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**Datasheet for the decision
of 20 November 2020**

Case Number: T 2891/19 - 3.2.01

Application Number: 05789301.8

Publication Number: 1796513

IPC: A47C7/02, A47C7/18

Language of the proceedings: EN

Title of invention:

A SEAT PORTION FOR A SEAT

Applicant:

The Way to Win Limited

Headword:

Relevant legal provisions:

RPBA 2020 Art. 13(2), 11
EPC Art. 54, 111(1)

Keyword:

Amendment after summons - exceptional circumstances (yes)
Novelty - (yes)
Remittal - (yes)

Decisions cited:

Catchword:



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Case Number: T 2891/19 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 20 November 2020

Appellant: The Way to Win Limited
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 5 July 2019
refusing European patent application No.
05789301.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: J. J. de Acha González
A. Jimenez

Summary of Facts and Submissions

- I. The appeal of the applicant lies against the decision of the Examining Division to refuse European patent application 05789301.8.
- II. In its decision the Examining Division held that the subject-matter claim 1 of the sole request was not new (Article 54 EPC) in view of:
- D3:** US 2 750 996 A,
 - D4:** US 3 606 463 A,
 - D7:** US 2 237 475 A, and
 - D11:** JP 63163654 U.

Specifically, the Examining Division reasoned its decision as follows:

"2.1. The present application does not meet the requirements of Article 52(1) EPC, because the subject-matter of claim 1 (amendment VI) is not new in the sense of Article 54(1) and (2) EPC.

2.1.1 The document D11 (see fig. 1-4) discloses (the references in parentheses applying to this document):

a seat portion (1 a) for a seat (see fig. 1,2), which seat portion (1 a) wherein:

(i) the seat portion (1 a) is made of a single foam material (see fig. 1,2, page 3, lines 4-6) having a plurality of apertures defining a seating area (see fig. 1,2);

(ii) the seating area (see fig. 1,2) is such that it comprises a first portion (C) for receiving a person's buttocks, a second portion (see fig. 1) for receiving a rear thigh part of a first leg of the person, and a third portion (see fig. 1) for receiving a rear thigh part of a second leg of the person, the third portion (see fig. 1) being spaced apart from the second portion (see fig. 1);

(iii) the seating area (see fig. 1,2) is softer than the remainder (see page 4, lines 3-12) of the seat portion (1 a);

(iv) each aperture (3) has an an open end (see fig. 1,2) which forms part of an outer surface (see fig. 1,2) of the seat portion (1 a); and

(v) the apertures (3) are cylindrical blind bores (see fig. 2 being a cross section 11-11 of fig. 1) (cf. claim 1).

2.1.2 *Furthermore the documents D3 (see column 2, line 38 - column 3, line 65; figures 1,5-7) D4 (see column 3, line 28 - line 50; figures 1,2,5,6) and D7 (see figures 3,4) show the characteristics of claim 1."*

III. With the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and a patent granted on the basis of the sole request underlying the impugned decision.

IV. With letter dated 1 October 2020, filed in response to a communication of the Board pursuant to Rule 100(2) EPC, the appellant filed amended claims 1 and 2 replacing the claims of his sole request.

V. With letter dated 6 November 2020, filed in response to a communication of the Board pursuant to Article 15(1) RPBA 2020 (Rules of Procedure of the Boards of Appeal OJ EPO 2019, A63), the appellant filed auxiliary requests 1 and 2.

VI. After a telephone consultation with the rapporteur of the Board, the appellant made with letter dated 13 November 2020 the auxiliary request 2 the main request.

Claim 1 of the main request reads as follows
(differences with respect to claim 1 of the request underlying the contested decision highlighted by the Board):

"A seat portion (2) for a seat (4), which seat portion (2) is characterised by the combination of:

- (i) the seat portion (2) is made of a single foam material having a plurality of apertures (6) defining a seating area (8);
- (ii) the seating area (8) is such that it comprises a first portion (10) which has the apertures (6) and which is for receiving a person's buttocks, a second portion (12) which has the apertures (6) and which is for receiving a rear thigh part of a first leg of the person, and a third portion (14) which has the apertures (6) and which is for receiving a rear thigh part of a second leg of the person, the third portion (14) being spaced apart from

- the second portion (12);
- (iii) the seating area (8) is softer than the remainder of the seat portion (2);
 - (iv) each aperture (6) has an open end which forms part of an outer surface (18) of the seat portion (2);
 - (v) the apertures (6) are cylindrical blind bores;
 - (vi) the apertures (6) in the second and third portions (12, 14) extend forwards and sideways over the seating area (8); and
 - (vii) the remainder of the seat portion (2) that extends completely between the second and third portions (12, 14) does not contain any apertures (6)."

Reasons for the Decision

1. *Admissibility of the main request*

- 1.1 The main request of the appellant was filed after notification of the summons to oral proceedings.

According to Article 13(2) RPBA 2020 any amendment to a party's appeal after such a notification shall, in principle, not be taken into account unless there are

exceptional circumstances, which have been justified with cogent reasons by the party concerned.

