 2020), Article 12(4) RPBA in the version 2007 continues to apply in the present case in accordance with Article 25(2) RPBA 2020.

According to established Case Law of the Boards of Appeal, Article 12(4) RPBA in the version 2007 applies all the more to requests which have been withdrawn during the first instance proceedings, thereby preventing the department of the first instance from giving a reasoned decision on the critical issues at stake. In this respect, it is further observed that admitting and considering in the appeal proceedings a request which has been withdrawn during the first

instance proceedings before a decision on it was taken would go against the scope of the appeal proceedings that is to review what was decided at the first instance and not what was not decided.

- 2.2 In view of the above the Board, in the exercise of its own discretion as provided by Article 12(4) RPBA 2007, does not admit the main request in the appeal proceedings.

1st Auxiliary Request

Amendments: Article 123(2) EPC

3. The 1st auxiliary request corresponds to the main request underlying the appealed decision which was rejected by the opposition division under Article 123(2) EPC in view of an unallowable intermediate generalisation resulting from the introduction in claim 1 of the feature that the support has a "*hollow support frame*". The arguments provided by the appellant (patent proprietor) that challenged this decision by arguing that the features omitted are not inextricably linked to the features introduced in claim 1 are not convincing for the following reasons:
- 3.1 Independent claim 1 has been amended, among others, by introducing the feature that the support has "*hollow support frame members*". As correctly observed by the opposition division and by the appellant (opponent) in its reply, this feature is disclosed in dependent claim 13 as filed, which was in turn dependent on claim 12, in combination with other features now omitted from claim 1. In fact, according to the preferred embodiment resulting from the combination of all the features of claims 12 and 13, the frames of both the base (12) and

the support (14) are rectangular, and both frames have hollow frame members (see wording of claim 12 "*each of the support and base comprises a rectangular frame*" and of claim 13 "*wherein the frames each comprises a plurality of members of hollow or channel section*"). The omission of some of the features defined in combination in claims 12 and 13 as filed results in new subject-matter, namely a bed lifting system having the frames of both the base and the support not compulsorily rectangular, and the frame of the base not compulsorily made of hollow members. Such an embodiment is not directly and unambiguously derivable either from the description nor from the figures of the application as originally filed. The passage on page 8, lines 15-16 of the originally filed description cited by the appellant (patent proprietor) merely states that the support has a hollow frame and hence cannot support the view of the appellant (patent proprietor) that the rectangular shape for both frames and the hollow structure for the frame of the base are facultative features which can thus be omitted without infringing Article 123(2) EPC.

- 3.2 The Board thus concurs with the conclusion of the opposition division that the introduction in claim 1 of the feature that the support has "*hollow support frame members*" results in an unallowable intermediate generalisation of the preferred embodiment disclosed in claims 12 and 13 as filed which infringes Article 123(2) EPC.
- 3.3 Therefore, regardless of the assessment of the further issues raised by the appellant (opponent), the 1st auxiliary request is not allowable.

2nd and 3rd Auxiliary Requests

4. The 2nd and 3rd auxiliary requests filed in appeal proceedings correspond to the 1st and 2nd auxiliary requests filed on 13 July 2017 in the first instance proceedings. Independent claim 1 of each one of these requests contains the same feature relating to the *"hollow support frame"* of claim 1 of the 1st auxiliary request filed in appeal and thus suffers from the same issue raised under points 3. to 3.3 above under Article 123(2) EPC in respect of the 1st auxiliary request. The 2nd and 3rd auxiliary requests are thus not allowable for the same reasons.

Admittance of the Judgement of the Federal Supreme Court

5. Regarding the contested decision of the opposition division not to admit the late filed document *"X ZR 107/ 12, Judgement by the Federal Supreme Court"* cited by the appellant (patent proprietor) in order to support its arguments regarding compliance of the amendments in claim 1 with Article 123(2) EPC, the Board notes that, according to established Case Law of the Boards of Appeal, in the procedures before the EPO questions of patentability have to be decided solely in accordance with the EPC, and that decisions of national instances are not binding on the instances of the EPO (see e.g. T452/91). Therefore, the decision of the opposition division not to admit the national judgement at stake as late filed and not relevant for the decision is considered to be correct.

4th Auxiliary Request

6. The 4th auxiliary request corresponds to the 3rd auxiliary request underlying the decision under appeal which was held allowable by the opposition division and to which the appeal of the appellant (opponent) is directed.

