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D E C I S I O N
of 14 October 1997

Case Number: T 0635/94 - 3.2.3

Application Number: 88305011.5

Publication Number: 0102825

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Language of the proceedings: EN

Title of invention:
Demountable partitioning system

Patentee:
Phoenix Interiors Ltd

Opponent:
K. G. Longhurst

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 111(2), 122

Keyword:
"Novelty - prior disclosure - different field or problem"
"Decision re-appeals - remittal (yes)"
"Restitutio - all due care"

Decisions cited:
T 0176/84

Catchword:
-



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Boards of Appeal

Chambres de recours

Case Number: T 0635/94 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 14 October 1997

Appellant I:
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Appellant II:
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office of 21 April 1994,
posted 27 May 1994 concerning maintenance of
European patent No. 0 102 825 in amended form.

Composition of the Board:

Chairman: C. T. Wilson
Members: F. Brösamle
L. C. Mancini

Summary of Facts and Submissions

I. European patent No. 0 102 825 was granted with thirty-five claims. The independent claims thereof are claims 1 and 35 which read as follows:

- "1. A demountable partitioning system comprising:
- (i) a first section (FW1; FW11) comprising an elongate channel-shaped member of constant, generally-rectangular cross-section throughout its length, the said member being open on one side and having formations (4,5;12,5) associated with at least that side wall (1) which is opposite to said open side such as to enable another elongate member (FW4; FW5) having complementary formations (8; 10) to be engaged with the said side wall (1) in a snap-fit manner and arranged to enable glazing to be effected to such side wall (1) by means of elongate glazing elements (FW6; FW7; FW8);
 - (ii) at least one second section comprising another elongate member (FW4; FW5) as aforesaid having complementary formations (8; 10) whereby said second section (FW4; FW5) may be engaged in a snap-fit manner with said side wall (1) of the first section (FW1; FW11);
 - (iii) elongate glazing elements (FW6; FW7; FW8) as aforesaid for enabling glazing to be effected to said side wall (1) of the first section (FW1; FW11); and
 - (iv) a third, glazing infill section (FW3) comprising an elongate member engageable with the open side of the first section (FW1; FW11) for enabling glazing to be effected thereto; characterised in that:
said glazing infill section (FW3) is so configured that when it is engaged with the open side of the

first section (FW1; FW11) it enables the same glazing elements (FW6; FW7; FW8) as are usable for effecting glazing to said side wall (1) of the first section (FW1; FW11) to be used also for effecting glazing to the open side thereof."

and

"35. A method of erecting a demountable partition comprising partition sections selected from the group comprising single-glazed glazing panels, double-glazed glazing panels, solid partition wall panels, and doors, the said method comprising utilizing multiple-function universal sections (FW1,FW11) as primary supports for the partition sections and interfacing the respective partition sections with their supporting universal sections (FW1,FW11) by clipping appropriate interfacing sections (FW3,FW4,FW5,FW6,FW7,FW8) to the respective supporting universal sections (FW1,FW11), the universal sections each comprising an elongate channel-shaped member of generally rectangular cross-section having a base wall (1), a pair of side walls (2) and an open side, a glazing stool (5) extending longitudinally of the channel-shaped member (FW1;FW11) on the outer side of the base wall (1) intermediate the two side edges of the base, the said glazing stool (5) being undercut on both sides facing the edges of the base, and a pair of formations (4;12) being provided extending along the two side edges of the base wall (1) externally of the channel-shaped member (FW1), the said formations (4;12) being undercut on their sides facing towards the undercut sides of the glazing stool (5), and formations (3;12) being provided at the edges of the two side walls (2) of the channel-shaped member between which the open side of the

