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D E C I S I O N
of 23 May 2000

Case Number: T 0097/97 - 3.2.3

Application Number: 90202660.8

Publication Number: 0455896

IPC: F24C 3/10

Language of the proceedings: EN

Title of invention:
Automatic unit for igniting appliances containing gas rings

Patentee:
TECNOGAS S.p.A.

Opponent:
BSH Bosch and Siemens Hausgeräte GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 54(2), 56, 114(2)
EPC R. 55(c)

Keyword:
"Novelty - public prior use (no) - insufficient evidence"
"Late submitted material - evidence admitted (no)"

Decisions cited:
T 0951/91

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0097/97 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 23 May 2000

Appellant: (Opponent)
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Representative:
-

Respondent: (Proprietor of the patent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 13 November 1996 rejecting the opposition filed against European patent No. 0 455 896 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: C. T. Wilson
Members: U. Krause
M. K. S. Aúz Castro

Summary of Facts and Submissions

I. The appeal contests the decision of the Opposition Division, dated 13 November 1996, to reject the opposition against European Patent No. 0 455 896. The single independent claim of this patent reads as follows:

"1. A gas cooking appliance comprising an automatic ignition unit and a series of gas rings (21) with which there are associated respective electrical ignition heads (22) and a corresponding number of aligned taps (5), these latter containing an operating stem (50) provided with knob (51) for sliding and rotating it, comprising a common ignition control member (12) which is hinged to the appliance (1) on an axis parallel to the line on which the taps lie, is disposed transversely to said stems (50), and is coupled to each of these latter by lever means (11) against which the stem acts only when translationally moving in one specific direction so that said member (12) is able to rotate in response to the translation movement of any one of the stems (50) to press a common pushbutton (16) which operates an ignition device (17) common to all the ignition heads; characterised in that said member (12) comprises a flat elongate element which on one side is provided with slots (13) which receive respective tongues (14) for its hinging to the appliance (1) and on the other side is provided with a number of forks (11) equal to the number of appliance taps (5), each individual fork (11) being mounted on a tap stem (50) and embracing this latter to act on a thrust ring (8) mounted on the stem and axially

fixed to this latter."

II. The opposition of the Appellant was filed against the patent in its entirety on the grounds that the subject-matter of claim 1 lacks novelty or inventive step in view of an alleged public prior use and three patent documents. As evidence for the prior use the following documents were submitted:

(D1) Copy of catalogue "Neff-Hausgeräte Gesamtprogramm 1985" ("Anlage 1")

(D2) Drawing "Anlage 2" with handwritten insertion 5.8Jst, V.12

(D3) Four drawings "Anlage 3a" to Anlage "3d", the latter having an imprint "Schaltschiene" and bearing the date 30 May 1985.

The Appellant offered to provide further evidence, in the form of documents and the testimony of witnesses, in support of the allegation that appliances as shown in (D1) to (D3) were produced and sold in the years preceding and following the year 1985 in thousands of samples. However, the contents of such documents or the names of the witnesses were not indicated.

The three patent documents are the following:

(D4) DE-A-1 905 797

(D5) FR-A-1 382 571

(D6) US-A-3 768 959

The Appellant did not comment on these documents.

III. The reason given for the rejection of the opposition was that the public prior use had not been proven and, taking the evidence (D1) to (D3) as documents, only (D1) was prior art which, however, neither discloses, nor renders obvious, the subject-matter of claim 1. (D4) to (D6) were not taken into consideration because they had already been examined in the granting procedure and the opponent had not made any comment on their technical content.

IV. The Appellant (Opponent) filed the notice of appeal on 22 January 1997, the appeal fee being paid on the same date. The statement of the grounds of appeal was filed on 24 March 1997.

V. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

In support of this request, he submitted essentially the following arguments:

The decision did not correctly appreciate the prior art which was a public prior use, rather than a disclosure by means of documents. The documents should have been used only as an indication of the actually used embodiment of the cooking appliance. A sample of this actually used embodiment could be presented at oral proceedings to be scheduled, and the testimony of witnesses could confirm that this embodiment was built into gas cooking appliances marketed and sold under the name NEFF before the priority date of 11 May 1990. Nevertheless, the technical features of this embodiment are shown in (D2) and functionally correspond to the

subject-matter of the patent. Practically, there is a difference in that the operating rail of the prior art is not closed, but this difference is negligible.