APPEAL OF THE APPELLANT (OPPONENT)

7. The appellant (opponent) contested the decision of the opposition division to admit the late filed 3rd auxiliary request and to maintain the patent in this amended form. The arguments submitted by the appellant (opponent) are not convincing for the following reasons:

Admittance of the 3rd auxiliary request

- 7.1 The Board observes that a decision on the admissibility of a late filed request is taken by the first instance in exercise of its own discretion and that, according to established Case Law of the Boards of Appeal, the review of this decision by the Board should be generally restricted to the question whether the first instance has exercised its discretion power properly and according to the correct criteria. The Board considers that the opposition division, when admitting the late filed 3rd auxiliary request, has exercised its own discretion properly and according to the right criterion of the "*prima facie*" allowability. In fact, the opposition division, in order to arrive to its conclusion, considered that the amendments were "*prima facie*" suitable for overcoming the issue under Article 123(2) EPC raised against the previous requests, and that further requirements, in particular compliance

with Article 84 EPC which was objected by the appellant (opponent) at the oral proceedings, were also "*prima facie*" met.

- 7.2 For these reasons the Board sees no reason to overturn the discretionary decision of the opposition division to admit the late filed 3rd auxiliary request in the opposition proceedings. This decision is thus hereby confirmed.

Amendments: Article 123(2) and (3) EPC

8. The Board concurs with the view of the opposition division that the introduction in claim 1 of the patent as maintained by the opposition division of all the inextricably linked features defined in dependent claims 12 and 13 and in the originally filed description, page 8, lines 3, 4 and 12 to 16 overcomes the objected unallowable intermediate generalisation resulting from the introduction from the description of the feature that the support has "*hollow support frame members*" (see points 3. to 3.1 above). This has not been contested by the appellant (opponent) in respect of the patent as maintained by the opposition division.
- 8.1 The appellant (opponent) further argued for the first time in the appeal proceedings that the application as originally filed does not support the feature that the arm is "*telescopically sliding within the hollow support frame forward and rearward end members*", but rather that each arm slides through the body (92) of the respective connector (90). The omission of this allegedly essential feature would result in a further unallowable intermediate generalisation which infringes Article 123(2) EPC.

- 8.2 As already pointed out by the Board in its preliminary assessment of the case, the admittance of this new argument in support of the objection under Article 123(2) EPC which could have been submitted in the first instance proceedings is at the discretion of the Board (Article 12(4) RPBA 2007).
- 8.3 Regardless of the admissibility issue above, the Board cannot share the view of the appellant (opponent) and concurs with the appellant (patent proprietor) that a clear and unambiguous basis for the feature under discussion can be found in the passage of the original description on page 8, lines 13-16, where the claimed telescopically sliding arrangement of the arm within the hollow support frame is described without any reference to the provision of the connector (90) which shall thus be considered as an optional feature.
- 8.4 The appellant (opponent) raised for the first time with the reply to the statement of the grounds of appeal of the appellant (patent proprietor) an objection under Article 123(3) EPC in respect of the patent as maintained. It was alleged that the deletion of some paragraphs from the description of the patent as maintained would lead to an extension of the protection conferred with respect to that of the patent as granted.
- 8.5 The Board, in exercise of its own discretion as conferred by Article 12(4) RPBA 2007 confirms the view already expressed in the preliminary opinion that this late filed attack against the patent as maintained cannot be admitted because it could and should have been raised during the first instance procedure, namely upon discussion of the 3rd auxiliary request at the

first instance oral proceedings.

- 8.6 The patent in amended form as maintained by the opposition division thus meets the requirements of Articles 123(2) and (3) EPC.

Clarity: Article 84 EPC

9. The Board, in accordance with the assessment of the opposition division and the view of the appellant (patent proprietor) does not share the allegation of the appellant (opponent) that the expressions "*lateral movement*", "*forward and reward*" and "*lengthened and shortened*" in claim 1 are unclear and thus not compliant with Article 84 EPC. The Board has no doubt that the person skilled in the art, reading these terms in the technical context of the claim, would unambiguously understand which limitations are meant thereby and would be able to carry out the invention accordingly. Moreover, it is observed that the expression "*lateral movement*" was already present in claim 1 as granted and as such, as correctly observed by the opposition division, is not open to clarity objections (see G 3/14).
10. The further objection raised by the appellant (opponent) under Article 84 in combination with Rules 43(1) and (3) EPC that the connectors (90) represent an essential feature missing in claim 1 has been presented for the first time in the appeal proceedings. As already pointed out in the preliminary opinion, the admittance of this new objection is subjected to the Board's own discretion as provided by Article 12(4) RPBA 2007.

- 10.1 Regardless of the admissibility issue above the Board, as already expressed in the preliminary assessment of the case, does not see why the connectors (90) should represent an essential feature of the invention in the meaning of Article 84 in combination with Rules 43(1) and (3) EPC. The allegation of the appellant (opponent) has not been convincingly substantiated and it is not supported by any passage of the description (see for example page 8, lines 13-16).
11. The patent as maintained by the opposition division thus meets the requirements of Article 84 EPC.