channel-shaped member is defined, the formations (4) at the external edges of the base wall (1) being spaced apart from one another a distance substantially equal to the spacing apart of the formations (3;12) at either side of the open side of the channel-shaped member (FW1;FW11) and being similarly shaped thereto for enabling the attachment to the base wall (1) and/or to the open side of the channel shaped member (FW1;FW11) of similarly configured further members (FW4;FW5) having complementary formations (8,10) and the interfacing sections being provided with complementary interengageable formations (3,4,5,12;8,10) for enabling clipping together of the respective sections, the interfacing sections being selected from the group comprising single-glazing and double-glazing glazing sections (FW6,FW7,FW8), blanking sections (FW4), door infill sections (FW5), and glazing infill sections (FW3) engageable with the open side of the channel-shaped member (FW1;FW11) for enabling glazing to be effected thereto by means of the same glazing sections (FW6;FW7;FW8) as are usable for effecting glazing to said base wall (1)."

II. In the oral proceedings of 21 April 1994 the opposition division upheld European patent No. 0 102 825 in amended form; the written decision within the meaning of Article 106(3) EPC was posted on 27 May 1994.

III. The independent claims 1 and 35 upheld with the above decision read as follows:

"1. A demountable partitioning system comprising:
(i) a first section (FW1; FW11) comprising an elongate channel-shaped member of constant, generally-rectangular cross-section throughout its length, the said member being open on one side and

having formations (4,5;12,5) associated with at least that side wall (1) which is opposite to said open side such as to enable another elongate member (FW4; FW5) having complementary formations (8; 10) to be engaged with the said side wall (1) in a snap-fit manner and arranged to enable glazing to be effected to such side wall (1) by means of elongate glazing elements (FW6; FW7; FW8);

(ii) at least one second section comprising another elongate member (FW4; FW5) as aforesaid having complementary formations (8; 10) whereby said second section (FW4; FW5) may be engaged in a snap-fit manner with said side wall (1) of the first section (FW1; FW11);

(iii) elongate glazing elements (FW6; FW7; FW8) as aforesaid for enabling glazing to be effected to said side wall (1) of the first section (FW1; FW11); and

(iv) a third, glazing infill section (FW3) comprising an elongate member engageable with the open side of the first section (FW1; FW11) for enabling glazing to be effected thereto; and wherein:

said glazing infill section (FW3) is so configured that when it is engaged with the open side of the first section (FW1; FW11) it enables the same glazing elements (FW6; FW7; FW8) as are usable for effecting glazing to said side wall (1) of the first section (FW1; FW11) to be used also for effecting glazing to the open side thereof; and said elongate glazing elements (FW6; FW7; FW8) comprise single-glazing elements (FW6) adapted to be fitted on each side of a glazing pane glazed to said side wall (1) or to a third section (FW3) fitted to said open side of said first section (FW1; FW11) and double-glazing glazing elements (FW7; FW8) comprising an inner elongate member

(FW8) adapted to be fitted generally centrally of said side wall (1) or of said third section (FW3) and outer elongate members (FW7) adapted to be fitted on each side of said inner elongate member (FW8) with the two glazing panes of a double glazing system each between the inner member (FW8) and respective ones of the outer elongate members (FW7)."

and

- "35. A demountable partitioning system comprising:
- (i) a first section (FW1; FW11) comprising an elongate channel-shaped member of constant, generally-rectangular cross-section throughout its length, the said member being open on one side and having formations (4,5;12,5) associated with at least that side wall (1) which is opposite to said open side such as to enable another elongate member (FW4; FW5) having complementary formations (8; 10) to be engaged with the said side wall (1) in a snap-fit manner and arranged to enable glazing to be effected to such side wall (1) by means of elongate glazing elements (FW6; FW7; FW8);
 - (ii) at least one second section comprising another elongate member (FW4; FW5) as aforesaid having complementary formations (8; 10) whereby said second section (FW4; FW5) may be engaged in a snap-fit manner with said side wall (1) of the first section (FW1; FW11);
 - (iii) elongate glazing elements (FW6; FW7; FW8) as aforesaid for enabling glazing to be effected to said side wall (1) of the first section (FW1; FW11); and
 - (iv) a third, glazing infill section (FW3) comprising an elongate member engageable with the open side of the first section (FW1; FW11) for