VI. The Respondent (Proprietor of the patent) requested that the appeal be dismissed.

His arguments can be summarised as follows:

The alleged public prior used was not proven before the first instance, and no new evidence can be accepted because all the facts and arguments in support of the opposition must be filed within the opposition period. Since the actually used embodiment is not known, no comments can be made thereon. The patent does not claim the working principle of using a common ignition control member for igniting a gas ring when opening the respective tap. This is already known from FR-A-1 382 571 discussed in the patent as prior art. The patent is directed to an improvement of this prior art so as to arrive at a simple and inexpensive solution.

VII. In a communication issued on 30 July 1999 in preparation of oral proceedings the Board expressed the provisional opinion that it would appear doubtful whether the submitted evidence is sufficient to prove the alleged production and marketing of the gas cooking appliances shown in (D1), (D2) and (D3). The submission of additional documents or the testimony of witnesses were offered by the Appellant, without, however, specifying the contents of such documents, the names of the witnesses or the subject-matter on which the witnesses would give evidence. It was made clear that the presentation of further evidence of the prior use at the oral proceedings would not be allowed as it

would be an abuse of the procedure because then the opposition procedure up until the oral proceedings would become meaningless, which would be unfair to the Respondent. Furthermore, none of the documents (D1), (D2) and (D3) discloses the features according to the characterising portion of claim 1. Thus, even if they could be shown to constitute part of the prior art, it would appear questionable whether they can give a lead to the skilled person to arrive in an obvious manner at the subject-matter of claim 1.

VIII. In oral proceedings dated 23 May 1995 the Appellant declared that he wished to present an example of a gas cooking hob, two original drawings allegedly corresponding to (D2) and (D3) and photographs allegedly showing the prior use. This was considered by the Board to constitute new evidence which was not allowed into the proceedings at that stage, as announced in the communication.

Reasons for the Decision

1. The appeal is admissible.

2. *Prior art*

2.1 Alleged public prior use

2.1.1. According to Article 54(2) EPC the state of the art may include something made available to the public by use before the filing or, if a priority is validly claimed, the priority date of the European patent application (public prior use). If an Opposition is based on such a public prior use, in contrast to an opposition based

solely on documents, it must first be determined what was actually disclosed to the public. Since the burden of proof is with the Opponent, who alleges the prior use, he must, as correctly pointed out in the appealed decision, provide all the facts and evidence necessary to enable the Proprietor and the Opposition Division to determine the date of the disclosure, the subject-matter of the disclosure and the circumstances relating to the disclosure. Rule 55(c) EPC stipulates that the facts and evidence shall be submitted together with the notice of opposition. Article 114(2) EPC gives the discretionary power to the departments of the EPO to disregard facts or evidence which are not submitted in due time, in order to ensure that proceedings can be concluded swiftly in the interests of the parties, the general public and the EPO, and to forestall tactical abuse (see T 951/91, published in OJ 1995,202). Thus, it is the duty of the Opponent to do his best to submit the facts and evidence relevant to his case as early and completely as possible if he wishes them to be taken into account in the Opposition procedure.

2.1.2. In the present case the opposition is based on the grounds of lack of novelty or inventive step of the subject-matter of claim 1 primarily vis-à-vis an alleged public prior use. The Appellant (Opponent) alleged that gas cooking appliances as described by (D1), (D2) and (D3) were produced and sold in the years preceding and following the year 1985 in thousands of samples. In order to corroborate this allegation the filing of further documents and the testimony of witnesses were repeatedly offered, first in the Notice of Opposition, then in the letter of 10 June 1996 in reply to a communication of the Opposition Division, and finally in the Grounds of Appeal. However, neither

the name of any particular witness nor any specific indication of what he could confirm was provided, nor was any particular document specified.

Thus, no evidence in addition to (D1), (D2) and (D3) themselves was available until, in oral proceedings before the Board of Appeal, the Appellant attempted to present an example of an actually used gas cooking hob, two additional drawings and photographs. This is clearly new evidence which was presented about six years after the date of publication of the patent, more than five years after filing the Notice of Opposition and more than three years after filing the Notice of Appeal. No exceptional reason or excuse was presented for such a late submission. Hence, the Appellant did not present his case as early and completely as possible but appears to have held back his cards until the very last moment. This late presentation of additional evidence would take the Respondent by surprise and would deny him the opportunity to prepare detailed counterarguments. Thus, the admission of this additional evidence at this late stage would be contrary to a proper and fair procedure. The Board therefore considers this late submission of new evidence at the oral proceedings as a clear abuse of the procedure and exercises the discretion conferred upon it under Article 114(2) EPC not to admit the additional evidence into the proceedings.

