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D E C I S I O N
of 12 December 2002

Case Number: T 0240/99 - 3.2.3
Application Number: 93924745.8
Publication Number: 0667949
IPC: F28G 1/16, F28G 9/00

Language of the proceedings: EN

Title of invention:
Cleaning apparatus for heat exchange surfaces

Patentee:
Clyde Bergemann Limited

Opponent:
Howden Sirocco Limited

Headword:
-

Relevant legal provisions:
EPC Art. 99, 104
EPC R. 55

Keyword:
"Examination of opposition - admissibility - (no)"

Decisions cited:
T 0629/90, T 0222/85, T 0328/87, T 0093/89, T 0786/95,
T 0028/93, T 0134/88

Catchword:
-



Case Number: T 0240/99 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 12 December 2002

Appellant: Clyde Bergemann Limited
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Glasgow G40 2QR (GB)

Representative: Gray, John James
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Respondent: Howden Sirocco Ltd
(Opponent) Old Govan Road
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Scotland PA4 (XY) (GB)

Representative: Allen, William Guy Fairfax
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 28 December 1998
revoking European patent No. 0 667 949 pursuant
to Article 102(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

I. European patent No. 0 667 949 was granted on 19 December 1996 in response to International application WO 94/11694 with 19 claims of which independent claim 1 reads as follows:

"1. Cleaning apparatus for cleaning heat transfer surfaces in a heat exchanger and capable of handling several cleaning mediums of different characteristics, said cleaning apparatus comprising outlet means (6) incorporating nozzle means (21, 22) for discharging cleaning mediums onto said heat transfer surfaces, conduit means (5, 23) for delivering cleaning mediums to said outlet means (6) and inlet means (19, 28) for supplying cleaning mediums to the conduit means (5, 23), said nozzle comprising two sets (21A, 22A) of discharge nozzles each of which sets is associated with a respective cleaning medium a first one of said nozzle sets (21A) having nozzles (21) for the discharge of relatively higher pressure medium, while the second nozzle set (22A) has nozzles (22) of relatively larger throat diameter serving for the discharge of relatively lower pressure medium, said nozzle sets (21A, 22A) being adapted for fluid communication with separate respective conduit means (23, 5) whereby each nozzle set receives its respective cleaning medium characterised in that said second nozzle set (22A) for the lower pressure medium is located downstream of said first nozzle set (21A) for the higher pressure medium, and in that nozzles (22) of said second set (22A) are arranged coaxially with nozzles (21) of said first set (21A) whereby

cleaning medium discharge from the first nozzle set (21A) passes through the throats of the nozzles (22) of the second nozzle set (22A) so enabling cleaning medium discharged selectively from both the nozzle sets (21A, 22A) to pass from the outlet means (6) without substantial obstruction."

Notice of the grant of the patent was given on 29 January in European Bulletin 1997/05.

- II. The respondent (opponent) filed a notice of opposition against the European patent on 10 October 1997 paying the opposition fee on the same day and requesting revocation of the whole patent on the basis of opposition grounds Article 100(a) EPC - lack of novelty and inventive step with regard to a public prior use - and Article 100(b) EPC - lack of sufficient disclosure of the invention.

- III. The notice of opposition, after having summarised the different characteristics of claim 1 and concluded that the alleged invention lies in features (f) and (g) only, sets out the following with regard to the alleged prior use:

"2. The opponents will contend that they, the opponents, cooperated with the patentees, then known as Clyde Blowers Plc, in the provision of Ljungstrom Heat Exchangers, together with Soot Blowers. Our clients were providing this equipment for Babcock Energy Limited for installation in a number of different power stations. The opponents placed orders with the patentees well before the earliest priority date (11 November 1993) to supply Soot Blowing devices to

the Drax FGD plant in the United Kingdom, to Ratcliffe FDG plant in the United Kingdom, and to the Naantali FGD plant in Finland.

3. The opponents will contend that these sales were all in connection with equipment which falls wholly within all of the claims of European Patent No. 0 667 949, and that the actual sales, at least as far as the Drax plant were concerned, took place in 1991.