enabling glazing to be effected thereto;
and wherein:

said glazing infill section (FW3) is so configured that when it is engaged with the open side of the first section (FW1; FW11) it enables the same glazing elements (FW6; FW7; FW8) as are usable for effecting glazing to said side wall (1) of the first section (FW1; FW11) to be used also for effecting glazing to the open side thereof; and wherein the first section (FW1; FW11) has similar formations (3; 12) associated with its open side for enabling a said second section (FW4; FW5) to be engaged also with said open side in a snap-fit manner."

IV. The proprietor - appellant I in the following - and the opponent - appellant II in the following - lodged appeals against the above decision on 5 August 1994 paying the appeal fee on the same day. The statements of grounds of appeal were filed on 4 October 1994 (appellant I) and on 7 October 1994 (appellant II).

V. Following two communications of the board dated 26 February 1996 and 13 May 1997 in which the board set out his provisional opinion, including its opinion on the newly cited partitioning system "Specialty", oral proceedings took place on 14 October 1997 in which the parties brought forward the following requests:

(a) appellant I:

to dismiss the appeal of appellant II and to set aside the decision under appeal and to maintain the patent as granted or in the amended form according to the decision under appeal; he further requested that the case be remitted to the first instance should the prior art "Specialty" be admitted to the proceedings;

(b) appellant II:

to dismiss the appeal of appellant I and to set aside the decision under appeal and to revoke European patent No. 0 102 825.

VI. The (essential) prior art discussed in oral proceedings before the board can be summarized as follows:

- system "Gibbons":

(E12) James Gibbons Windows Ltd drawing (undated but accepted by appellant I as prior art);

(E15) Letter dated 12 December 1991 from James Gibbons Window Ltd;

(E16) Assembly drawings based on (E12) above, and

(E25) James Gibbons Windows brochure, 1978;

- system "Slenderdee":

(E2) Unilock Slenderdee "The versatile partition" leaflet, 1980;

(E3) Unilock "Firesound" leaflet, June 1979;

(E26) Unilock "Systems Guide" leaflet, September 1980;

(E27) Unilock "Context" leaflet, November 1979;

- system "Ultrawall":

(E1) Ultrawall Partition Systems leaflet SA-1020, 1980;

(E23) Drawings of Ultrawall (E1) main section,
1974;

(E24) Drawing of Ultrawall (E1) glazing bead,
1974;

- system "Specialty":

publicity leaflet marked A to G and J, Q, R and S
from "Specialty Contractors Inc", Los Angeles
California.

VII. The arguments of the parties are essentially as
follows:

(a) appellant I:

- from EP-B1-0 102 825, see column 1, lines 3 to
7, and claims, it can be seen that a
"demountable" partitioning system is envisaged
which can be varied at the will of the occupier
and which is based on sections which merely
snap together so that the reusability of
demounted partitioning is possible;
- when choosing the nearest prior art system and
when dealing with the issue of novelty of the
subject-matter claimed the functional term
"demountable" of the partitioning system has
therefore clearly to be considered;
- "Gibbons" and "Slenderdee" are seen as
"windowing" systems which are not governed by
the requirement of demounting or relocating of
the walls so that they relate to a neighbouring
technical field different from that of
demountable partitioning walls; from (E25), see
cover page, it is obvious for a skilled person

that the lateral beads of the profile carrying the hooks make demounting of the joined-together profiles impossible;

