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D E C I S I O N
of 14 June 2002

Case Number: T 0993/99 - 3.2.4

Application Number: 92200796.8

Publication Number: 0507378

IPC: A01G 9/12

Language of the proceedings: EN

Title of invention:

Arrangement for training plants and operating procedure and device for the embodiment of the aforementioned arrangement

Patentee:

Sebrechts, Jan, et al

Opponents:

W.D. Products B.V.
SOCIETE ARTIFIL SA

Headword:

Tomato hook/SEBRECHTS

Relevant legal provisions:

EPC Art. 100(a), 100(b)

Keyword:

"Prior use (not proven)"

Decisions cited:

-

Catchword:

-



Case Number: T 0993/99 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 14 June 2002

Respondent I: W.D Products B.V.
(Opponent I) Groothees 11
NL-5469 ST Erp (NL)

Representative: Vollebregt, Cornelis Jacobus
Algemeen Octrooibureau
Veraartlaan 4
NL-2288 GM Rijswijk (NL)

Respondent II: SOCIETE ARTIFIL SA
(Opponent II) Z.I. de la Dame Hugonotte
F-52000 Chaumont (FR)

Representative: Bruder, Michel
Cabinet Guiu & Bruder
10, rue Paul Thénard
F-21000 Dijon (FR)

Appellants: Sebrechts, Jan et al
(Proprietors of the patent) Oelegemsesteenweg 31-A
B-2520 Broechem-Ranst (BE)

Representative: Donné, Eddy
Bureau M.F.J. Bockstael nv
Arenbergstraat 13
B-2000 Antwerpen (BE)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 18 August
1999 concerning maintenance of the European
patent No. 0 507 378 in amended form.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
C. Holtz
M. G. Hatherly
R. T. Menapace

Summary of Facts and Submissions

- I. Two oppositions were filed against the European patent No. 507 378, which results from the European patent application No. 92 200 796.8 filed on 20 March 1992 and claiming the priority date of 4 April 1991.

The independent claims 1, 11 and 12 of the patent in suit read as follows:

- "1. Arrangement for the training of plants, comprising a holder (2) and a rope (3) connected to the holder (2), characterised in that said rope (3) comprises two distinctly formed quantities, one of which being of predetermined length, and in that the arrangement (1) is equipped with means allowing that said quantity of rope (3) of predetermined length can be released from the arrangement (1) at once without the necessity of unwinding this quantity of rope.
11. Procedure to manufacture an arrangement according to claim 1, characterized in that it comprises attaching a rope (3) to a holder (2); the winding of a first quantity of the rope (3) on a winding core (6) of the holder (2); and the winding of a second quantity of rope (3), in addition to which this second quantity is wound at least in part next to the aforementioned winding core (6).
12. Device for the manufacture of an arrangement according to claim 2, comprising a winding mechanism (30), characterized in that it further comprises a support system (31) for the attachment

of a holder; and switchable means (32) switchable between two positions permitting by their switching that two distinctly formed quantities of rope are created on or at the holder, i.e. wound on said holder and/or near said holder."

- II. The opposition division rejected the main request of the proprietors of the patent, which was based upon the patent as granted, and maintained the patent on the basis of amended claims.

The opposition division found that the subject-matter of Claims 1 and 11 as granted lacked novelty with respect to a public prior use alleged by both opponents (hereinafter respondents I and II).

- III. On 15 October 1999 the proprietors of the patent (hereinafter appellants) lodged an appeal against this decision. The appeal fee was paid on 14 October 1999. A statement setting out the grounds of appeal was received on 22 December 1999.

- IV. The public prior use alleged by the parties concerns horizontal tomato hooks produced by the firm Paskal LTD.

With respect to this alleged public prior use, Opponent I (hereinafter respondent I) during the opposition proceedings filed *inter alia* the following documents:

- (C) Copy of a brochure of the firm Dekker Hechttechniek, referring to products of the firm Paskal (one sheet, without date).

(E) Minutes of the preliminary hearing of witnesses held on 19 November 1996 in the Court of The Hague in case number 96.449 (W.D. Products B.V. *versus* Jan Sebrechts and Jozef Sebrechts) concerning *inter alia* the depositions of G.W.M. Noordam and P. van Leerdam, the minutes referring *inter alia* to the following annexes:

(E2) Copy of a sheet corresponding to document C;

(E3) Copy of the packing list No. 1006 dated 10 September 1990 issued by Paskal LTD to Cebeco Horti-Products B.V. (Cat. No. 5210);

(E4) Statement of Mr Noordam, signed on 14 March 1994, revised and corrected on 24 September 1996;

(E6) Statement of Mr van Leerdam, signed on 14 March 1994, revised and corrected on 24 September 1996;

(E') Translation of document E.

