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**Datasheet for the decision
of 26 June 2023**

Case Number: T 0440/21 - 3.2.01

Application Number: 11150278.7

Publication Number: 2343000

IPC: A47K3/40, B28B11/00

Language of the proceedings: EN

Title of invention:

Curved tile

Patent Proprietor:

Easy Sanitary Solutions B.V.

Opponent:

Seranit Granit Seramik Sanayi ve Ticaret A.S.

Headword:

Relevant legal provisions:

EPC Art. 100(b)

RPBA 2020 Art. 12(3), 12(5), 12(6), 15(1)

Keyword:

Accompanying person - allowed to make oral submissions (no)
Sufficiency of disclosure - (yes)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no)
Amendment to case - amendment admitted (no)

Decisions cited:

G 0004/95

Catchword:



Beschwerdekammern

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Case Number: T 0440/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 26 June 2023

Appellant: Seranit Granit Keramik Sanayi ve Ticaret A.S.
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 16 March 2021 rejecting the opposition filed against European patent No. 2343000 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairwoman A. Beckman
Members: A. Pieracci
 O. Loizou

Summary of Facts and Submissions

- I. An appeal was filed by the opponent against the decision of the opposition division to reject the opposition against the European patent No. 2 343 000.
- II. In preparation for oral proceedings, the Board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020, according to which it appeared that the appeal could be dismissed.
- III. Oral proceedings before the Board took place on 26 June 2023.

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

- IV. The following documents are mentioned in the present decision:

D2: AU 2007 203171 A1;
D3: DE 197 25 963 A1;
D14: WO 2006/016272 A1;
D17: WO 2019/022685 A2;
D18: WO 2021/150104 A1.

- V. The final requests of the parties were as follows.

The appellant (opponent) requested

- that the decision under appeal be set aside and
- that the patent be revoked.

The respondent (patent proprietor) requested

- that the appeal be dismissed (main request);
- alternatively, that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 6 filed in opposition proceedings by letter of 16 September 2019.

The respondent (patent proprietor) at the beginning of the oral proceedings requested further that Ms Arkesteijn, a trainee patent attorney, be allowed to make oral submissions on behalf of the patent proprietor as an accompanying person. The appellant (opponent) objected.

VI. The arguments of the parties relevant for the decision are dealt with in detail in the Reasons for the Decision.

VII. Independent claim 1 of the patent as granted (main request) reads as follows:

"Ceramic tile (12, 13, 14, 15; 22; 41; 50) manufactured according to a method comprising the steps of:

- forming a tile (12, 13, 14, 15; 22; 41; 50) from clay, wherein the upper surface of the tile comprises at least two zones (12, 13, 14, 15; 23, 24, 25; 51, 52),

which two zones (12, 13, 14, 15; 23, 24, 25; 51, 52) are each flat and wherein the normal vectors of the two surfaces (12, 13, 14, 15; 23, 24, 25; 51, 52) form an angle greater than 0° with each other;

- subsequently firing the tile (12, 13, 14, 15; 22; 41; 50) formed from clay,

characterized in that the ceramic tile (12, 13, 14, 15; 22; 41; 50) comprises an opening, wherein at least one

of the two zones (12, 13, 14, 15; 23, 24, 25; 51, 52) of the upper surface has a slope in the direction of the opening, and wherein the ceramic tile (12, 13, 14, 15; 22; 41; 50) is a gres porcellanato tile."

VIII. Claim 5 of the patent as granted (main request) reads as follows:

"Combination of a ceramic tile (12, 13, 14, 15; 22; 41; 50) as claimed in any of the foregoing claims 1-4 and a drain (16; 29; 44; 53), wherein at least one edge of the tile lies against the drain."

IX. Claim 7 of the patent as granted (main request) reads as follows:

"Shower tray comprising only one ceramic tile (50) as claimed in any of the claims 1-4, wherein the peripheral edge (51) of the tile lies in one plane."