4. There is filed herewith copies of correspondence in 1990 on the subject of these sales between Mr R J Smith of the patentees and Mr McCullum of the opponents, copies of the drawings sent from Mr D J Dickie of the patentees to Mr Chirrey of the opponents in November 1990, and further correspondence with Babcock Energy Limited in connection with these matters.

5. The opponents will contend that this documentation all clearly shows that Soot Blowers exactly as claimed in European Patent No. 0 667 949 were freely available in a non-confidential manner to the opponents, to Babcock Energy, and to the ultimate customers.

6. While all of the claims of European Patent No. 0 667 949 have not been analysed herein, the opponents will contend that the attached documentation makes it clear that the features of each and every one of Claims 1 to 19 are fully disclosed and were freely available to the public well before 11 November 1993, and that the claims therefore are fully anticipated and are therefore open to objection under Article 52(1) and

Article 54 EPC and/or do not involve an inventive step and therefore are open to objection under Article 52(1) EPC and Article 56."

The attached documentation consists of 41 pages.

With regard to Article 100(b) EPC the notice of opposition sets out the following:

"7. The opponents will contend that the specification of patent 0 667 949 does not disclose the invention sufficiently clearly and completely for it to be carried out by a person skilled in the art, because, inter alia, it fails to identify the prior art mentioned herein and what technical problem arises from such prior art and what solution is proposed by the alleged invention."

- IV. The appellant (patentee) objected to the admissibility of the opposition because of lack of substantiation.
- V. With decision of 28 December 1998 the opposition division revoked the patent holding that the opposition had been adequately substantiated and was admissible and that the patent lacked novelty with regard to the alleged public prior use.
- VI. Against this decision the appellant filed a notice of appeal on 5 March 1999 paying the appeal fee on the same day. In its statement of grounds of appeal received on 7 May 1999 the appellant pursued further its allegation that the opposition was not admissible due to lack of substantiation.

- VII. With the communication of 9 May 2001 the board informed the parties of its preliminary assessment of the case, namely that - contrary to the findings of the opposition division - the notice of opposition seemed not to be sufficiently substantiated.
- VIII. By letter of 2 October 2001 the respondent withdrew its opposition.
- IX. The appellant requested that the decision be set aside and that the opposition be rejected as inadmissible, auxiliarily oral proceedings, and award of costs.

Reasons for the Decision

1. The appeal is admissible.
2. The fact that the respondent has withdrawn its opposition in the appeal proceedings is of no direct significance in terms of procedural law since the patent has been revoked by the opposition division and the patent proprietor is the appellant (T 629/90, OJ EPO 1992, 654). Therefore, the board has to further prosecute the appeal proceedings and decide on the appeal.
3. The admissibility of the opposition being an indispensable procedural requirement for any substantive examination of the opposition submissions has to be checked *ex officio* in every phase of the opposition and ensuing appeal proceedings.

In the case under consideration this point was already raised by the appellant in its reply to the notice of

opposition.

4. Pursuant to Article 99(1) sentence 2, EPC, notice of opposition shall be filed in a written reasoned statement. The content of this statement is prescribed in Rule 55(c) EPC according to which it must indicate

- (i) the extent to which the patent is opposed;
- (ii) the grounds on which the opposition is based;
- (iii) the facts, evidence and arguments presented in support of these grounds.

4.1 Whereas the first two requirements are fulfilled - the patent is opposed in its entirety and the opposition grounds are expressly invoked there is lack of substantiation with regard to the two alleged opposition grounds, Article 100(a) and (b) EPC.

Decision T 222/85 (OJ, EPO 1988, 128) has interpreted the third requirement in that it must be ensured that the notice of opposition sets out the opponent's case sufficiently so that both the patentee and the opposition division know what that case is. Depending upon the circumstances of each individual case this requirement will only be satisfied if there is **sufficient** indication of the **relevant** "facts, evidence and arguments" (ie relevant to the extent of the patent which is opposed), for the reasoning and merits of the opponent's case in relation to the grounds of opposition relied upon to be properly understood by the opposition division and the patentee. This must be assessed on an objective basis, from the point of view of a reasonably skilled person in the art to which the

opposed patent relates.