(E'4) Translation of document E4.

(E'6) Translation of document E6.

(F) Minutes of the preliminary hearing of witnesses held on 19 February 1997 at the Court of The Hague in case number 96.449 (W.D. Products B.V. *versus* Jan Sebrechts and Jozef Sebrechts) concerning the deposition of Z. Lurie.

(F') Translation of document F.

- (G) Declaration of M.B. Dror, signed on 7 February 1997.

- (G') Translation of document G.

- (H) Minutes of the preliminary hearing of witnesses held on 20 August 1997 in the Court of The Hague in case number 96.449 (W.D. Products BV *versus* Jan Sebrechts and Jozef Sebrechts) concerning the deposition of M.B. Dror, the minutes referring *inter alia* to the following annexes:
 - (H1) Copy of a sheet corresponding to document C;

 - (H3) Copy of the drawing 7.2082.00 of Paskal LTD, dated 5 February 1990 (ie document XXVI);

 - (H4) Copy of a page of catalogue showing two tomato hooks (52 and 53), ie document P3bis;

 - (H5) Copy of a letter from Paskal LTD to Cabinet Claude Guiu dated 23 April 1993 and signed by Mr Shay, ie document P1;

- (H') Translation of document H.

- (L) Affidavit of Mr van Leerdam, signed on 22 September 1997, the affidavit referring to the following annexes:
 - (L1a) Copy of a letter from Paskal LTD to Mr Noordam, dated 24 January 1991 and signed by Mr Shay;

 - (L1b) Copy of a letter from Paskal LTD to

Mr Noordam, dated 6 February 1991 and signed by Mr Shay;

(L1c) Copy of a facsimile message from Mr van Leerdam to Mr Shay, dated 8 February 1991;

(L2) Copy of a picture showing a tomato hook.

Opponent II (hereinafter respondent II) with its notice of opposition filed *inter alia* the following documents:

(P1) Letter from the firm Paskal LTD to "Cabinet Claude Guiu", signed by Mr Shay and dated 23 April 1993.

(P2) Invoice No. 1003 issued by Paskal LTD to Dekker Hechttechniek on 17 August 1990, referring to 2000 "String holders", Cat. No. 5208.

(P3bis) Copy of a sheet showing *inter alia* two models of tomato hooks provided with the reference numbers 52 and 53 (one sheet, without date).

With respect to the same alleged public prior use, the appellant filed during the opposition proceedings *inter alia* the following evidence:

(III) Copy of a letter from the firm Dekker Hechttechniek (signed by Mr de Waard) to Mr Sebrechts, dated 14 September 1993.

(IV) Translation of document III.

(V) Copies of the Benelux Design Registrations

No. 21311-01 and No. 21311-02 filed by Paskal LTD on 2 May 1991.

- (VI) Copy of a letter from Paskal LTD to the "Bureau M.F.J. BOCKSTAEL", dated 26 May 1995 and signed by Mr Shay.
- (VII) Copy of a letter from the "Bureau M.F.J. BOCKSTAEL" to Paskal LTD, dated 19 May 1995.
- (XXI) Minutes of the interim cross-examination of the witness Ben Dror held on 20 February 1997 at the Court of The Hague in the case 96.449 (W.D. Products BV *versus* Jan Sebrechts and Jozef Sebrechts), corresponding to document H.
- (XXIII) Declaration of M.B. Dror, signed on 7 February 1997, ie document G.
- (XXIV) Minutes of the preliminary hearing of witnesses held on 19 February 1997 at the Court of The Hague in case number 96.449 (W.D. Products BV *versus* Jan Sebrechts and Jozef Sebrechts), concerning the deposition of Z. Lurie, corresponding to document F.
- (XXVI) Drawing No. 7.2082.00 of Paskal LTD, dated 5 February 1990, showing a tomato hook without legs (ie document H3).
- (XXVIII) Drawing of ARAN MOULDS LTD, dated 9 April 1991, showing a tomato hook provided with legs.
- (XXXI) Drawing of ARAN MOULDS LTD, dated 9 May 1991,

showing a tomato hook provided with legs.