Reasons for the Decision

1. Request of the patent proprietor to allow Ms Arkesteijn to make oral submissions at the oral proceedings

It was undeniable that before the day of the oral proceedings the patent proprietor had never requested that Ms Arkesteijn be allowed to make submissions at the oral proceedings on any issues on its behalf under the supervision of the authorized professional representative.

Since the opponent has denied its consent to the oral

submissions of Ms Arkesteijn, the Board has to examine whether the criteria set in G4/95 are met in order to exercise its discretion. These require that the request should state the name and qualifications of the accompanying person, specify the subject-matter of the proposed oral submissions and be made sufficiently in advance of the oral proceedings.

As this request was made at the oral proceedings and the Board does not acknowledge any exceptional circumstances said request is refused (see G4/95, point II (b)(iii) of the headnote).

2. Sufficiency of disclosure (Article 100(b) EPC)

2.1 In the statement setting out the grounds of appeal the opponent repeats almost word by word the arguments it brought forward in opposition proceedings (see statement setting out the grounds of appeal, page 4, point III., first paragraph to page 9, third paragraph; notice of opposition, pages 3 to 4; letter dated 16 April 2020, pages 1 to 6) and then contests the finding of the opposition division (see the impugned decision, page 4, point 6), that the person skilled in the art is capable of finding ways to control the effect of the shrinking of the tiles during firing of the same. The opponent argues that this might be the case for normal tiles with a flat surface and without opening, but not for the claimed subject-matter (see statement setting out the grounds of appeal, page 10, second to fourth paragraph).

2.2 With its submissions dated 20 July 2022 (see page 1, first paragraph to page 3, first paragraph) the opponent argues that the post-published document D18, page 1, lines 19 to 28 and page 2, lines 5 to 8,

indicates that there are problems associated with the manufacture and the transport of the tiles according to the opposed patent which D18 wishes to solve. Since neither the opposed patent nor the common general knowledge provides a solution to these problems the invention of the opposed patent is insufficiently disclosed.

2.3 At the oral proceedings before the Board the opponent, referring to decisions cited in point II.C.9.1 of the Case Law of the Boards of Appeal (CLB), 10th edition, 2022, argued that since the patent proprietor has not indicated in the patent specification how the claimed gres porcellanato tile is to be manufactured, a weak presumption for sufficiency of disclosure is present and the burden of proof for sufficiency of disclosure shifts to the patent proprietor.

2.4 The Board disagrees.
The argument of the opponent that there is a weak presumption for sufficiency of disclosure cannot be followed, as this assertion remains unsubstantiated. The mere consideration that it has not been indicated in the opposed patent how to overcome possible manufacturing problems, such as the shrinking, does not imply that the person skilled in the art with the support of the common general knowledge is not capable of manufacturing a tile according to the invention overcoming the difficulties which might be encountered, as found by the opposition division (see the appealed decision, page 4, points 5 to 7).
The Board thus disagrees that the burden of proof on sufficiency of disclosure has shifted on to the patent proprietor.

2.5 The Board therefore maintains its preliminary opinion according to the communication pursuant to Article 15(1) RPBA 2020 (see point 9 thereof) that also in this case, the established jurisprudence applies, that an objection of lack of sufficient disclosure presupposes that there are serious doubts substantiated by verifiable facts and that the burden of proof is upon the opponent to establish on the balance of probabilities that a skilled reader of the patent, using its common general knowledge, would be unable to carry out the invention (see CLB, *supra*, II.C.9.)

2.6 The arguments of the opponent submitted with the statements setting out the grounds of appeal are a mere assertion which remains unsubstantiated. The opponent has contested the finding of the opposition division without providing anything more than a mere disagreement.

The fact that D18 acknowledges that some problems may arise when manufacturing and transporting the tiles according to the invention cannot be equated to the non reproducibility of the invention, but rather indicates that there is room for further improvement.

The objection of insufficiency of disclosure raised by the opponent is thus neither based on serious doubts nor substantiated by verifiable facts. The opponent has therefore failed to discharge its burden of proof.

