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D E C I S I O N
of 17 February 2003

Case Number: T 0301/01 - 3.2.1

Application Number: 97923207.1

Publication Number: 0907606

IPC: B67D 3/00

Language of the proceedings: EN

Title of invention:

Method and apparatus for serving mulled wine

Applicant:

Elliott, Ian Richard

Opponent:

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Headword:

-

Relevant legal provisions:

EPC Art. 56

Keyword:

"Inventive step (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0301/01 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 17 February 2003

Appellant: Elliott, Ian Richard
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Representative: McNeight, David Leslie
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 20 March 2001
refusing European patent application
No. 97 923 207.1 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: S. Crane
Members: M. Ceyte
H. Preglau

Summary of Facts and Submissions

- I. European patent application No. 97 923 207.1 (International publication No. WO-A-97/44273) was refused by the decision of the Examining Division posted on 20 March 2001.

The reasons given for the decision were that the subject-matter of independent claims 1 and 13 under consideration lacked respectively inventive step and novelty with regard to the state of the art known from GB-A-1 057 957 (document D1).

- II. A notice of appeal against this decision was filed on 30 May 2001 and the fee for appeal paid at the same time. The statement of grounds of appeal was received on 20 July 2001.

- III. In response to a communication of the Board posted on 18 March 2002 in preparation for oral proceedings to be held on 25 July 2002 the appellant filed on 26 June 2002 further submissions together with a new set of claims 1 to 12 on the basis of which they requested grant of a patent. At the same time they withdrew their request for oral proceedings, which were accordingly cancelled.

Claim 1, which corresponds to claim 1 considered by the Examining Division reads as follows:

" A method for serving an alcoholic beverage in which a mix of the beverage is supplied from a source (11) connected to a serving tap (12) and heated between leaving the source and being served from the tap."

Dependent claims 2 to 12 relate to preferred embodiments of the method according to claim 1.

- IV. In a further communication posted on 9 September 2002 the Board addressed in particular the issues of inventive step and whether the procedure followed by the Examining Division had been substantially flawed.

In a reply dated 19 November 2002 and received the same day the appellant maintained his request for grant of a patent on the basis of the previously filed claims 1 to 12 but withdrew his request for reimbursement of the appeal fee.

- V. The arguments put forward by the appellant in support of his request can be summarised as follows:

The claimed invention represented a paradigm shift in the serving of hot alcoholic beverages and despite the difficulties traditionally associated with the entry of a small entity into the large and highly competitive alcoholic beverage industry had already enjoyed commercial success. This clearly indicated that the argument that it was obvious to use the dispenser disclosed in document D1 to serve hot alcoholic beverages was one made with hindsight of the invention, for if it were indeed the case then surely someone else would have come up with the idea in the almost 30 years between the publication date of document D1 and the priority date of the patent application. Without the benefit of hindsight no motivation could be found for abandoning the traditional method of serving hot alcoholic beverages and contemplating a new improved method.

According to the case law of the Boards of Appeal obviousness should be addressed with regard to what the skilled person **would** do, rather than what he **could** do. In the present circumstances it appeared that for nearly 30 years the skilled person could have arrived at the claimed method. The fact that he had not done so strongly indicated that this was not something he **would** do.

Reasons for the Decision

1. The appeal meets the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.
2. As set out in the application the traditional method of preparing hot alcoholic beverages, eg "Glühwein", in a bar or the like involves the making up of a large batch which is kept hot. This may be practicable when a large number of servings in a short time can be expected, such as to skiers, but is not compatible with a situation when there may only be an occasional client wishing to partake of a somewhat unconventional drink.

The application therefore proposes a method in which an alcoholic beverage mix is stored in a source connected to a serving tap and is heated between leaving the source and being served from the tap. Rather than being made up in the bar the alcoholic beverage mix can be supplied as a branded item. Alternatively the barman could make up his own mix at an off-peak time when he is not otherwise busy. Since the alcoholic beverage does not have to be kept hot for any length of time, there is no risk of its degradation.

In the light of what is said in the application it is the opinion of the Board evident that the difficulties inherent to the preparation of a hot alcoholic beverage in a bar, particularly single servings of such a beverage, could not have gone unnoticed to the person skilled in the art, so that the formulation of the idea that improvements could be made in this area cannot in itself be seen as something which would require an inventive insight. It can be reasonably expected of the skilled person who sets himself this goal to investigate what proposals have been made in the prior art for facilitating the serving of hot beverages in bars and the like. Here he will find document D1. This discloses counter-top equipment for dispensing a hot beverage in which on demand a predetermined quantity of water or other fluid is taken from a bulk source, is heated, and is then served from a tap. The application of this teaching to the serving of hot alcoholic beverages by providing a pre-mix of the beverage involved in the source is something which is free of any potential technical difficulties and an obvious step for the skilled person.

In support of his belief that the claimed method involves an inventive step the appellant relies in essence solely on considerations purportedly derived from the so-called "could/would approach". The seductively simple catchphrase-like quality of this term disguises the deeper meaning of what it was intended to convey and leads to it being used in situations, such as the present one, which are inappropriate. The main purpose of the approach is to distinguish purely theoretical combinations of features from the prior art (the "could") from such combinations which are indicated to the skilled person on the basis

of the technical result he had set out to achieve (the "would"). Seen in this light the "could/would approach" is nothing more than a re-statement of one aspect of the underlying guiding principle of the examination of inventive step in the European Patent Office, namely that of problem and solution.

The present case is, however, not concerned with the combination of features from diverse pieces of prior art. Instead, it resolves solely to the question of whether it was obvious from a technical point of view to use the method of serving hot beverages already known from document D1 to provide a quick and convenient way of serving hot alcoholic beverages. As already stated above the Board is of the opinion that this is so. The extension of the "could/would approach" to these circumstances as developed by the appellant amounts in fact to no more than a reworking of the traditional argument of last resort in support of inventive step, namely "if it was obvious, why has it not been done before?"

As has, however, been pointed out numerous times before there may be various reasons of a commercial or other non-technical nature which have deterred others from a particular course of action but these reasons cannot make a development which is obvious from a technical point of view inventive. It makes no difference to this conclusion that the development, when actually made, found commercial recognition, as the appellant alleges is the case with his method.

The subject-matter of claim 1 therefore lacks inventive step (Article 56 EPC).

3. In view of the fact that the appellant is no longer pursuing his request for reimbursement of the appeal fee the Board sees no need to go into detail on the issues he has raised concerning the procedure followed by the Examining Division. Instead, the Board refers merely to its comments on these issues made in the communications of 18 March 2002 and 9 September 2002.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

S. Crane