

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen
(D) [] No distribution

D E C I S I O N
of 16 July 2001

Case Number: T 0798/00 - 3.2.2

Application Number: 92910842.1

Publication Number: 0578775

IPC: A61M 5/142

Language of the proceedings: EN

Title of invention:
Ambulatory fluid delivery system

Patentee:
Sherwood Medical Company

Opponent:
N.V. Nutricia

Headword:
Ambulatory fluid delivery system/SHERWOOD MEDICAL COMPANY

Relevant legal provisions:
EPC Art. 99(1)
EPC R. 55(c)

Keyword:
"Substantiation/admissibility of opposition (yes)"

Decisions cited:
T 0222/85, T 0925/91

Catchword:
-



Case Number: T 0798/00 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 16 July 2000

Appellant: N.V. Nutricia
(Opponent) Postbus 1
NL-2700 MA Zoetermeer (NL)

Representative: Bartelds, Erik
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
2317 GK Den Haag (NL)

Respondent: Sherwood Medical Company
(Proprietor of the patent) 1915 Olive Street
St. Louis, MO 63103-1642 (US)

Representative: Chettle, Adrian John
Withers & Rogers
Goldingss House
2 Hays Lane
London SE1 2HW (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 23 May 2000
rejecting the opposition filed against European
patent No. 0 578 775 as inadmissible.

Composition of the Board:

Chairman: W. D. Weiss
Members: S. S. Chowdhury
R. T. Menapace
R. Ries
J. C. M. De Preter

Summary of Facts and Submissions

- I. Sherwood Medical Company, St. Louis, MO (US) is the Proprietor of the European patent No. 0 578 775 which concerns a "support device for a fluid delivery system including a pump, a fluid container and a tube for connection to the pump characterised by means for preventing kinking or occlusion of the tube between the container and the pump" (see claim 1).
- II. In column 4, lines 13 to 22 of the description the above-mentioned means is described as follows: "The support device also includes a third compartment formed as an elongated channel extending around a substantial portion of the perimeter of the rigid body into which the tubing of the fluid delivery set can be inserted. The elongate channel is designed to approximately match the length of the tubing included on a "standard" fluid delivery set between the container and the pump to protect the tubing against kinking and occlusion along its entire length".
- III. Against said patent N.V. Nutricia, Zoustermeer (NL) ("Opponent") filed an opposition within the prescribed period. In support of the alleged lack of novelty and inventive step the notice of opposition relied exclusively on a specific prior use. The notice of opposition included the following:
- A list of all the features (a. - i.) of claim 1 of the opposed patent was presented;
 - Enclosed as Exhibit 1 were Instructions for Use of a carrier case from Pfrimmer Kabi GmbH + Co. KG (company) which indicates a printing date of March

1988 and 11 pictures demonstrating the steps necessary for the correct use of said carrier case. More specifically, it is explained therein by way of the pictures, each with a short accompanying text, how to insert a bottle-like fluid container and the "Nutromat®"-pump into the carrier case and how to correctly place and fix a segment of the delivery tube ("pump segment") in a channel-like groove on the front side of the pump (pictures 8, 9 and 11).

- It was then submitted that from these Instructions for Use those "items" are known, which appear on a second list presented, this list being identical to the first one (concerning the features of claim 1 of the patent-in-suit), and additionally including for each feature a reference to at least one of the 11 pictures in the Instructions for Use; eg. the last feature of the two lists is presented as:

"i. means for preventing kinking or occlusion of the tube between the container and the pump (viz. Figure 8, 9, 11)."

- There follows the statement: "From the above it is clear that the carrier case for Nutromat has all the features as mentioned and claimed in claim 1."
- Finally, it was submitted that, as evidenced by an enclosed printout dated 30 November 1987 ("Kundenstatistik" = client statistics), the carrier case for Nutromat®, which was produced and marketed by the Pfrimmer company, was delivered to private and other clients and widely produced and

sold before the earliest priority date of the patent-in-suit.

- IV. In reply to a letter of the Proprietor, in which he explained why in his view the opposition was inadmissible, the Opponent, in his letter received on 20 May 1997, submitted further arguments and facts regarding the opposition and its admissibility.
- V. By the decision announced at the end of the oral proceedings held on 15 March 2000 the Opposition Division, which had been enlarged by appointment of a legal member, rejected the opposition as inadmissible for lack of substantiation. This finding was in essence based on two grounds (see written reasons for the decision dated 23 May 2000):
- Firstly, it was not sufficiently clear from the notice of opposition what has been the object of the prior use. A mere description of the prior use by repeating the wording of the claim and by referring to a range of Figures was not sufficient. The Opponent must indicate which features are recognisable from the object so that the Patentee and the Opposition Division can determine any substantive identity or similarity of the alleged piece of the art with the subject-matter of the opposed patent. The Opponent must then compare those features with the features of the patent, taking into account other elements required for a complete setting out of the case. The Opponent failed to do this in the notice of opposition, so that the Patentee and the Opposition Division could not understand without guesswork what the purpose of the elements seen in the Figures (ie. the pictures in the Instructions for Use) was. None of the Figures 8,9 or 11 gave any hint towards means for

preventing kinking or occlusion of the tube between the container and the pump.

Secondly, the circumstances of the prior use were also not given sufficiently clearly in the notice of opposition, in that the computer print-out of 30 November 1997 was supposed to prove sales of the carrier case which was shown in the Instructions for Use dated 1988. Thus it could not be established whether the products allegedly sold in 1987 were identical to the product shown in the Instructions for Use (of 1988) or whether this brochure shows a new model.