2.7 The Board has therefore no reason not to concur with the opposition division that the claimed invention is sufficiently disclosed for it to be carried out by a person skilled in the art.

2.8 The Board notes that the above finding also renders superfluous addressing the corresponding objection of insufficiency of disclosure against claims 5 and 7 which were based on the alleged insufficient disclosure of claim 1 (see the statement setting out the grounds of appeal, page 10, fifth full paragraph).

3. Admittance of the objection of lack of inventive step of the subject-matter of claim 1 of the patent as granted (main request) in view of D2 in combination with the common general knowledge

3.1 The opponent argues lack of inventive step of the subject-matter of claim 1 starting from the teaching of document D2 in combination with the common general knowledge, considering, as in opposition proceedings, that the subject-matter of claim 1 is distinguished by the disclosure of D2 by the last feature of claim 1, namely:

"and wherein the ceramic tile is a gres porcellanato tile."

3.2 The opponent argues that the subject-matter of claim 1 is not inventive because there is no specific technical advantage provided in the opposed patent linked to the use of gres porcellanato and that this material is acknowledged in the patent specification as being well known (see statement setting out the grounds of appeal, page 15, fourth paragraph to page 16, second paragraph).

3.3 That gres porcellanato is well known and that to use it would be an obvious measure for a person skilled in the art, should also be proven by an extract from Wikipedia showing possible materials for ceramic tiles (see

statement setting out the grounds of appeal, page 16 , third paragraph to page 17, last paragraph).

3.4 The opponent however does not explicitly address the reasons given by the opposition division for considering the choice of gres porcellanato in combination with D2 as being based on hindsight, since the element of D2 is to be used as a base for providing a tiled shower and not as a tile as such (see the impugned decision, II.11.1.5).

3.5 At the oral proceedings the opponent contested the above finding communicated to the parties with the Board's communication pursuant to Article 15(1) RPBA 2020 (see point 10 thereof), arguing that in the statement setting out the grounds of appeal (see page 11, last paragraph, first and second sentences, and page 14, first paragraph), it has been argued that D2 (see page 8, first paragraph) indicates that

"The shower tray 1 includes a flat basin support member 2 with a top surface 3 of the size to support at least one person to stand thereupon"

and that

since the shower base of D2 could be made out of ceramic clay, document D2 shows a ceramic tile.

In this way, so the opponent, the reasoning of the appealed decision has been implicitly addressed indicating that the shower base of D2 can be seen as being itself a tile.

Furthermore, since the problem and solution approach has been used in the argumentation of the statement

setting out the grounds of appeal no hindsight is present.

3.6 The Board disagrees.

The fact that the problem and solution approach has been used is not enough to properly rebut the appealed decision, since the arguments presented in the appealed decision in this regard have not been addressed.

In point II.11.1.5 of the appealed decision, the opposition division found that according to D2, page 15, lines 18-20, the shower tray therein disclosed is meant to be covered with tiles and is thus not to be seen as a tile as such and is also not meant to be covered with water. The latter would also be underlined by the other choices of possible material for the shower tray given in D2 (D2, page 7, lines 24 to 30) many of which are not suited to be exposed to water.

Since the opponent has not indicated why the detailed finding of the opposition division is not correct and how its argument of considering the shower tray as a tile can be reconciled with the teaching of D2 referred to by the opposition division, the opponent's argumentation does not sufficiently address the appealed decision and is thus not substantiated in the sense of Article 12 (3) RPBA 2020.

According to Article 12 (5) RPBA 2020 the Board has discretion not to admit any part of a submission by a party which does not meet the requirements of Article 12 (3) RPBA 2020. The Board does not see any reason nor considers it appropriate to exercise its discretion in favour of the opponent and thus does not admit the inventive step attack starting from document D2 in combination with the common general knowledge into the appeal proceedings.