V. Oral proceedings were held on 14 June 2002.

Respondent II, although duly summoned, did not appear at the oral proceedings. According to Rule 71(2) EPC, the proceedings were continued without this party.

During the oral proceedings the appellant filed two amended sets of claims upon which two auxiliary requests were based.

VI. During the oral proceedings respondent I based its arguments essentially upon the documents filed by respondent II with its notice of opposition and argued that the tomato hooks according to the alleged public prior use prejudice the novelty of Claims 1 and 11 of the patent as granted.

Respondent II did not present any arguments in reply to the statement setting out the grounds of appeal. With the letter dated 27 May 2002 the representative of respondent II informed the board that respondent II would not be present at the oral proceedings, maintained the arguments presented during the opposition proceedings (without any further arguments) and waited for the final decision of the board.

VII. The appellants requested that the decision under appeal be set aside and that the patent be maintained as granted (main request).

Auxiliarily the appellants requested that the decision under appeal be set aside and that the patent be maintained on the basis of one of the amended sets of

claims filed during the oral proceedings.

VIII. Respondent I requested that the appeal be dismissed.

Auxiliarily, respondent I requested - near the end of the oral proceedings - to be allowed time to try to find a letter sent by Mr Guiu (representative of respondent II) to Mr Shay, to which the letter of 23 April 1993 of Mr Shay (document P1) was a response.

IX. It is understood that respondent II requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *The alleged public prior use*

2.1 The alleged public prior use concerns horizontal tomato hooks produced by the firm Paskal LTD which are provided with two stocks of rope, one of the stocks being wound between quick-release legs so that it can be quickly released (quick-release tomato hooks). Hooks of this type are represented in documents C (right-hand side), V (item 21311-02), XXXI, P3bis and L2.

The provided evidence relates to at least two types of horizontal quick-release tomato hooks, each type having a different weight, namely:

a **light horizontal quick-release tomato hook**, as shown for instance in documents C (right-hand side), V (item 21311-02), and XXXI (NB. "light" means about 13 or

15 g; (see documents H and F));

and

a **massive horizontal quick-release tomato hook**, as shown for instance in documents P3bis (item 53) and L2 (NB. "massive" means about 30-33 g - see documents H, F and L).

It is understood from the evidence submitted by the parties that Paskal LTD has developed not only horizontal quick-release tomato hooks but also conventional horizontal tomato hooks having a single stock of rope, as shown for instance in documents H3 and XXVI. These conventional hooks are similar in shape to the massive horizontal quick-release tomato hooks but are not provided with quick-release legs (see document G, page 1).

2.2 Considerations on the evidence relating to the alleged public prior use

2.2.1 Document P1 is a letter sent by facsimile on 23 April 1993 from the firm Paskal LTD (the letter being signed by Mr Shay) to the Cabinet Claude Guiu (for the attention of Mr Guiu, representative of respondent II) which refers to a previous letter sent apparently by facsimile from Cabinet Claude Guiu to Paskal LTD on 21 April 1993 (see P1, 8th line: "reference: your fax of April 21st").

The facsimile-letter from Paskal LTD (ie document P1) consists of three pages (see document P1, 4th line: "Pages: 3") and refers to two enclosures which are indicated as "Schemes of the two modles (*sic*)" and

"Copy of invoice of first trial delivery to Holland"
(see document P1, lines 24 and 25).

It has to be noted that the top line of document P1 includes the information data added by the fax machine when the facsimile was dispatched, namely the date, the time and the name of firm ("23 APR '93 16:16 PASKAL LTD") and the page numbering ("P.1/3").

According to document P1 the first model of horizontal tomato hook (catalogue No. 5300), "was exposed to the European during July 1990", was presented "to at-list (*sic*) 4 Dutch companies (Amevo Ubbink, Cebeco, Dekker Hechttechniek, Jobu Plastics)" and "was send (*sic*) for field tests through Dekker to about four Dutch tomato growers", whereas the second model (catalogue No. 5200) was "exposed" during 1991. Moreover, it can be derived from document P1 that the first model, which was much more massive than the second one, was firstly called "String Holder" (with the catalogue No. 5200), and later on was called "Massive Horizontal Tomato Hook" with a catalogue No. 5300.