Priority

12. The appellant (opponent) contested the validity of the claimed priority in respect of the patent as maintained by the opposition division. However, the Board notes that the appellant (opponent), in the context of the discussion of the 3rd auxiliary request which took place at the oral proceedings, did not question the priority at all. This circumstance is clearly reflected in the decision under appeal, point 9.1 and in the minutes, point 6.1, both expressly stating that "*the opponent had no objections regarding the validity of the priority*". The Board thus concludes that the priority objection, previously raised with the notice of opposition in respect to the patent as granted, was never raised or at least not maintained in respect of the 3rd auxiliary request underlying the decision under appeal. Under these circumstances the Board, in exercise of its own discretion as conferred by Article 12(4) RPBA 2007, decides not to admit the late filed objection against the validity of the priority because this issue could and should have been raised in the first instance proceedings.

Novelty: Articles 52(1) and 54 EPC

13. The sole novelty attack submitted by the appellant (opponent) is based on document D1 and on the assumption that the priority of the contested patent is not valid. However, for the reasons given above, the claimed priority of 17 December 2004 is deemed to be valid, and therefore this document, published on 14 October 2005, is not prior art pursuant to Article 54(2) EPC. The Board thus confirms the conclusion of the opposition division that the subject-matter of claim 1 of the patent as maintained in amended form is novel over the prior art in the meaning of Articles 52(1) and 54 EPC.

Inventive Step: Articles 52(1) and 56 EPC

D4 in combination with D2 or D11

14. In the passage at the end of page 22 of the statement of the grounds of appeal the appellant (opponent) contested the conclusion of the opposition division that the subject-matter of claim 1 of the patent as maintained involves an inventive step by merely referring to the arguments previously submitted regarding claim 1 of the patent as granted. No detailed reasoning specifically directed to claim 1 as maintained is presented.
- 14.1 However, the Board considers that the lines of inventive step attack developed in respect of claim 1 of the patent as granted cannot be fully and convincingly extended to the subject-matter of claim 1 as allowed by the opposition division which contains further limitations which have not been taken into

account in the argumentation submitted by the appellant (opponent) regarding lack of inventive step of the main request. The Board thus confirms the view expressed in the preliminary opinion that the objection of lack of inventive step with respect to the independent claim 1 as allowed by the opposition division has not been properly substantiated by clearly and concisely setting out the reasons why the decision of the opposition division to positively assess inventive step was wrong and should be reversed .

14.2 The Board has thus not been provided with any convincing reasons for deviating from the conclusion of the opposition division that the subject-matter of claim 1 of the patent as maintained involves an inventive step in view of D4 as closest prior art in combination with D2 or D11.

14.3 In this respect it is observed that, as correctly assessed by the opposition division, the bed lifting system according to D4 is not provided, among other features, with lands arranged at an end of a respective arms (42) which can be adjustably lengthened or shortened in order to modify the bed width. According to D2, the arms (10) carrying the lands can be only longitudinally rather than laterally adjusted as instead required by claim 1, while according to D11, the lands (60) are fixed on the lateral frame (12,12a) and thus not mounted on telescopically slidable arms and movable therewith. It follows that, in accordance with the assessment of the opposition division, the combination of D4 with either D2 or D11 would not directly result in the constructional solution according to claim 1 as maintained. Furthermore, the Board concurs with the view of the opposition division that the major constructional modifications to the bed

lifting system of D2 which would be required in order to arrive to the constructional solution according of claim 1 when applying the teaching of D2 to the bed lifting system of D4, cannot be considered obvious.

Admissibility of the further lines of attack

14.4 At the first instance proceedings lack of inventive step of claim 1 as maintained by the opposition division has been discussed by the appellant (opponent) only in view of D4 in combination with D2 or D11. From the passage at the bottom of page 22 of the statement of the grounds of appeal of the appellant (opponent), it may be also assumed that the further lines of inventive step attack discussed in respect of the main request are also implicitly directed, for the first time during the appeal proceedings, to the patent as maintained by the opposition division. The Board is convinced that these new lines of inventive step attack could and should have been presented during the first instance oral proceedings. Furthermore, no arguments justifying the submission of these new attacks for the first time in the appeal proceeding have been provided by the appellant (opponent). Under these circumstances the Board decides, in exercise of its own discretion as conferred by Article 12(4) RPBA 2007, not to admit these further inventive step attacks which are thus disregarded.

15. In view of the above, the Board does not see any reason for deviating from the conclusion of the opposition division that the patent as maintained meets the requirements of Articles 52(1) and 56 EPC.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



D. Magliano

G. Pricolo

Decision electronically authenticated