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D E C I S I O N
of 9 October 2003

Case Number: T 0978/01 - 3.2.1

Application Number: 96300330.6

Publication Number: 0723929

IPC: B67D 5/04, B67D 5/08

Language of the proceedings: EN

Title of invention:
Multi-product fuel dispensing apparatus employing a common meter

Patentee:
Marconi Commerce Systems Inc.

Opponent:
Tokheim GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 56, 113(1)
EPC R. 67

Keyword:
"Inventive step - no"
"Inventive step - indicia"
"Basis of decisions - right to be heard (yes)"
"Request for reimbursement of the appeal fee for reasons of a substantial procedural violation (refused)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0978/01 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 9 October 2003

Appellant: (Opponent)
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 20 July 2001 concerning maintenance of European patent No. 0723929 in amended form.

Composition of the Board:

Chairman: S. Crane
Members: J. Osborne
G. E. Weiss

Summary of Facts and Submissions

I. The opponent's appeal is directed against the decision of the Opposition Division posted 20 July 2001 according to which it was found that, taking account of the amendments made by the patent proprietor during the opposition procedure, European patent No. 0 723 929 and the invention to which it relates met the requirements of the EPC.

II. The following prior art which was cited during the opposition was of particular importance during the appeal:

D6 US-A-3 731 777.

III. During oral proceedings held 9 October 2003 the appellant requested that the impugned decision be set aside and that the patent be revoked. It furthermore requested that the appeal fee be reimbursed by reason of a substantial procedural violation by the Opposition Division. The respondent requested that the appeal be rejected and that the patent be maintained on the basis of claims 1 to 11 submitted during the oral proceedings.

IV. Claim 1 according to the respondent's request reads:

"Forecourt fuel dispensing apparatus comprising:
a plurality of fuel sources (1, 2, 3) of respective different grades;
a plurality of pumps, each of the plurality of pumps (21, 22, 3) pumping fuel from one of said plurality of fuel sources;

a plurality of fuel outlets (61, 62, 63) respectively associated with the different grades of fuel;
a positive displacement or inferential meter (90), each of the plurality of fuel sources (1, 2, 3) and each of the plurality of fuel outlets (61, 62, 63) being arranged to be in fluid communication with said meter (90), said meter measuring the amount of fuel discharged through a fuel outlet;
a plurality of flow control means (101, 102, 103), for respectively controlling the flow of fuel from said plurality of fuel sources (1, 2,3) to said meter (90) such as to selectively control, in dependence on the fuel type or grade it is desired be dispensed, from which of said plurality of fuel sources (1,2,3) fuel flows through said meter (90) to said a fuel outlet (61, 62, 63);
a plurality of valves (111, 112, 113) closely adjacent the meter, each associated with a respective fuel outlet (61, 62, 63); and
a controlling device (200) for controlling the flow control means (101, 102, 103) and the valves such that fuel of a particular grade is dispensed through an outlet associated with that particular grade, wherein the meter and flow control means are arranged such that each grade of fuel can be dispensed substantially comprising fuel from a single one of said plurality of fuel sources."

V. The arguments of the appellant (opponent) can be summarised as follows:

As regards inventive step, it is acknowledged in the patent specification in respect of figure 1 that it is conventional that a forecourt fuel dispensing apparatus

has discrete fluid paths, each including a pump and a meter, for each source of fuel. D6 relates to a similar apparatus in which, according to the embodiment of figure 1, discrete fluid paths are used for each grade of fuel except in the delivery nozzle where the fluid paths come together. In an alternative embodiment shown in figure 4, for use where regulations do not require separate flow paths and which implicitly reduces cost and complexity, the fluid paths join and pass through a single pump and a single meter before reaching the outlet nozzle. The skilled person would exercise no inventive activity in striving for a reduced common volume in order to satisfy regulations limiting cross-contamination when changing the grade of fuel to be dispensed. To this end he would modify the figure 4 embodiment by placing a pump, which is a relatively low cost item, in each flow path whilst retaining a single meter, which is of relatively high cost. The various features which differentiate the subject-matter of claim 1 from the prior art exhibit no aggregative effect and are each obvious to the skilled person.

The Opposition Division committed a substantial procedural violation because during the oral proceedings it declined the opponent's requests to explain its interpretation of the meaning of an amendment which had been made to claim 1. Although the formal decision in the case was made in the subsequent written procedure, the Division decided during the oral proceedings on the matter of inventive step. As a result, the opponent had been deprived of its right to be heard in accordance with Article 113(1) EPC. Had the Opposition Division explained its interpretation to the opponent before arriving at its decision on the matter

of inventive step, the present appeal would have been unnecessary. Reimbursement of the appeal fee is therefore justified.