- windowing systems require heavier and more expensive profiles than partitioning systems and the issue of demounting is not predominant for the way in which their profiles are joined together, for instance by screwing or a snap fit which is not readily demountable, see (E25) front page;
- experts in the technical field of partitioning systems such as Mr Eames, Jeffries, Williams, Barrett and Still have set out in their affidavits presented in the post-grant proceedings that "Gibbons" never was seen as a demountable system, but rather as a window system;
- Mr Roth cannot be seen as a neutral expert since he has a financial interest in the outcome of the proceedings so that his affidavit should not be relied upon by the board;
- one of the basic features of granted claim 1 is the existence of a universal section whereas "Slenderdee" and also "Gibbons" are based on different sections;
- as a result of the above arguments "Gibbons" and "Slenderdee" cannot be seen as the nearest prior art since in these systems essential features of granted claim 1 are not present; nearest prior art is therefore "Ultrawall", see EP-B1-0 102 825, columns 1 and 2;

- "Specialty" is late-filed and should therefore not be taken into account; if allowed, however, by the board into the proceedings it is requested that the case is remitted to the first instance for further prosecution; further (auxiliary) requests are reserved by appellant I in this case.

(b) appellant II:

- granted claim 1 is cast in general terms without clearly defining what is meant by a "demountable" partitioning system and without specifying the profiles, the glazing elements and the snap-fit which depends on the form, the size, the tolerances, and the material of the profiles to be fitted together;
- the difference between the subject-matter of granted claim 1 and "Gibbons" is therefore only a question of size, so that a skilled person would also consider a shopfront relating to a neighbouring technical field where identical or similar problems have to be solved;
- "Gibbons" allows glazing to be carried out on all sides of the profile; the profiles are moreover demountable in the broad sense expressed in granted claim 1; "Gibbons" is therefore seen as a novelty destroying prior art to the subject-matter of granted claim 1 whereby reference has to be made to the affidavit of Mr Roth filed in the appeal proceedings;

- Mr Roth is seen as independent since he was not a licensee of the appellant I when producing his above affidavit for the appeal proceedings; in considering the balance of probabilities with respect to the issue of independence the board should decide in favour of appellant II;
- the newly cited prior art "Specialty" is also seen as novelty destroying to the subject-matter of granted claim 1; "Specialty" could not be filed earlier since it was not known to appellant II;
- it is admitted as that page 10 of (E2) is not comprised in the leaflet itself but was produced by appellant II without any intention to deceive the board;
- the question of what has actually been sold is seen as irrelevant since the crucial question is what could be realized with the known system "Slenderdee"; it is emphasized that "Slenderdee" is also a complete system for demountable walls;
- the affidavits relied upon by appellant I are seen as irrelevant since they only reflect personal opinions of what is considered known, suited for etc.;
- a first profile in the sense of a universal profile of the system is known from "Ultrawall"; the only difference is the profile element needed for glazing, namely a recess instead of a T-protrusion on the first (universal) profile;

- the systems "Specialty" and "Ultrawall" can be combined by a skilled person so that the demountable partitioning system of granted claim 1 - even if considered to be novel - at least is not based on an inventive step;

- although "Specialty" was only cited in the appeal proceedings it is requested that it is considered by the board since it is not a state of the art in the form of a prior use.

Reasons for the Decision

1. The appeals are admissible. With respect to the appeal of appellant II reference is made to the board's decision T 635/94 - 3.2.3 dated 25 April 1995 in which the board allowed re-establishment of rights of appellant II in connection with the filing of an admissible appeal, and considered the statement of grounds of appeal as having been filed in due time according to Article 108 EPC.

Main request

2. The main request of appellant I is to set aside the impugned decision of the opposition division and to maintain the patent as granted in combination with dismissing the appeal of appellant II.

2.1 Novelty

- 2.1.1 What is considered in this context is "Gibbons", "Slenderdee" and "Ultrawall" but not "Specialty" which according to the board's findings in the oral

proceedings should be dealt with - singly and in combination with the further prior art considered in the impugned decision - by the first instance as requested by appellant I.