4. Admittance of the objection of lack of inventive step of the subject-matter of claim 1 of the patent as granted (main request) in view of D2 in combination with D14
 - 4.1 Similarly to the case discussed previously under point 3 above, the opponent argues lack of inventive step in view of D2 in combination with the teaching of D14 (see the statement setting out the grounds of appeal, page 18) without adequately addressing the reasons which led the opposition division to consider this line of argument as the result of hindsight (see the impugned decision, point II.11.2.2).
 - 4.2 Analogously to the above, the opponent's case is unsubstantiated in the sense of Article 12 (3) RPBA 2020 and the Board considers it appropriate to exercise its discretion and not admit the above inventive step objection into the proceedings pursuant to Article 12 (5) RPBA 2020.
5. Admittance of the objection of lack of inventive step of the subject-matter of claim 1 of the patent as granted in view of D14 alone
 - 5.1 The opponent argues that the subject-matter of claim 1 is not inventive in view of the teaching of D14 (see statement setting out the grounds of appeal, page 19, first paragraph to page 21, last paragraph). As indicated by the patent proprietor (see reply to the statement setting out the grounds of appeal, point 12), this objection of lack of inventive step has not been raised during the opposition procedure (see impugned decision, point II.11.1 and II.11.2, and the minutes, points 22 to 40).

- 5.2 At the oral proceedings the opponent argued that this line of attack should be allowed into the appeal proceedings since it is prima facie relevant and the Board should not leave standing a patent which is clearly not allowable.
- 5.3 According to Article 12 (6) RPBA 2020 the Board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.
- 5.4 The Board considers that the objection of lack of inventive step starting from D14 as closest prior art could and should have been raised in opposition proceedings to allow the patent proprietor to react to it and the opposition division to decide on it. The alleged prima facie relevance of the attack and the alleged clear unallowability of the claim is not a factor to be considered in applying Article 12 (6) RPBA 2020. Furthermore the Board does not see any circumstance regarding the present appeal proceedings which could justify the submission of this objection for the first time in appeal proceedings.
- 5.5 The objection of lack of inventive step starting from D14 as closest prior art is therefore not admitted into the proceedings pursuant to Article 12 (6) RPBA 2020.
6. Admittance of the objection of lack of inventive step of the subject-matter of claim 1 of the patent as granted in view of D3 as closest prior art
- 6.1 The opponent argues with its letter dated 20 July 2022 (see page 3, second paragraph to page 13, first

paragraph), that the subject-matter of claim 1 is not inventive in view of the teaching of D3 considered as the closest prior art. An objection of lack of inventive step starting from D3 as closest prior art has not been submitted in opposition proceedings (see impugned decision, point II.11.1 and II.11.2, and the minutes, points 22 to 40).

6.2 At the oral proceedings before the Board the opponent argued analogously as for D14 (see point 5.2 above), that the objection of lack of inventive step of the subject-matter of claim 1 in view of D3 as closest prior art should be allowed into the appeal proceedings since it is prima facie relevant and the Board should not leave standing a patent which is clearly not allowable.

6.3 For reasons analogous to the one discussed under point 5 above in relation to the objection of lack of inventive step in view of D14 (see points 5.3 and 5.4 above) the Board does not admit the objections of lack of inventive step starting from D3 in the proceedings pursuant to Article 12 (6) RPBA 2020.

7. Inventive step of the subject-matter of claims 5 and 7 of the patent as granted

The opponent argued in the written procedure that the subject-matter of claims 5 and 7 is not inventive. These claims comprise the subject-matter of claim 1 and the opponent refers to the submission in relation to claim 1 for their subject-matter (see statement setting out the grounds of appeal, page 22, third paragraph; page 23, last paragraph; page 24, fourth and penultimate paragraph; page 26, first paragraph; letter dated 20 July 2022, page 13, points II.9 and II.10).

Analogously to the objections of lack of inventive step of the subject-matter of claim 1 the Board does not admit these objections into the proceedings for the same reasons as set out above.

8. Other issues

The opponent also requested to admit document D18 into the proceedings and the patent proprietor to admit document D17 into the proceedings and to not admit document D18.

In view of the above findings for the outcome of the decision it is not necessary to deal with these requests.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



A. Vottner

A. Beckman

Decision electronically authenticated