VI. The respondent (patent proprietor) essentially replied that:

The problem solved by the subject-matter of claim 1 is to reduce the cost of the fuel dispensing apparatus whilst satisfying regulatory requirements as regards avoidance of cross-contamination when changing the grade of fuel delivered. The main teaching of D6 relates to the arrangement of figure 1 in which there is a separate pump, meter and set of valves for each flow path. The embodiment of figure 4 is merely a suggestion for an alternative which was unworkable because of regulatory requirements and which was published over 20 years before the priority date of the contested patent. In order to arrive at the claimed subject-matter when beginning from the embodiment of D6 figure 4 the skilled person would have needed to replace the single pump by one in each flow path, contrary to the teaching of the embodiment of figure 4, and to locate the valves and flow control means closely adjacent to the meter. D6 contains no information either leading the skilled person to reduce the volume common to the flow paths or in respect of the positioning of the valves and flow control means.

Reasons for the Decision

Interpretation of claim 1

1. During the oral proceedings before the Opposition Division the patent proprietor amended claim 1 to add the wording "wherein the meter and flow control means are arranged such that each grade of fuel can be dispensed substantially comprising fuel from a single one of said plurality of fuel sources". The meaning of this wording and the interpretation thereof by the Opposition Division was the subject of some discussion both during the remaining opposition procedure and during the appeal procedure and the Board considers it necessary for it to first establish how this wording is to be interpreted.

1.1 According to present claim 1 the flow control means control "the flow of fuel from … fuel sources to said meter" in such a way as to "selectively control … from which of said sources fuel flows though said meter". It follows from this that the flow control means are located upstream of the meter and that the arrangement of the flow control means and the meter as defined in the wording added to the claim specifies that the system is capable of drawing fuel from a single source. The term "substantially" implies that the flow control means are positioned close to the meter in order to minimise the volume common to all flow paths and so minimise also the volume of fuel which can cause cross-contamination when changing grades.

Inventive step

2. It is acknowledged in the patent that the closest prior art is a conventional multi-grade fuel dispensing apparatus which delivers fuel through discrete flow paths from a plurality of sources to respective outlets. In such a conventional apparatus each flow path is provided with a respective pump, meter, valve and control means such that each grade of fuel can be dispensed comprising fuel from a single one of the sources.

2.1 As set out in the patent specification, the large number of meters necessary in the prior art device greatly increases the costs of manufacturing the unit, increases the required interior volume of the unit, complicates servicing, and creates more potential leakage points for flammable liquid during both operation and servicing, which in turn may result in more extensive testing procedures having to be employed to comply with the appropriate legislation. Legislation may also determine the maximum number of potential fuel leakage points which can be exposed during assembly or servicing of a fuel pump or fuel dispenser unit. In addition, there are regulations governing the amount of variation in octane level that may occur in a dispensing nozzle for a particular grade of fuel and governing the amount of fuel that may be purged before this variation is measured.

2.2 The subject-matter of claim 1 differs from the conventional fuel dispensing apparatus in the following features:

– each of the plurality of fuel sources and each of the plurality of fuel outlets is arranged to be in fluid communication with the meter i.e. there is a single meter; and

– meter and flow control means are arranged such that each grade of fuel can be dispensed substantially comprising fuel from a single one of a plurality of sources, i.e. the flow control means are positioned close to the meter, and each of the plurality of valves associated with the respective fuel outlets is closely adjacent the meter.

2.3 The differentiating features have the effect that the cost and complexity of the dispensing apparatus is reduced by employing only a single meter. On the other hand this results in an increase in cross-contamination when changing grades because the volume common to the flow paths of the various grades of fuel has increased. However, the increase in cross-contamination is minimised by the positioning of the valves and flow control means relative to the meter. The corresponding problem solved by the claimed subject-matter is to reduce cost and complexity of the apparatus whilst ensuring that it satisfies legislative requirements.

3. D6 relates generally to the control features of a fuel dispensing system. In the embodiment according to figure 1 the dispensing apparatus includes two fuel flow paths each for a different grade of fuel and each containing a pump, meter and flow control means in the form of valves V_{s1}, V_{f1}, V_{s2}, V_{f2}. A controlling means (in D6 "grade transfer control") controls the pumps and the

valves such that fuel of a particular grade is dispensed. The two flow paths converge only in the outlet nozzle so a minimum of cross-contamination occurs when changing from one grade of fuel to another. According to D6 some legislation requires separate flow paths for different grades of fuel with the only common portion being in the nozzle itself, as in the embodiment of D6 figure 1. Figure 4 of D6 discloses an alternative embodiment for use where separate flow paths are not required and in which the flow paths join together downstream of the flow rate control valves and pass through a single meter and a single pump to the nozzle. Although D6 is silent as regards any advantages achievable by the figure 4 embodiment the saving in cost and complexity achievable by the reduction in the number of pumps and particularly the number of meters would be evident to the skilled person.

