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D E C I S I O N
of 9 April 2002

Case Number: T 0960/99 - 3.2.7

Application Number: 92920829.6

Publication Number: 0607223

IPC: B26B 13/20

Language of the proceedings: EN

Title of invention:

Plastic handle for a cutting instrument such as scissors and scissors having a pair of such handles

Patentee:

ZIVI S.A. - CUTELARIA

Opponent:

MANUFACTURE D'ARTICLES DE PRECISION ET DE DESSIN M.A.P.E.D
S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 104(1), 111(1), 114(1), (2)

Keyword:

"Late filed document admitted"
"Remittal to the first instance"
"Apportionment of costs"

Decisions cited:

T 0326/87

Catchword:

-



Case Number: T 0960/99 - 3.2.7

D E C I S I O N
of the Technical Board of Appeal 3.2.7
of 9 April 2002

Appellant: MANUFACTURE D'ARTICLES DE PRECISION ET DE
(Opponent) DESSIN M.A.P.E.D S.A.
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F-74370 Pringy (FR)

Representative: Bratel, Gérard
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Respondent: ZIVI S.A. - CUTELARIA
(Proprietor of the patent) Rua Visconde de Pelotas No. 130
Porto Alegre 91030-530, RS (BR)

Representative: Bardo, Julian Eason
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 13 August 1999
rejecting the opposition filed against European
patent No. 0 607 223 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: A. Burkhardt
Members: K. Poalas
J. H. P. Willems

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the Opposition Division on the rejection of the opposition against the European patent No. 0 607 223.

Opposition was filed against the patent as a whole based on Article 100(a) EPC on the grounds of lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC).

The Opposition Division held that the grounds for opposition mentioned in Article 100(a) EPC did not prejudice the maintenance of the patent unamended, having regard to following documents:

D1: FR-A-2 419 804 (together with D1': GB-A-2 016 348 being the corresponding British patent application)

D2: DE-A-3 928 859

D3: DE-U-8 801 248.4

D4: FR-A-2 157 307.

The abstract of Document D5 (= FR-A-2 515 563) was filed after expiry of the opposition period. The Opposition Division disregarded document D5 according to Article 114(2) EPC arguing that document D5 did not represent a relevant prior art.

II. On 21 March 2002 the appellant filed document

D1'': US-A-4 184 249

being the corresponding US patent document to document D1.

On 25 March 2002 the Appellant filed document

D6: DE-U-70 812 247.

III. Oral proceedings before the Board of Appeal took place on 9 April 2002.

(i) The appellant requested that the decision under appeal be set aside and the patent revoked.

(ii) The respondent requested that the appeal be dismissed and that the patent be maintained. In case of admittance of the late filed documents D1'' and D6 the respondent requested remittal of the case to the first instance and the imposition on the appellant of the costs of attendance of the oral proceedings.

IV. Independent claims 1 and 6 of the patent in suit as granted read as follows:

"1. Plastic handle for a cutting instrument such as scissors, comprising a first handle end-receiving portion (5) adapted for receiving therein a handle end of a cutting member and a second finger-receiving portion (8) integrally formed with said first portion, said second portion having an external peripheral surface (10) and an internal peripheral surface (11),

said internal peripheral surface defining a finger hole (9) for receiving one or more fingers of the user, characterised by further comprising an elastically deformable annular covering (15) applied around the said internal peripheral surface (11) of the said finger-receiving portion (8) so as to provide said finger-receiving portion (8) with ergonomic characteristics adaptable to any finger, independently of the user being right- or left-handed, said annular covering (15) having an inner peripheral surface (16) for finger contact and an outer peripheral surface (17), one of said outer peripheral surface (17) and said internal peripheral surface (11) of said finger-receiving portion (8) having at least one projection, the other of said surfaces (11,17) being shaped to cooperate in mutual connecting relationship with said projection so as to anchor the annular covering (15) in place."

"6. Scissors comprising:

first and second cutting members (1,1'), each said cutting member having a blade portion (2,2') and a handle end portion (3,3') and said first and second cutting members being pivoted together to permit relative scissor movements thereof about a point (2a) between said blade portions and said handle end portions, and
first and second plastic handles (4,4') respectively mounted on said handle end portions (3,3') of said first and second cutting members each of said handles (4;4') having a first handle end-receiving portion (5;5') adapted for receiving therein the handle end portion (3;3') of a corresponding one of said first and second cutting members and a second finger-receiving portion (8;8') integrally formed with said

first portion said second portion having an external peripheral surface (10;10') and an internal peripheral surface (11;11'), said internal peripheral surface defining a finger hole (9;9') for receiving one or more fingers of the user, characterised by further comprising an elastically deformable annular covering (15;15') applied around the said internal peripheral surface (11;11') of the said finger-receiving portion (8;8') so as to provide said finger-receiving portion (8;8') with ergonomic characteristics adaptable to any finger, independently of the user being right- or left-handed, said annular covering (15;15') having an inner peripheral surface (16;16') for finger contact and an outer peripheral surface (17;17'), one of said outer peripheral surface (17;17') and said internal peripheral surface (11;11') of said finger-receiving portion (8;8') having at least one projection, the other of said surfaces (11,17;11',17') being shaped to cooperate in mutual connecting relationship with said projection so as to anchor the annular covering (15;15') in place."