VI. On 31 July 2000 the Opponent filed a notice of appeal and paid the appeal fee. The statement of the grounds of appeal was filed on 2 October 2000. He requests that:

- the decision under appeal be set aside;
- the opposition be deemed admissible and be remitted to the Opposition Division for substantive examination;
- the appeal fee be reimbursed;
- oral proceedings be held in case the Board was inclined to reject any of the foregoing requests.

VII. In his reply received on 24 January 2001 the Patent Proprietor submitted that full compliance with Rule 55(c) EPC was essential if the Patentee was to understand the nature of the attack made upon the patent. The notice of opposition did not contain any

argument linking the alleged prior use to the features of claim 1. In this case the Opponent should have precisely identified all of the features of claim 1. The Proprietor stated that he wished to attend any oral proceedings appointed at the request of the Appellant and to be heard.

VIII. In response to the communication of the Board dated 17 April 2001 the Appellant (Opponent) withdrew his request for reimbursement of the appeal fee; the respondent (Proprietor) submitted that the subject-matter of the alleged prior use seemed to correspond both literally and functionally to the pre-characterising portion of claim 1 of the patent in suit in that the guide channel being functionally part of the pump, no anti-kinking means can be identified between the container and the pump of the Nutromat® device.

Reasons for the Decision

1. The appeal is admissible.
2. As the decision under appeal correctly pointed out, submissions made after expiry of the opposition period must not be taken into account for assessing the admissibility of the opposition, more specifically in respect of the requirement to indicate the facts, evidence and arguments presented in support of the grounds on which the opposition is based (Rule 55(c) EPC). Hence, in the present case the content of the notice of opposition alone is to be considered for that purpose.

3. The issue of substantiation of an opposition is not to be approached in a formalistic manner. Rather, the criterion is whether the contents of the notice of opposition are sufficient for the opponent's case to be properly understood on an objective basis (decision T 222/85) from the point of view of a person skilled in the art to which the opposed patent related (T 925/91). The sufficiency of a notice of opposition in respect of the substantive requirements of Article 99(1) and Rule 55(c) EPC - to be distinguished from the substantive merit of the opponent's case - can only be decided in the context of each individual case since the relevant factors, such as the complexity of the issues raised, vary from case to case (T 222/85). A notice of opposition must also be assessed having regard to its purpose, namely to obtain the revocation of the patent.

4. Since the factual basis on which the notice of opposition in question - the only submissions filed by the Opponent during the opposition period - relies is limited to an alleged prior use, the latter must be fully substantiated ie. by an indication of the date on which the alleged prior use occurred, what has been used, and the circumstances under which the subject-matter of the prior use was made available to the public within the meaning of Article 54(2) EPC. In this point, the Board concurs with the Opposition Division's view as well as with its finding that the indications in respect of the date (or period) of the alleged prior use were sufficient.

5. As regards the content of an alleged prior use, it is to be indicated and specified in such a manner that the Patent Proprietor and the Opposition Division - both

qualifying as persons skilled in the art - can understand which features, in the Opponent's view, individually or in combination jeopardize the patentability of the claimed subject-matter and so that both can form an opinion as to whether and to what extent the Opponent is right or wrong, ie. "to understand the Opponent's case" also in this respect.

6. Contrary to the findings in the decision under appeal that requirement has been met in the present case, in particular as regards the principal feature in dispute, namely "means for preventing kinking or occlusion of the tube between the container and the pump".

It seems to be recognisable from pictures 7, 8, 9 and 11 in Exhibit 1 that in the groove-like channel in the front cover of the Nutromat® device, at least when closed with the knob (see picture 9 and related instructions), kinking or occlusion of the tube ("pump segment") can hardly occur, said tube constituting (the greater) part of the connecting tube between the fluid container placed on the upper part of the carrying bag and the pump (left part of the Nutromat® device where the channel is curved). In the given context, it appears to be clear and in fact the only reasonable interpretation of the relevant submissions in the notice of opposition under consideration, that the Opponent considers the specific features shown in pictures 8, 9 and 11 of Exhibit 1 as comprising an anticipation of "item i", namely "means for preventing kinking or occlusion of the tube between the container and the pump (viz. Figure 8, 9, 11)" (sic), this feature being the only one appearing in the characterizing part of claim 1 of the patent opposed.

7. So, even if one came to the conclusion that the alleged specific features of the Nutromat® device are in fact not suitable for preventing kinking or occlusion of the connecting tube, or that for whatever other reason they do not qualify as a means for that purpose (eg. because the groove-like channel mentioned above is functionally part of the pump, as argued by the patent Proprietor in his last letter) this conclusion - ie. that the Opponent's attack must fail - can be drawn without any investigations by the Opposition Division or the patent Proprietor. This is sufficient for substantiation of the features of an alleged prior use.

8. Equally, a lack of substantiation of the circumstances under which the subject-matter of the prior use was allegedly made available to the public cannot be concluded from the fact that Exhibit 1 (instruction for use showing the subject matter of the prior use) and Exhibit 2 (sales list) have different dates. Again, in the given context, the only reasonable understanding of the situation is that the Opponent filed Exhibit 2, which is a client statistics dated 30.11.87 and mentions 14 "STÜCK" [pieces] "TRAGETASCHE FUER [carrier case for] NUTROMAT", as evidence for his contention that a container-tube-pump arrangement (exactly) as described in Exhibit 1 was already marketed at the date of Exhibit 2 (and afterwards) and thus became available to the public before the priority date of the opposed patent. Whether this implicitly, but unambiguously alleged identity of the device common to both pieces of evidence is credible or needs further evidence before it can be definitely established is not a question of substantiation.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The opposition underlying the present appeal is substantiated within the meaning of Rule 55(c) EPC.
3. The matter is remitted to the Opposition Division for further prosecution of the opposition proceedings.

The Registrar:

The Chairman:

R. Schumacher

W. D. Weiß