In document P1 it is also referred to a "Belgium Patent" as mentioned in the facsimile letter from Cabinet Claude Guiu to Paskal LTD (dated 21 April) and it is stated that the horizontal tomato hooks of Paskal LTD "DO NOT disturb" the Belgium Patent because they were "marketed before this patent was registered (*sic*)".

- 2.2.2 Document P2 is a copy of the invoice No. 1003 of 17 August 1990 issued by Paskal LTD to the Dutch firm Dekker Hechttechniek concerning the sale of 2000 "string holders (Plastic) with 8 m plastic string"

(Catalogue No. 5208).

- 2.2.3 Document P3bis is a copy of a sheet which schematically depicts two horizontal tomato hooks, the first hook being provided with the reference number 53 and indicated as "first modle (*sic*)" (handwritten), a second hook being provided with the reference number 52 and indicated as "second modle (*sic*)" (handwritten).
- 2.2.4 Document C is the copy of a brochure of the firm Dekker Hechttechniek which refers to products of the firm Paskal LTD and shows on the right-hand side a horizontal tomato hook provided with quick-release legs. This tomato hook is similar to the tomato hook shown in document P3bis under the catalogue No. 52 ("Second Modle"). This document is not provided with a publication date.
- 2.2.5 According to document E3, thirty carton boxes, each containing 300 products of Paskal LTD having the catalogue No. 5210 were shipped by Paskal LTD to Cebeco Horti-Products B.V. on 10 September 1990, the gross weight of each carton being 14 kg.
- 2.2.6 According to the statements of Mr Noordam (see documents E'4 and E' (pages 4 and 5)), a quick-release tomato hook as represented in document E2 (ie document C) was presented to him in the summer of 1990 by two employees of Paskal LTD and the boxes referred in document E3 were received by him in the autumn of 1990.
- 2.2.7 According to the statements of Mr van Leerdam (see documents E'6 and E' (page 6)) a quick-release tomato hook as represented in document C was presented to him

in the beginning of 1991 by Mr Shay of Paskal LTD.

2.2.8 Document L, which refers to documents L1a, L1b, L1c and L2 as enclosures, is a further declaration of Mr van Leerdam referring to his previous statements (see documents E'6 and E' (page 6)), in which he had indicated that the hook shown to him by Mr Shay (at the beginning of 1991) was a hook of the type represented in document C (ie a hook of the **light** type). In document L Mr van Leerdam asserts, contrary to these previous statements, that the hook shown to him by Mr Shay on 20 February 1991 was the hook represented in document L2, ie a hook of the **massive** type (44 g including rope - 33 g excluding rope).

2.2.9 According to document V, Paskal LTD filed on 2 May 1991 two Benelux Design Registrations concerning tomato hooks. The drawings relating to the Registration No. 21311-02 (Figures 1 and 2) show a tomato hook which is similar to the tomato hook (represented on the right-hand side) of document C.

Document VII is a letter sent on 19 May 1995 from the representative of the appellants for the attention of Mr Shay of Paskal LTD, in which Mr Shay is asked to state whether the tomato hooks as disclosed in document V had been marketed before 2 May 1991.

Document VI is the reply of Mr Shay to this letter. In his reply Mr Shay states that the tomato hooks referred to in document V were not marketed before the end of July 1991.

2.2.10 Document III is a letter sent by Dekker Hechttechniek to Mr Sebrechts (one of the appellants), in which it is

stated that quick-release hooks had been sold by Dekker Hechttechniek since August 1991.

2.3 During the oral proceedings, respondent I alleged that a **massive** horizontal quick-release tomato hook was made available to the public before the priority date of the patent in suit and argued essentially as follows:

- (i) Documents P2 and P3bis are the enclosures referred to in document P1. The first model referred to in document P1 is a **massive** horizontal tomato hook as shown in document P3bis (see hook 53), it was presented to Dutch firms during 1990 and was marketed in August 1990. This hook is provided with two distinctly formed quantities of rope, one of which being of a predetermined length, and is provided with means allowing a quick release of the quantity of rope of a predetermined length, and thus prejudices the novelty of the subject-matter of Claims 1 and 11 of the patent in suit.

- (ii) The information content of document P1 is consistent with the declarations of Mr van Leerdam and Mr Noordam (documents E', E'4, E'6 and L), in so far as it can be derived from these declarations that a quick-release tomato hook was shown by Mr Shay to Mr van Leerdam and to Mr Noordam.