V. The appellant argued essentially as follows:

Document D1'' disclosing scissors having a finger bow 4 made of resilient material is a novelty destroying document for the subject-matter of claims 1 and 6. Each structural feature of claims 1 and 6 is present in the scissors of document D1''. Document D1'' showing a closed finger hole 21 in Figure 11 is more relevant than document D1 showing an open finger hole 8 in Figure 1.

Document D6 disclosing scissors having elastically deformable rings 11 and 12 being snap fitted into

finger holes 3 and 4 is a novelty destroying document for the subject-matter of claims 1 and 6, or, at least renders the subject-matter of claims 1 and 6 obvious.

VI. The respondent argued essentially as follows:

Document D1'' is not more relevant than document D1 since it also fails to show an elastically deformable annular covering providing the finger-receiving portion with ergonomic characteristics adaptable to any finger, independently of the user being right or left-handed, said annular covering being anchored in place through at least one projection or indentation on its outer peripheral surface.

The rings 11 and 12 in document D6 being snap fitted into the finger holes 3 and 4 are made of resilient material. However, these rings are not designed so as to provide the finger holes 3 and 4 with ergonomic characteristics adaptable to any finger, independently of the user being right or left-handed. Besides that, the finger holes 3 and 4 do not have a projection on their inner peripheral surface so as to anchor the rings 11 and 12 in place. Therefore, document D6 cannot be regarded as being a relevant document to the subject-matter of claims 1 and 6 of the patent in suit.

Reasons for the Decision

1. The Board agrees with both parties that document D5 being mentioned both in the international search report and in column one of the description of the patent in suit forms part of the proceedings.

2. *Late filed documents*

The Board considers documents D1'' and D6 to be late-filed, since these documents were submitted for the first time after the time limit set in the annex to the invitation to the oral proceedings in the appeal proceedings and since the citation of these documents is not occasioned as a response to an amendment of the claims of the patent in suit.

In accordance with Article 114(2) EPC the Board has a discretion to disregard facts or evidence which are not submitted in due time by the parties concerned. However, the Board should consider under Article 114(1) EPC whether documents D1'' and D6 are of such relevance as to justify their admission to the proceedings at a late stage.

2.1 Document D1''

Document D1 already forming part of the proceedings describes scissors having an annular covering 4 made of resilient material, said annular covering being mounted into a finger hole 8. It is true that the figures of document D1 show an open finger hole 8, however, a closed finger hole 8 is implicitly disclosed in document D1 since on page 2, line 4 of document D1 it is mentioned that a forked form represents an alternative form of such an eyelet (= closed) finger hole.

The Board, therefore, does not consider document D1'' to be more relevant than document D1.

Consequently, the Board takes the view that document

D1'' should be disregarded under Article 114(2) EPC.

2.2 Document D6

The scissors of document D6 comprise the essential structural features of the subject-matter of claims 1 and 6 of the patent in suit needed to solve the problem mentioned on column 2, lines 37 to 41 of the patent in suit.

There can thus be no doubt that the close technical relationship of the scissors known from document D6 to the subject-matter of claims 1 and 6 of the patent in suit raises new issues of patentability within the terms of Article 100(a) EPC, which require a fresh assessment of the case.

Therefore, the Board having found document D6 relevant admits document D6 into the appeal proceedings.

3. *Remittal to Opposition Division*

In deciding on this appeal, the Board may, in accordance with Article 111(1) EPC, either exercise any power within the competence of the Opposition Division (which was responsible for the decision appealed) or remit the case to that department for further prosecution. It is thus at the Board's discretion whether it examines and decides the case or remits the case to the first instance.

It is established jurisprudence of the Boards of Appeal that any necessary fresh assessment of a case should normally be carried out by the first instance (cf. T 326/87, OJ EPO 1992, 522, point 2.2). This is

especially so when, as in the present case, having regard to the high degree of relevance of the late-filed document D6, the maintenance of the patent in suit would be at risk. In such a situation, further examination should be undertaken by the Opposition Division so as to afford the parties two levels of jurisdiction, all the more so when, as in the present case, the Respondent has expressly asked for this.

4. *Apportionment of costs*

In the present case the late submission of the relevant document D6 necessitates remittal of the case to the first instance. For this reason the oral proceedings in the Appeal were rendered superfluous in the overall sense, and the responsibility for this should, as expressed in costs, be borne wholly by the late-filing party, ie by the appellant (cf. T 326/87, OJ EPO 1992, 522).

In the present case, no plausible reasons were given by the appellant for the belated submission of document D6.

Therefore, the Board in exercising its discretion under Article 104(1) EPC, for reasons of equity, orders the appellant to pay the costs of one representative of the respondent incurred in attending the oral proceedings in the appeal.

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.
3. The appellant shall bear the costs of one representative of the respondent incurred in attending the oral proceedings held before the Board on 9 April 2002.

The Registrar:

The Chairman:

G. Rauh

A. Burkhart