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**D E C I S I O N**  
of 6 February 1997

**Case Number:** T 0120/96 - 3.2.3

**Application Number:** 89108820.5

**Publication Number:** 0348653

**IPC:** EO3C 1/06

**Language of the proceedings:** EN

**Title of invention:**

Shower cubicle with control centralising column

**Patentee:**

CESANA S.p.A.

**Opponent:**

Kermi GmbH

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 111(1), 113(1), 116(1)  
EPC R. 67

**Keyword:**

"Termination of opposition proceedings after remittal without previous notification and without taking into account the partie's request for oral proceedings - procedural violation"

**Decisions cited:**

T 0892/92, OJ EPO 1994, 664; T 0047/94

**Catchword:**

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Case Number: T 0120/96 - 3.2.3

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.3  
of 6 February 1997

**Appellant:**  
(Opponent)

Kermi GmbH  
Pankofen-Bahnhof 1  
D-94447 Plattling (DE)

**Representative:**

Schwabe, Hans-Georg, Dipl. -Ing.  
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**Respondent:**  
(Proprietor of the patent)

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I-20123 Milano (IT)

**Representative:**

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SAIC Brevetti s.r.l.  
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**Decision under appeal:**

Decision of the Opposition Division of the  
European Patent Office posted 07 December 1995  
rejecting the opposition filed against European  
patent No. 0 348 653 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** C. T. Wilson  
**Members:** J. B. F. Kollar  
L. C. Mancini

## Summary of Facts and Submissions

- I. European patent No. 0 348 653 was granted with ten claims on the 2 May 1991 on the basis of European patent application No. 89 108 820.5.
- II. Notice of opposition was duly filed requesting the revocation of the patent on the ground that its subject-matter did not involve an inventive step. In the course of the opposition proceedings ten documents (D1 to D10) were cited.
- III. The Opposition Division came to the conclusion that it would not be obvious for a person skilled in the art to combine the teachings of documents D1 to D10 and to thereby arrive at the invention of Claim 1. By a decision dispatched on the 5 July 1993, the Opposition Division rejected the Opposition.
- IV. Notice of Appeal was lodged against this decision on the 6 September 1993 with a Statement of Grounds of Appeal and with payment of the prescribed fee. In his Statement the Appellant (Opponent) introduced into the appeal proceedings a new document, US-A-2 527 852, hereinafter referred to as D11, and argued, inter alia, that the subject-matter of Claim 1 lacked an inventive step in view of the disclosure of this document.
- V. In a letter received on the 6 May 1994 the Respondent (Patentee) considered document D11 to be not harmful either to the novelty or to the inventive step of the patent. He requested that the patent be maintained as granted and that the appeal be dismissed.

VI. In a submission received on the 21 September 1994 the Appellant introduced into the appeal proceedings a further document, US-A-1 785 636, hereinafter referred to as D12. It was then argued, inter alia, that the subject-matter of Claim 1 lacked an inventive step in view of the disclosure of this document in combination with D11.

VII. Oral proceedings were subsidiary requested by both parties.

VIII. By its decision T 0810/93, dated 15 March 1995, the Board remitted the case back to the Opposition Division for further examination of the opposition.

In this decision, the Board referring to T 0047/94 of 16 January 1995 (not to be published) found it neither necessary nor appropriate to appoint any oral proceedings before the Appeal Board in spite of the subsidiary requests of both parties.

IX. Thereafter, and without further notification or invitation to the parties for comments in written or oral form the Opposition Division rejected the opposition by its decision of 7 December 1995.

In this decision, the Opposition Division, referring to T 1002/92 and T 0255/93, took the view that for late filed documents to be considered they must be clearly decisive, rather than merely relevant, in the sense that the decision depends upon them. The Opposition Division held that the late filed documents D11 and D12 did not prejudice the maintenance of the patent unamended and invoked its powers under Article 114(2) EPC not to admit these late filed documents into the proceedings.