In particular, what is important in these declarations is the fact that the hooks according to alleged public prior use - independently of the weight and of the construction of the hooks - are defined as quick-release hooks. In other

words, the general idea that a tomato hook can be provided with a quick-release facility can be derived from these declarations.

- (iii) The information content of document P1 is also consistent with the declarations of Mr Dror (document H) in so far as Mr Dror stated that "a massive hook provided with a guide eye as well as with quick-release legs existed for some time in 1991, and that this hook was also marketed for some time" (see document H', page 5) and that it was possible that Mr Shay saw a prototype of the quick-release hook before the end of March 1991 (see document H', page 6).

- (iv) Document VI does not relate to **massive** quick-release tomato hooks but to **light** quick-release tomato hooks. Thus, the content of this document does not contradict the allegation that massive horizontal tomato hooks of the type shown in document P3bis were marketed in August 1990.

- (v) The documents presented by the appellants do not represent a substantial denial of the statements made by Mr Shay in document P1. In these respects, the appellant did not offer Mr Shay as a witness.

2.4 The board cannot accept the arguments summarized in section 2.3 above for the following reasons:

- (i) The statements of Mr Shay in document P1 have to be considered as being replies to questions asked by the representative of respondent II in a previous letter, which letter has not been filed

as a piece of evidence in this proceedings. Although these questions, in the absence of the previous letter, cannot be clearly identified, it can be understood from the content of the replies that the questions concerned the issue of whether in April 1993 the horizontal tomato hooks produced and sold by Paskal LTD infringed a Belgian Patent which is not identified. This means that document P1 is not directly related to the public prior use alleged by the parties, in so far as it does not directly concern the issue of whether the quick-release tomato hooks produced by Paskal LTD which were on the market in April 1993 had been made available to the public also before the priority date of the patent in suit, ie before 4 April 1991. Moreover, these assertions are not corroborated by any further statement of Mr Shay confirming them.

Document P1 - taken alone - does not allow the board to establish what has been presented to the public or sold, in so far as it does not refer to an horizontal tomato hook provided with two stocks of rope, one of which can be quickly released. On the contrary, it proves that different hooks were available in different time periods with the same catalogue number, so that a specific catalogue number cannot identify a specific hook.

The only way to put document P1 in relation with quick release tomato hooks is to consider document P3bis as being one of the enclosures referred to in document P1. However, it has to be considered that - although document P1 includes

the information data added by the fax machine when it was dispatched (see section 2.2.1 above, third paragraph) - neither document P3bis nor document P2 shows these information data. Thus, it is not proven that documents P2 and P3bis are the enclosures referred to in document P1 and, therefore, that the Massive Horizontal Tomato Hook referred to in document P1 corresponds to the tomato hook referred to as "First Modle" in document P3bis.

- (ii) The quick-release tomato hook referred to in the declarations of Mr Noordam (documents E'4 and E' (pages 4 and 5) and of Mr van Leerdam (documents E'6 and E' (page 6)) is that shown on the right-hand side of document C, ie a hook of the light type and not a "Massive Horizontal Tomato Hook" as referred to in document P1. Therefore, even if document P3bis were to be considered as being an enclosure of document P1, the declarations of Mr Noordam and of Mr van Leerdam would not corroborate the allegation of Respondent I which concerns a massive tomato hook.

The declaration L of Mr van Leerdam refers to document L2, which shows a hook similar to that shown in document P3bis, ie a massive horizontal quick-release tomato hook. However, according to this declaration, this hook should have been presented to Mr van Leerdam on 20 February 1991, whereas the massive tomato hooks referred to in document P1 should have been presented during July 1990 and the hooks referred to in the invoice P2 were sold on 17 August 1990. Thus, even if documents P2 and P3bis were to be

considered as being enclosures of document P1, the declaration L of Mr van Leerdam would not corroborate the allegations of respondent I in so far as it relates to a different period of time.

Furthermore, it has to be noted that Mr van Leerdam's declaration L differs considerably from the previous declaration he made under oath before the Court of the Hague (see document E).

Moreover, the general idea that a tomato hook - independently of its weight and of its structure - can be provided with a quick-release facility cannot be derived from the specific declarations of Mr Noordam and of Mr van Leerdam. On the contrary, in the declaration of Mr Noordam a specific tomato hook is clearly referred to (and no "variant" - see document E') and Mr van Leerdam's declarations (documents E' and L) even switch from one specific tomato hook (of the light type) to another specific tomato hook (of the massive type).