4. Whilst the embodiment of D6 figure 1 may have been proposed to satisfy legislation which specifies constructional requirements as regards separate flow paths, the present patent concerns itself with apparatus to satisfy legislation which specifies performance criteria by governing the permitted variation in octane level when changing grades. The skilled person beginning from the conventional fuel dispensing apparatus and wishing to achieve a reduction in cost and complexity whilst nevertheless satisfying such performance-based legislation would recognise the teaching of D6 figure 4 as being relevant because it is disclosed as being for use when the constructional requirement satisfied by the embodiment of D6 figure 1 does not apply. If when adopting that teaching the skilled person were to find the volume common to the

various flow paths too great, resulting in excessive cross-contamination, it would be within his normal capability to seek a compromise solution having a minimum common volume but nevertheless offering savings in cost and complexity by retaining either a single meter or a single pump. In view of the higher cost of meters in comparison with pumps the skilled person would choose to retain the single meter of the figure 4 arrangement whilst reverting to a plurality of pumps. The arrangement of valves close to the meter to limit the common volume and direct the flow would then fall within the routine work of the skilled person. It follows from the above that the skilled person beginning from a conventional fuel dispensing apparatus would, in following the teaching of D6, arrive at the subject-matter of claim 1 without exercising inventive effort. The respondent points to the publication date of D6 20 years before the priority date of the present patent as being a secondary indicium of the presence of inventive step and argues that the embodiment of D6 figure 4 was never developed. However, in technical fields such as that of fuel dispensers which are subject to legislative requirements, changes in those requirements can provide motivation for the skilled person to re-consider earlier proposals which were not previously developed because of their failure to comply with former legislation. This secondary indicium therefore provides no support for an inventive step in the present case.

4.1 The Board concludes that claim 1 does not involve an inventive step (Article 56 EPC).

Refund of the appeal fee

5. The request for refund of the appeal fee relates to the conduct of the oral proceedings before the Opposition Division following the patent proprietor's amendment of claim 1 to include the wording discussed under 1 above and in particular to the Opposition Division's refusal of the opponent's request to explain the Division's interpretation of the added wording. The appellant essentially argues that the Opposition Division's refusal to explain its interpretation offended the opponent's right to be heard.

5.1 The appellant has not disputed that the minutes of the oral proceedings before the Opposition Division are a true record of the facts and the Board can therefore rely on the minutes as the basis for its considerations. According to the minutes the opponent had argued during the oral proceedings that claim 1 according to the then main request lacked inventive step with respect to D6 alone. Following announcement by the Opposition Division of its opinion that the subject-matter of that claim 1 did not involve an inventive step consideration turned to claim 1 of the auxiliary request which had been amended by the addition of the wording referred to. The opponent argued that the added feature was also known from D6 and so would not lead to a different outcome. Before interruption of the oral proceedings for the Opposition Division to come to a conclusion on inventive step of the auxiliary request the opponent requested it to "explain their (sic) interpretation of the added features". The Opposition Division refused this request. After resumption of the oral proceedings the Opposition Division announced its opinion that the

subject-matter of claim 1 according to the auxiliary request involved an inventive step but that the final decision would await adaptation of the description, for which the procedure was continued in writing. Once again the opponent requested an explanation from the Opposition Division, which was again refused. In the written decision the Opposition Division states in the sentence bridging pages 5 and 6 that "the opponent argues that the feature … is already disclosed in document D6 … ". This is followed by a detailed summary of the opponent's argumentation and by the Opposition Division's reasoning why it disagrees with the opponent's view.

5.2 Article 113 (1) EPC, which provides the legal basis in the EPC for the parties' right to be heard, requires that decisions "may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments". In the present case it is clear that the opponent had the opportunity during the oral proceedings before the Opposition Division to present its comments in respect of its interpretation of the wording added to claim 1 before the Opposition Division reached its conclusion that the subject-matter of the amended claim involved an inventive step. The basis of the appellant's objection is that the Opposition Division refused to explain its interpretation of the amendment. It is nevertheless apparent that the opponent must have been aware of what that interpretation was, even though it did not agree with it. However, the provisions of Article 113(1) EPC do not give a party the right to hear the reasoning in support of a decision of an Opposition Division in advance of it making that decision (cf. *Singer/Stauder*,

"Europäisches Patentübereinkommen", 2. Auflage 2000, Artikel 113 Rn. 19). Moreover, even if the Opposition Division had explained its interpretation of the added wording before arriving at its decision it would have had no influence on the need for the opponent to file the present appeal because the opponent already had argued its case as regards the interpretation it believed to be correct but nevertheless failed to persuade the Opposition Division of the correctness of its point of view.

5.3 The Board therefore considers that the Opposition Division's refusal to explain its interpretation of the added wording was not a procedural violation.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

3. The request for reimbursement of the appeal fee is refused.

The Registrar: The Chairman:

S. Fabiani S. Crane