- X. On 6 February 1996 the Appellant (Opponent) lodged an appeal against this decision and paid the appropriate fee. A Statement of Grounds of Appeal was received on 7 March 1996.
- XI. The Appellant argued that the manner in which the case had been handled by the Opposition Division after the Board had remitted it was contrary to the requirement of Article 113(1), since the case was decided without inviting the parties to file their observations. In particular, he submitted, referring to T 0892/92, that Article 113(1) EPC requires that an express opportunity to present observations be given to the parties by the Opposition Division after remittal to it of a case by a Board of Appeal for further prosecution on the basis of new evidence, even if submissions with respect to this new evidence have already been made during the preceding proceedings. Therefore, the proceedings suffered from a substantial procedural violation.
- XII. The Appellant requests that
- (i) the decision of the Opposition Division of 7 December 1995 be set aside,
  - (ii) the appeal fee be reimbursed,
  - (iii) the patent be revoked,
  - (iv) subsidiary oral proceedings be appointed, and
  - (v) the case be decided by the Board.
- XIII. The Respondent, defending in his submission received 10 October 1996 the decision of the first instance, requests the appeal be dismissed, subsidiarily a hearing be appointed.

## Reasons for the Decision

1. The appeal is admissible.
2. The basic issue to be decided in these appeal proceedings is whether or not the proceedings before the Opposition Division that took place after remittal suffer from a substantial procedural violation, as was submitted by the Appellant.
  - 2.1 The provisions that are relevant to this issue are those of Articles 113(1) and 116(1) EPC.
  - 2.2 Article 113(1) provides that the decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. Consequently Article 113(1) requires (see also decision T 0892/92, OJ EPO 1994, 664, point 2.1 of the reasons) that an express opportunity to present observations be given to the parties by the Opposition Division after remittal to it of a case by a Board of Appeal for further prosecution on the basis of new evidence, even if submissions with respect to this new evidence have already been made during the preceding appeal proceedings. The term "opportunity" in this article can only be given effective meaning by applying the principle of good faith and the right to a fair hearing.

However, it is obvious in the light of these principles that no such opportunity can exist where, as in the present case, a remittal by a Board of Appeal for further prosecution on the basis of new evidence is immediately, i.e. without any intervening communication announcing the resumption of proceedings, followed by the rejection of the opposition. For such opportunity to exist, it is therefore necessary that the parties be

expressly asked whether or not they wish to present, within a fixed period of time, their comments, or if, as in the present case, the parties have already made detailed submissions during the preceding appeal proceedings, whether or not these submissions should be regarded as complete.

Already for this reasons, the Board finds that the immediate termination of the opposition proceedings following the remittal was not in accordance with the provision of Article 113(1)EPC and, therefore, constituted a substantial procedural violation within the meaning of Rule 67 EPC, and the decision under appeal must be set aside. Since the appeal was caused by this substantial procedural violation, the reimbursement of the appeal fee is also equitable.

- 2.3 Having regard to the fact that the resumed proceedings before the Opposition Division are governed by the requests existing at the time, it is also desirable, at the same time to clarify whether any requests submitted originally, i.e. before the opposition proceedings were interrupted by the appeal proceedings, are maintained, modified or withdrawn or whether further requests will be submitted. In this context, the Board finds that the Appellant's request for oral proceedings during former proceedings had been revived on remittal and was therefore legally effective, but, contrary to Article 116(1) EPC, had not been taken into account by the Opposition Division.

In the present circumstances, the Board following the established jurisprudence of the Boards of Appeal (see T 0892/92, point 2.2 of the reasons) is of the opinion that further proceedings on remittal by the Board of Appeal ordering "further examination of the opposition" should be regarded as a continuation of the original opposition proceedings, particularly so, since the

original interlocutory decision to maintain the patent unamended was set aside by the Board and was therefore no longer legally effective. Consequently, the Appellant's original requests, among them his subsidiary request for oral proceedings, which have never been withdrawn or amended, became once more effective after remittal, so that the Opposition Division should not have taken a decision adversely affecting the Appellant, without giving him an opportunity to present his case orally (Article 116(1) EPC).

3. For the reasons put forward in points 2.2 and 2.3 above the Board has decided not to investigate the substantive questions of patentability but, and again in order to give the parties the opportunity to have these questions considered by two instances, to exercise its power under Article 111(1) EPC and to remit the case once more to the Opposition Division for further prosecution.
4. The Board is concerned that this case is again having to be remitted without a final decision on the substantive issues. The Board therefore observes that the aim to streamline the proceedings before the EPO, an aim which is strongly supported by the Boards of Appeal, cannot be reached at the expense of the parties' right to a fair procedure.

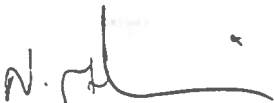


Order

For these reasons it is decided that:

1. The decision under appeal be set aside.
2. The case is remitted to the Opposition Division for further prosecution.
3. The appeal fee is to be refunded.

The Registrar:




N. Maslin

The Chairman:



C. T. Wilson



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