- (iii) Mr Dror - in document H' - declared that the **light** horizontal quick-release tomato hook as shown in document H1 (ie document C) was developed by him at the beginning of 1991 (see document H', paragraph bridging pages 2 and 3) and that the first commercial quick-release tomato hooks were produced in August or September 1991.

It is true that he stated that "there has never been a massive hook provided with a guide eye as well as with legs" (see document H', page 5,

lines 13 and 14) and that he later corrected this statement (after having seen document P1 and heard the translation of the content of this document) by asserting that "a massive hook provided with a guide eye as well as with quick-release legs existed for some time in 1991, and that this hook was also marketed for some time" (see document H', page 5, lines 23 to 26). However, this statement is not consistent with the allegations of respondent I because it refers to 1991 and not to 1990 as indicated in document P1.

Moreover, Mr Dror declared that massive horizontal tomato hooks without quick-release legs as shown for instance in document H3 (dated 5 February 1990) had been developed by him in 1990 (see document H', page 3, last paragraph) and that legs were added to this massive hook after he developed the light quick-release tomato hook in the beginning of 1991 (see document H', page 5, last paragraph). Therefore, the declarations of Mr Dror are in conflict with the allegations of respondent I.

The statement of Mr Dror according to which Mr Shay could have seen a prototype of the quick-release tomato hook and that such a prototype could have been on the desk of Mr Shay before the end of March 1991 (see document H', page 6) does not corroborate the allegations of respondent I because this statement firstly does not imply that the prototype was presented to the public before the end of March 1991 and secondly clearly refers to the light quick-release tomato hook and

not to the massive one.

- (iv) The argument according to item 2.3(iv) is irrelevant for the issue to be decided.

- (v) It can be derived from to the declaration of Mr Dror (document H') that horizontal quick-release tomato hooks were developed only at the beginning of 1991, that an aluminium mould was made in February 1991 for producing prototypes (see document H', paragraph bridging pages 2 and 3), and that the first commercial quick-release tomato hooks were produced in August or September 1991 (see page 3). These statements are consistent with those of Mr Lurie (see document F') who stated that the quick-release hooks "produced in or around February 1991" were prototypes made by means of an experimental mould (see document F', page 3, 2nd paragraph) and that Paskal LTD did not start the commercial production of quick-release tomato hooks before July or August 1991 (see document F', page 4, 2nd paragraph). Although these statements specifically refer to light horizontal quick-release tomato hooks, they have a general value in so far as they relate to the idea of developing a hook provided with quick-release legs.

Moreover, it can be clearly derived from the declaration of Mr Dror that the quick-release legs were added to the massive hook "by the end of 1991" (see document H', page 5, third sentence), after the development of the light quick-release hook (see item 2.4(iii) above,

third paragraph). Therefore, the allegations of the appellants based on these documents are in conflict with the allegations of the respondent I which are based on document P1.

In these respects, it has also to be considered that in document III the Sales Director of Dekker Hechttechniek B.V., the firm which distributed the products of Paskal LTD in the Netherlands, states that quick-release tomato hooks had been sold since August 1991 (see document IV, 3rd paragraph).

It has to be noted that the respondents carry the onus of proof with respect to their allegations of public prior use. Thus, it was not up to the appellants to offer Mr Shay as a witness but to the respondents to submit evidence supporting sufficiently their allegations.

2.5 The comments in section 2.4 above take account of the arguments presented by respondent II during the opposition proceedings in so far as these arguments related to documents P1, P2 and P3bis.

2.6 Having regard to the comments above, from the evidence referred to by the respondents, it cannot be established with certainty **what** was presented or shipped.

This also applies for the further evidence referred to by respondent I during the opposition proceedings and by the opposition division in the decision under appeal. In these respects, the following has to be noted:

Having regard to the evidence submitted by the respondents, it can be assumed that there were a first contact between employees of Paskal LTD (ie Mr Shay) and Mr Noordam (in the summer of 1990) and a further contact (see documents L1a, L1b and L1c) between Mr Shay of Paskal LTD and Mr Leerdam (on 20 February 1991), the aim of these contacts being that of presenting products of Paskal LTD, and that products of Paskal LTD were received by Mr Noordam in the autumn of 1990 (see sections 2.2.6 to 2.2.8 above).