2.1.2 The crucial features of granted claim 1 which make its subject-matter novel are the **demountable** partitioning system and a first section which is a **universal** profile for all purposes, e.g. single- or double-glazing glazing panels, solid partition wall panels or doors.

2.1.3 Demountable in the present context is to be understood not only as allowing disassembling of parts, but also as enabling the elements of a partitioning system to be **relocated** or **reused** so that the occupier can vary the system readily since the profiles can be reassembled by snap fitting them together.

Using a **universal** profile (as first section) offers the possibility to reduce the number of profiles drastically.

2.1.4 The Gibbons-system, see cover sheet of (E25), clearly discloses a system which does not fulfil the above features of granted claim 1 since it is possible to snap fit the profiles together but not to easily demount them. The lower profile comprises two lateral beads which exclude for a skilled person **not knowing** the claimed subject-matter any reasonable possibility of demounting the profiles since no tool can be inserted to bend the hooks of the lower profile for demounting the system.

2.1.6 From page 6 of (E25) can be seen that a multitude of "first sections" is used with the Gibbons-system so that there is a further difference between this system and the subject-matter of granted claim 1.

Profiles "B4/B5" of (E25) are not even restricted to a snap fit but apparently are based on a screw connection not claimed in EP-B1-0 102 825.

2.1.7 The text on page 2 of (E25) headed "Anti-Bandit Screens" is a further indication that (E25) is not a demountable partitioning system as claimed rather a window system - even when used for internal screening problems according to its page 2 - where it is just **not intended** to demount the partitioning system. In addition it is clear for a skilled person that the size of profiles used for an anti-bandit screen is considerably outside the range used in combination with a partitioning system not to speak of the difference of costs.

2.1.8 The board is convinced that "Slenderdee" is also a window system contrary to what is claimed. In this context only document (E2) was discussed in detail without, however, its page 10, which is not original but was produced at a later stage by appellant II.

What is immediately clear is again that "Slenderdee" does not make use of a **universal** profile as first section but relies on a multitude of first sections. Novelty can therefore not be denied with respect to granted claim 1 and "Slenderdee".

2.1.9 As a consequence of the above considerations the nearest prior art is the "Ultrawall" partitioning system, see EP-B1-0 102 825 and its columns 1 and 2 in which this system is discussed, (see in particular column 2, lines 21 to 55), namely that **no** universal profile is used as first section having formations associated with at least that side wall which is opposite to the open side of the first section and that

only the claimed partitioning system enables the same glazing elements to be used for glazing to the open side of the first section as are used for glazing to the sidewall thereof.

"Ultrawall" is therefore also not novelty destroying prior art with respect to the subject-matter of granted claim 1.

- 2.1.10 As can be seen from above the system of granted claim 1 differs not only in its size from "Gibbons" so that the argument of appellant II fails since moreover a shopfront is nothing more than a window or anti-bandit screen not envisaged to be easily demounted and reused.

According to the above considerations it is clear that in the technical fields of window - and partitioning systems identical or similar problems do not have to be solved; the principles laid down in T 176/84, OJ EPO 1986, 50, are therefore not applicable in the present context.

- 2.1.11 Appellant II is right that granted claim 1 is not restricted to a specific snap-fit or to a specific form/size/material of the profiles and to specific tolerances between cooperating profiles but this is irrelevant in request of the issue of novelty since other features of claim 1 as granted such as the functional term "demountable" make the claimed subject-matter novel over "Gibbons" and "Slenderdee" within the meaning of Articles 54 and 100(a) EPC.

2.2. Inventive step

- 2.2.1 Starting from Ultrawall, a demountable partitioning system identified above (paragraph 2.1.9) and during the examination procedure, as the closest prior art, the subject-matter of claim 1 differs therefrom in that

the glazing infill section is so configured that when it is engaged with the open side of the first section it enables the same glazing elements as are usable for effecting glazing to the side wall of the first section to be used also for effecting glazing to the open side thereof.