This interpretation has been taken over by numerous decisions and has thus become well established case law.

The fact that the respondent contended that they cooperated with the appellant in the provision of heat exchangers together with soot blowers and that thus the appellant seemed to be familiar with the alleged prior use, does not release the respondent from properly substantiating the notice of opposition in order to fulfill the requirement of Rule 55(c) EPC.

4.2 With regard to the substantiation of a public prior use the third requirement of Rule 55(c) EPC is satisfied if the opposition division (and the patent proprietor) are able to determine the following details:

- (a) the date on which the alleged use occurred,
- (b) what has been used, in order to determine whether the object in prior use is identical with or similar to the subject-matter of the contested patent,
- (c) all the circumstances relating to the use, by which it was made available to the public, as for example the place of use and the form of use (see decision T 328/87, OJ EPO 1992, 701; T 93/89, OJ 92, 718; T 786/95).

4.2.1 With regard to criterion (a) the notice of opposition specifies under point 3 that sales took place in 1991. As evidence copies of correspondence (including

drawings) between identified persons from the patentee, the opponent and the customer were indicated and filed (point 4 in the notice of opposition) without, however, assigning particular pages or passages of the 41 pages filed as evidence to the allegation of date, so that the opposition division was forced to read the whole documentation in order to find the corresponding evidence.

This does not comply with the requirement of **sufficient** indication of evidence.

- 4.2.2 Criterion (b) is not fulfilled at all, since the object of the use is not described. The notice of opposition amounts to nothing more than the contention that the equipment used "falls wholly within all of the claims" of the contested patent and that the attached documentation makes that clear, without, again, specifying which parts of the documentation.

An abstract circumscription of the object of the prior use by reference to the wording of the claims is not sufficient because then it cannot be established whether the object of the prior use is identical with or similar to the subject-matter of the claims (see decision of the board T 28/93). Also the drawings filed as part of the evidence cannot lead further since they are not commented on and are not compared to the features of the claims of the contested patent, nor to its drawings.

The conclusion of the Opposition Division in the framework of the admissibility check that from the attached drawings "it is credible that the two sets of nozzles work with higher and lower pressure so that it

can be expected that the subject-matter of the alleged prior use and that of the contested patent are identical" which is repeated exactly in the passage for the examination of the prior use as to substance, where it would belong, lacks its basis since the respondent did not even substantiate this point in the notice of opposition.

- 4.2.3 Criterion (c) contrary to the opposition division's evaluations, does not seem to have been fulfilled either, since the allegation that the soot blowers in question are freely available in a non-confidential manner has also not been substantiated, let alone supported by a precise indication of evidence. In particular, no explanation was given as to the relationship of the different firms involved. The allegation that sales took place in 1991 is also too vague in particular since again, no indication of evidence is given.

However, since the subject-matter of the prior use has not been substantiated, the availability of the prior use to the public does in fact not need any further evaluation.

- 4.3 The allegations in respect of Article 100(b) EPC concern objections which do not fall under this provision. For the teaching how the invention is to be carried out no identification of prior art and of the problems arising from it is necessary nor the identification of the solution proposed by the invention under consideration. Those considerations relate more to the evaluation of inventive step in view of the prior art.

For the requirement pursuant to Article 100(b) the only question which has to be examined is whether there is sufficient disclosure in the patent specification in order to carry out the invention. This problem has not been approached in the notice of opposition. Therefore, these allegations cannot establish admissibility of the notice of opposition (compare T 134/88).

5. Since neither of the alleged opposition grounds has been substantiated, the appeal has to succeed.

6. With regard to the award of costs it is stipulated in Article 104(1) EPC that each party to the proceedings shall meet the costs he has incurred unless, for reasons of equity, a different apportionment of costs incurred during taking of evidence or in oral proceedings is ordered.

The appellant has forwarded no reasons for this request and the board cannot see that any of the requirements of the above provision is fulfilled. Therefore, the request has to be refused.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.

2. The opposition is rejected as inadmissible.

3. The request for the apportionment of costs is refused.

The Registrar:

The Chairman:

A. Counillon

C. T. Wilson