In its communication pursuant to Rule 100(2) EPC the Board was, in line with the Examining Division, of the preliminary view that the subject-matter of claim 1 of the request underlying the impugned decision was not new with regard to D11. In particular, it explained that the first and third rows of apertures in the forward end of the seat that are spaced apart by the two solid non-apertured rows together with the middle row of apertures in figure 1 of D11 corresponded to the claimed second and third portions of apertures in feature (ii).

With letter dated 1 October 2020, the appellant filed an amended main request.

In the communication pursuant to Article 15(1) RPBA 2020, accompanying the summons to oral proceedings, the Board expressed doubts in respect of the admissibility of the main request and further indicated that the amendments made raised issues under Article 84 EPC.

In the letter dated 6 November 2020, the appellant argued that there were cogent reasons that justified that the main request should be taken into account. In its view the decision of the Examining Division lacked a detailed reasoning that specified exactly why the different features of point (ii) of claim 1 were disclosed in figure 1 of D11. The decision recited literally the wording of claim 1 as regards feature (ii) and it merely referred to figure 1 in brackets without giving any sort of explanation. The Board in its communication gave for the first time the missing detailed explanation. The appellant was after that in a

position to understand the objection with respect to feature (ii) and to accordingly amend the claim to overcome the objection. Furthermore, the appellant filed two auxiliary request dealing with the issues under Article 84 EPC raised by the Board.

The Board agrees with the appellant that the main request filed with letter of 1 October 2020 was to be taken into consideration. The reasoning in the decision of the Examining Division as regards the features under (ii) (see point II above), when analysing novelty of claim 1 in view of D11, is not so detailed as the one given by the Board in the above-mentioned communication, since the reasoning in the decision only refers to figure 1 without explaining exactly what features in the figure correspond to the different features recited under (ii), respectively. The appellant after the more detailed explanation of the Board was thus in a position to better understand the issue as regards feature (ii) and reacted accordingly. Furthermore, the auxiliary request 2 filed with letter dated 6 November 2020 is based on the main request amended such as to deal with the issues under Article 84 EPC raised by the Board in the communication pursuant to Article 15(1) RPBA 2020 accompanying the summons to oral proceedings. Finally, the amendments in accordance with the auxiliary request 2 clearly overcome the reasons for the refusal and do not raise any further objections, and the appellant has made this auxiliary request 2 the main request in reply to the telephone's consultation with the rapporteur of the Board.

The Board is persuaded that the above circumstances qualify as exceptional circumstances in the sense of Article 13(2) RPBA 2020 and accordingly, admits the main request into the appeal proceedings.

2. *Basis in the application as originally filed*

Claim 1 according to the main request is based on claims 1, 2 and 5 as well as on figure 1 of the application as originally filed. Its subject-matter does not thus go beyond the content of the application as originally filed (Article 123(2) EPC).

3. *Novelty*

3.1 As explained under point 1 above feature (ii) contested by the appellant is disclosed in figure 1 of D11. The appellant considers that the seat according to D11 does not disclose feature (ii) of claim 1 because the second and third portions shown in figure 1 of D11 are solid non-apertured portions.

The Board does not concur with the appellant's view that the claimed second and third portions of the seating area of the seat portion shown in figure 1 of D11 correspond to the solid non-apertured rows spaced apart by the middle row of apertures. In contrast thereto, the claimed second and third row portions in figure 1 of D11 are the first and third rows of apertures situated at the forward end of the seat that are spaced apart by the two solid non-apertured rows together with the middle row of apertures.

3.2 Feature (vi) is also disclosed in figure 1 of D11 since the referred first and third row of apertures in figure 1 extend forwards and sideways over the seating area defined by the plurality of apertures 3.

3.3 However the seat portion of figure 1 of D11 does not show feature (vii) of claim 1 because the remainder of

the seat portion that extends completely between the first and third rows of apertures contains apertures.

Consequently, the subject-matter of claim 1 is new in view of the disclosure of D11 (Article 54 EPC).

- 3.4 The contested decision further included under novelty the following reasoning:

"2.1.2 Furthermore the documents D3 (see column 2, line 38 - column 3, line 65; figures 1,5-7) D4 (see column 3, line 28 - line 50; figures 1,2,5,6) and D7 (see figures 3,4) show the characteristics of claim 1."

The Board considers that these objections of lack of novelty cannot be seen as reasoned objections justifying the refusal of the patent application. Neither the applicant nor the Board are in a position to understand why these pieces of prior art with their cited passages disclose in the Examining Division's view the subject-matter of claim 1 of the request underlying the contested decision. Accordingly, the Board takes the view that the sole reason for the refusal is lack of novelty over D11, which, as explained above, has been overcome by the present main request.

4. *Remittal to the Examining Division*

Since the reasons for the refusal no longer hold, the contested decision is to be set aside.

Under Article 111(1) EPC the Board of Appeal may either decide on the appeal or remit the case to the department which was responsible for the decision appealed.

Under Article 11 RPBA 2020 the Board may remit the case to the department whose decision was appealed if there are special reasons for doing so.

The Board holds that such special reasons are immediately apparent in the present case as the contested decision does not thoroughly deal with all the relevant state of the art and the issue of inventive step (Article 56 EPC).

Under these circumstances and further considering that the appellant did agree to a remittal, the Board considers it appropriate to remit the case to the Examining Division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution.

The Registrar:

The Chairman:



D. Magliano

G. Pricolo

Decision electronically authenticated