The person skilled in the art is given no suggestion in the cited prior art, "Gibbons" and "Slenderdee", to amend the "Ultrawall" system in this way to arrive at the subject-matter of claim 1.

- 2.2.2 Only with hindsight can it be argued by appellant II that the only difference between "Ultrawall" and the claimed system is a recess instead of a formation opposite the open side of the first section.
- 2.2.3 Appellant I brought forward convincing evidence in the form of several affidavits that "Gibbons" was never intended as a **demountable** system, (see affidavits especially from Mr Eames and Mr Barrett). Mr Eames is a former employee of "Gibbons" and insofar an expert for Gibbons'-products, whereas Mr Barrett is an architect who is familiar with the complete range of partitioning and window systems. The board has no doubt that "Gibbons" never was understood by the skilled person **not knowing** the claimed invention as a **demountable** system.
- 2.2.4 Mr Roth in his affidavit came, however, to differing findings. Firstly Mr Roth cannot be seen as a neutral expert with no personal interests in the outcome of the present proceedings. Although it has been argued that he was independent, since he was not a **licensee** at the time when swearing his affidavit. However, the board is not convinced by this argument since becoming a licensee is not only a question of signing a contract with a proprietor of a patent but is a question of

prior, sometimes long-term, negotiations and mutual contacts etc. The board cannot therefore clearly treat the findings in his affidavit in the same way as those of Mr Eames and Mr Barrett, (see above remark 2.2.2).

Irrespective of the question of the independence or otherwise of Mr Roth, the board prefers the practice oriented approach adopted in the affidavits of Mr Barrett and Mr Eames to the approach adopted by Mr Roth, where he appears to concern himself more with an analysis and interpretation of the prior art documents and the present patent claims.

2.2.5 It follows that "Gibbons" and "Slenderdee" for the above reasons under remark "Novelty" are irrelevant for the question of what a skilled person could derive from this prior art to achieve the demountable partitioning system according to claim 1. It has to be decided what a skilled person not knowing the claimed invention would have derived from "Gibbons", "Slenderdee" and "Ultrawall" and not what he could have derived therefrom. Speculation has no place in an assessment of inventive step. Even if "Slenderdee" per se is a "complete" system the subject-matter of granted claim 1 is non-obvious within the meaning of Article 100(a) and 56 EPC.

2.3 Late-filed "Speciality"

2.3.1 Appellant II has argued that "Specialty" can be combined with "Ultrawall" to immediately achieve the subject-matter of granted claim 1.

2.3.2 The board has decided that the newly cited prior art "Specialty" must be admitted into the proceedings due to its relevancy. However, the board is of the opinion

that it should be dealt with by the first instance, as requested by appellant I, and the case is therefore remitted to the first instance pursuant to Article 111(1) EPC.

2.3.3 Appellant II cannot be followed in his argumentation that "Specialty" should be allowed into the proceedings at this late stage, but should not be considered first by the first instance. His request has therefore to be rejected by the board. The fact that "Specialty" has to be seen as written state of the art is irrelevant in this respect.

2.4 As a consequence of the above considerations granted claim 1 seen in the light of "Ultrawall", "Gibbons" and "Slenderdee" is valid whereby the first instance has to extend that prior art by "Specialty" after remittal of the case by the board.

2.5 Claim 35 as granted is so closely related to granted claim 1 that it is also valid for the above reasons with respect to "Ultrawall", "Gibbons" and "Slenderdee".

First auxiliary request

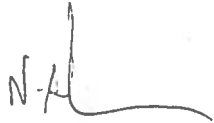
3. This request by incorporating granted claims 4 and 19 is narrower than the main request so that its claimed subject-matter is not open to an objection under Articles 54, 56 and 100(a) EPC either with respect to "Ultrawall", "Gibbons" and "Slenderdee".

Order

For these reasons it is decided that:

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

The Registrar:



N. Maslin

The Chairman:



C. T. Wilson