2.1.3. As a consequence, the determination of what has been disclosed is based on the evidence presented with the Notice of Opposition, i.e. (D1), (D2) and (D3).

(D1) is a copy showing part of a catalogue of Neff-household appliances, and comprises a front page with

the heading "Neff-Hausgeräte Gesamtprogramm 1985" and two pages showing the frontal views of Neff gas cooking appliances of various types designated "Joker", and gas cooking platforms, accompanied by a reference to the basic features such as the number of gas rings and the type of ignition ("Einhand-Taktfunkenzündung"). No specific features of the gas cooking appliances are described. Since catalogues of this type are typically produced for marketing the appliances shown therein, (D1) can be considered as evidence for the fact that gas cooking appliances of the type "Joker" were intended to be marketed in 1985.

(D2) is a drawing showing an exploded view of parts of a gas cooking appliances. Some of the parts are numbered but there is no explanation of these parts. Further, there is neither a designation of the apparatus shown nor the name of the designer nor the date when the drawing was produced.

(D3) is a set of four drawings with only one drawing having an imprint with the designation "Schaltschiene", the name of the designer and of the company NEFF, the date of the drawing (30 May 1985) and an indication as to the observance of confidentiality.

Based on this evidence it appears highly probable that gas cooking appliances of the type "Joker" were marketed in the years following 1985. However, the exact dates of production and the number of appliances sold cannot be derived. Furthermore, there is no indication whatsoever, for example by mentioning the name "Joker" on (D2) or (D3), of a connection between (D1), (D2) and (D3), which could be taken as evidence for the allegation that (D2) and (D3) show an appliance

of the type as produced and sold according to (D1). Thus, the technical details of the marketed cooking appliances remain unknown.

2.1.4. The Board therefore concludes that the evidence (D1), (D2) and (D3) is insufficient to prove the allegation of the Appellant that gas cooking appliances as shown in (D1), (D2) and (D3) were produced and sold in the years preceding and following the year 1985 in thousands of samples. The prior use cannot, therefore, be taken into consideration as prior art according to Article 54(2) EPC.

2.2. Written descriptions

(D4), (D5) and (D6) were cited in the Notice of Opposition but the Opponent never commented on their technical content. The Opposition Division decided not to study in detail such documents which were already examined in the granting procedure because it was of the opinion that it was the Opponent on whom lies the burden of proving the truth of his allegation that the subject-matter of the patent was not novel or not inventive in view of the prior art. This opinion was not disputed by the Appellant and does not seem to be in error. There is, therefore, no reason to take (D4), (D5) and (D6) into consideration as prior art.

3. *Novelty and inventive step*

3.1. Since neither the alleged prior use nor the documents (D4), (D5) and (D6) are to be taken into consideration as prior art for the reasons outlined above, there is no prior art available for assessing whether the subject-matter of the patent is novel and involves an

inventive step. Since the opposition was based solely on the grounds of lacking novelty and inventive step, the grounds of opposition do not prejudice maintenance of the patent.

3.2. As confirmed by the Appellant in the Grounds of Appeal, (D1), (D2) and (D3) were submitted as evidence for a prior use, rather than as written descriptions. It is, therefore, not necessary to examine whether these documents alone were available to the public, or the technical contents thereof. This also applies to (D1) which, as part of a catalogue intended for distribution to clients, can be considered as having been available to the public since 1985, i.e. some years before the priority date of the patent. (D1), therefore, can in principle also be considered as prior art in the form of a written description. In this case, which was also considered by the Opposition Division, it follows from the above discussion of this document that all that can be derived from (D1), with respect to the subject-matter of claim 1 of the patent, is a gas cooking appliance with a number of gas rings, a number of aligned taps and some sort of ignition device. None of the technical details included in claim 1 are disclosed. As a consequence, the subject-matter of claim 1 of the patent could neither be derived from, nor rendered obvious by, this document even if it is considered as representing a written description available to the public. This is also valid for (D2) and (D3) in the theoretical case that these documents were considered to be comprised in the prior art; in fact, none of these documents discloses the features of hinging a flat elongate element to the appliance by means of tongues received in slots of the element and of providing the elongate element with forks each being

mounted on a tap stem and embracing this latter to act on a thrust ring axially fixed to the stem. This was correctly discussed in some detail in the decision under appeal (points 12 to 15 of the decision) and not disputed by the Appellant. Thus, the Board sees no reason to discuss this point any further.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

A. Counillon C. T. Wilson