Mr Noordam in documents E'4 and E' refers to the hook shown to him or to the hooks shipped (see document E3) as being light horizontal quick-release tomato hooks (as shown in document C). Furthermore, he stated that he was sure to have seen that specific hook of the light type and not a "variant". These assertions are in conflict with the assertions of Mr Dror in document H' who calculates that the weight of each of the 300 hooks contained in a carton box referred to in document E3 is about 43 g including the rope (10m) and about 33 g excluding the rope and concludes that document E3 refers to massive hooks since a light quick-release tomato hook weights about 13 g without rope (see document H', page 4). The assertions of Mr Dror concerning the weight of the hooks are consistent with the declaration of Mr van Leerdam in document L according to which the weight of a hook shown in document L2 is 44 g including the rope and 33 g excluding the rope. The assertions of Mr Dror are also consistent with the declaration of Mr Lurie in document F, according to which the weight of a hook without rope as defined in document E3 (5210) is between 30 and 35 g, whereas the light quick-release hook weighs about 15 g. Thus, the declarations of

Mr Noordam are in conflict with those of Mr Dror and of Mr Lurie with respect to **what** was presented or shipped.

Having regard to the fact that Mr van Leerdam referred to the hook shown to him by Mr Shay firstly (in his previous declarations) as a hook of the light type and then (in his later declaration) as a hook of the massive type (see section 2.2.8 above), the board considers that the declarations of Mr van Leerdam do not clearly and unambiguously prove **what** was shown to him.

- 2.7 Thus, it cannot be established on the basis of the evidence referred to by the respondents whether the products of Paskal LTD which are alleged to have been made available to the public (by showing, or selling or shipping them) were quick-release tomato hooks (provided with quick-release legs) or conventional tomato hooks (without legs) of the type shown in document XXVI.

In these respects, it has to be noted that documents XXVIII and XXXI, which are drawings representing tomato hooks provided with legs, are dated, respectively, 9 April 1991 and 8 May 1991, whereas document XXVI is dated 5 February 1990.

- 2.8 Having regard to the above comments, it has to be concluded that the alleged public prior use has not been sufficiently proven.

- 2.9 Since the arguments brought forward by both respondents during the appeal proceedings with regard to Article 100(a) EPC only related to the alleged public prior use, which however - as discussed above - cannot

be considered as belonging to the state of the art in the meaning of Article 54(2) EPC, the ground for opposition mentioned in Article 100(a) EPC does not prejudice the maintenance of the patent as granted.

3. Respondent II referred in its notice of opposition to Article 100(b) EPC, alleging that the patent as granted does not disclose the invention as defined in Claim 1 in a manner sufficiently clear for it to be carried out in so far as the characterising portion of Claim 1 as granted defines a result to be achieved.

Having regard to the fact that the description of the patent clearly discloses five different arrangements which permit to achieve the quick release of the quantity of rope of predetermined length as defined in the characterising portion of Claim 1, this allegation of respondent II is not founded.

Therefore, the ground for opposition mentioned in Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

4. The auxiliary request of respondent I (see section VIII above) was presented near the end of the oral proceedings, ie at a late stage of the proceedings.

Respondent II filed document P1 with its notice of opposition of 28 September 1995 without filing the previous letter sent by its representative to Mr Shay. Thus, the board considers that respondent I had had enough time to ask the representative of respondent II whether the letter sent by him to Mr Shay was available.

Moreover, this auxiliary request does not relate to a document available to respondent I but to a document that respondent I would attempt to find. In the present case, the potential relevance of the document in question must have been clear to respondent I and he could have tried to retrieve it and file it a long time ago. To give him an opportunity to make good this omission would inevitably lead to a considerable delay of the proceedings (e.g. procedural time limits under the EPC, further oral proceedings), apart from the fact that it is not at all sure that respondent I's efforts would be successful, nor that the document would actually have a relevant content. Under these circumstances, to allow the auxiliary request would be in conflict with the principle of economy of proceedings, from which principle the jurisprudence of the boards has inferred that late filed documents are to be disregarded if they are not relevant and/or if their late filing constitutes an abuse of the proceedings.

5. Having regard to the above the grounds for opposition invoked by the respondents do not prejudice the maintenance of the patent as granted.

Since the main request of the appellants can be allowed, there is no need to deal with their auxiliary requests.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries