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**Datasheet for the decision  
of 13 May 2009**

**Case Number:** T 0900/07 - 3.2.07

**Application Number:** 00115308.9

**Publication Number:** 1076014

**IPC:** B65D 83/14

**Language of the proceedings:** EN

**Title of invention:**  
Dual function dispenser

**Patentee:**  
S.C. JOHNSON & SON, INC.

**Opponent:**  
Reckitt Benckiser (UK) Limited  
Jeyes Group Limited

**Headword:**  
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**Relevant legal provisions:**  
EPC Art. 56, 113(1)

**Relevant legal provisions (EPC 1973):**  
-

**Keyword:**  
"Inventive step - yes, after amendment"  
"Right to be heard - yes, amended claim 1 contains a further  
limitation"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0900/07 - 3.2.07

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.07**  
**of 13 May 2009**

**Appellant:** S.C. JOHNSON & SON, INC.  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
16 April 2007 concerning maintenance of  
European patent No. 1076014 in amended form.

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** H.-P. Felgenhauer  
I. Beckedorf

## Summary of Facts and Submissions

- I. This appeal is against the decision of the opposition division maintaining European patent No. 1 076 014 in amended form.
- II. Appellant 01 (proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of claim 1 filed during the oral proceedings, with the dependent claims 2 to 19, description and drawings of the patent as granted to be adapted.

Furthermore it requested that the appeal of appellant 02 be dismissed.

Appellant 02 (opponent 01) requested that the decision under appeal be set aside and the patent be revoked.

Both appellants also requested as an auxiliary request oral proceedings to be held.

Opponent 02 as respondent/party as of right did not file any substantive submission.

After the parties had been summoned to oral proceedings for 13 May 2009 appellant 02, with letter dated 14 April 2009, and the respondent/party as of right, with letter dated 13 April 2009, notified the Board of their intention not to attend the oral proceedings.

- III. With the annex to the summons for oral proceedings dated 23 February 2009 the Board gave its preliminary

opinion indicating i.a. that document D3 appeared to constitute the closest prior art.

IV. Claim 1 of the patent in suit according to appellant 01's request (entitled "main request") reads as follows:

"An assembly (1) for dispensing dispersible materials which is able to provide simultaneously a burst of dispersible material into the air and to dispense the same or a different dispersible material passively into the atmosphere by evaporation over an extended time period, said assembly comprising:

one active dispenser (12) for an actively dispersible material, said active dispenser comprising a first reservoir (18) in the form of a spray container containing said actively dispersible material, and means (3, 4, 20-22, 24) to actively dispense said actively dispersible material from said reservoir directly to the atmosphere; and

one independent passive dispenser (30) for a volatile dispersible material (40), said passive dispenser comprising a second reservoir (32) containing said volatile dispersible material, separate from said first reservoir, and means (34, 38, 39, 41) to control volatilisation of said volatile dispersible material and to prevent volatilisation of said volatile dispersible material from said second reservoir;

wherein prior to first use said second reservoir (32) contains said volatile dispersible material;

said assembly further comprising an outer shell (2) surrounding the active dispenser and passive dispenser,

said shell (2) having a passageway to allow direct dispensing of the volatile material from the active dispenser into the atmosphere and vent openings to release the volatile dispersible material from the passive dispenser to the atmosphere; characterized in that prior to first use said means (34, 38, 39, 41) to control volatilisation of said volatile dispersible material includes a removable vapour impermeable membrane (41) whereby said volatilisation can be initiated by removal of said impermeable membrane; and wherein the second reservoir is a twin gel cartridge (30) comprising a pair of reservoir enclosures (39) each in the form of a tray and closed by a vapour permeable membrane (38) adjacent to a central hinge portion having a centering hole (33) and folding seams or hinge points (35), wherein the reservoir enclosures (39) are provided with a conforming configuration (42), shaped to fit about the side of the spray container and to accept the circumference thereof, the cartridges being angled slightly outwardly from top to bottom of the spray container, at an angle of about 7 degrees from the vertical as measured at the hinge point of the cartridge, thereby assisting in holding the refill unit of the spray container (12) and the cartridge (30) in position in the shell, and allowing more of the content of the cartridge trays to contact the vapour permeable membrane (38), as well as bringing the vapour permeable membrane in closer proximity to the vent openings of the shell."

V. The following documents are referred to in the present decision

a) documents considered already in the impugned decision

D3: translation in English of JP 54 021247 U

D10: US-A-5 788 155

b) documents filed with the appeal of appellant 02

D16: GB-A-2 347 860

D17: GB-A-2 352 180.

VI. According to the impugned decision the subject-matter of claim 1 as granted lacks novelty over D2 (US-A-3 972 473) and inventive step with respect to D1 (JP 06 036643 U).

The subject-matter of claim 1 of the then auxiliary request 1 has been considered as involving an inventive step, considering D2 as closest prior art.

VII. The facts, evidence and arguments essentially relied upon by appellant 01 in the oral proceedings can, as far as they are relevant to the present decision, be summarised as follows:

(a) The subject-matter of claim 1 according to the main request, as filed during the oral proceedings before the Board, involves an inventive step starting from the assembly according to D3 as

closest prior art, since this document does not give any indication to provide the passive dispenser in the form of a twin gel cartridge having the effect that the volume of the passive reservoir and thus its evaporative surface, is increased.

- (b) Considering D10 as further prior art it needs to be taken into account that, although this document discloses a twin gel cartridge, this cartridge lacks a centering hole so that it cannot cooperate together with an active dispenser in the form of the container as known from D3.
- (c) Thus there is no indication that the skilled person would, starting from the assembly according to D3, abandon the known arrangement of the active dispenser in the form of a spray container and the passive dispenser being in the form of a ring mounted on the spray container. This holds true even more with respect to the particular arrangement of the active and the passive dispenser according to present claim 1.

VIII. In the written part of the procedure appellant 02 has argued that claim 1 as granted lacks novelty and does not involve an inventive step considering D3 as closest prior art.

It did not comment on claim 1 according to auxiliary request VIII filed with letter dated 14 April 2009, in respect of which present claim 1 contains further limitations. Concerning a claim 1 similar to claim 1 according to auxiliary request VIII referred to above

appellant 02 indicated during the opposition proceedings, with letter dated 22 February 2007, that starting from the assembly according to D3 the claimed arrangement is simply a matter of normal design choice (cf. point 9.2)

The respondent/party as of right did not make any substantive submission during the appeal proceedings.

### **Reasons for the decision**

#### 1. *Procedural aspects*

During the oral proceedings, which appellant 02 and the respondent/party as of right chose not to attend, claim 1 has been amended starting from claim 1 according to auxiliary request VIII filed with letter dated 14 April 2009, further limiting this claim concerning the structure and the arrangement of the twin cartridge passive dispenser.

Both appellant 02 and the respondent/party as of right have had the opportunity to file observations in the appeal proceedings with respect to this auxiliary request VIII but refrained from doing so.

Thus by admitting and considering claim 1 as further limited during the oral proceedings their right to be heard (Article 113(1) EPC) has been observed.

#### 2. *Amended claim 1*



In comparison with claim 1 as maintained with the impugned decision, amended claim 1 (in the following: claim 1) has been amended (as indicated in point 1 above) by further defining the structure of the passive dispenser and its cooperation with the active dispenser and the shell and by defining that the reservoir of the active dispenser is in the form of a spray container.

These and the other features added to claim 1 to further define the first and the second reservoir and the shell have been taken literally from the description as originally filed (page 6, lines 10 - 20; page 12, lines 13 - 30; page 19, lines 7 -21).

The board has convinced itself that amended claim 1 satisfies the requirements of Articles 123(2) and (3) EPC.

3. *Subject-matter of claim 1*

3.1 Claim 1 defines an assembly for dispensing dispersible materials which is able to provide simultaneously a burst of dispersible material into the air and to dispense the same or a different dispersible material passively into the atmosphere by evaporation over an extended time period, said assembly essentially comprising

(a) one active dispenser for an actively dispersible material, said active dispenser comprising a first reservoir in the form of a spray container containing said actively dispersible material, and means to actively dispense said actively

dispersible material from said reservoir directly to the atmosphere and

- (b) one independent passive dispenser for a volatile dispersible material, said passive dispenser comprising a second reservoir containing said volatile dispersible material, separate from said first reservoir, and
- (c) means to control volatilisation of said volatile dispersible material and to prevent volatilisation of said volatile dispersible material from said second reservoir, wherein prior to first use said second reservoir contains said volatile dispersible material
- (d) said assembly further comprising an outer shell surrounding the active dispenser and passive dispenser, said shell having a passageway to allow direct dispensing of the volatile material from the active dispenser into the atmosphere and vent openings to release the volatile dispersible material from the passive dispenser to the atmosphere.

3.2 According to the characterizing portion of claim 1

- (e) prior to first use said means to control volatilisation of said volatile dispersible material includes a removable vapour impermeable membrane whereby said volatilisation can be initiated by removal of said impermeable membrane and

- (f) the second reservoir is a twin gel cartridge comprising a pair of reservoir enclosures each in the form of a tray and closed by a vapour permeable membrane adjacent to a central hinge portion having a centering hole and folding seams or hinge points,
- (g) wherein the reservoir enclosures are provided with a conforming configuration, shaped to fit about the side of the spray container and to accept the circumference thereof, the cartridges being angled slightly outwardly from top to bottom of the spray container, at an angle of about 7 degrees from the vertical as measured at the hinge point of the cartridge,
- (h) thereby assisting in holding the refill unit of the spray container and the cartridge in position in the shell, and allowing more of the content of the cartridge trays to contact the vapour permeable membrane, as well as bringing the vapour permeable membrane in closer proximity to the vent openings of the shell.

#### 4. *Closest prior art*

- 4.1 Document D3 has, as already indicated in the annex of the Board (cf. point III above) been considered as constituting the closest prior art. The assembly according to this document comprises an active dispenser which, corresponding to feature (a), comprises a first reservoir in the form of a spray container containing said actively dispersible material, and means to actively dispense said actively

dispersible material from said reservoir directly to the atmosphere.

- 4.2 Corresponding to features (b) and (c) the assembly according to D3 comprises one independent passive dispenser for a volatile dispersible material, said passive dispenser comprising a second reservoir containing said volatile dispersible material, separate from said first reservoir, and means to control volatilisation of said volatile dispersible material and to prevent volatilisation of said volatile dispersible material from said second reservoir, wherein prior to first use said second reservoir contains said volatile dispersible material.

According to D3 the second reservoir, which can be filled with a gel (cf. page 3, first paragraph) is in the form of a ring-shaped element surrounding the upper portion of the spray container (cf. figures 1, 2). The means to control volatilisation of said volatile dispersible material and to prevent volatilisation of said volatile dispersible material from said second reservoir includes a sealing top, which can be unscrewed to enable dispensing via a hole in the outer shell 11 (cf. page 3, first paragraph; figures 1, 2: sealing top 9).

- 4.3 Corresponding to feature (d) the assembly according to D3 further comprises an outer shell surrounding the passive dispenser and the top part of the active dispenser, said shell having a passageway to allow direct dispensing of the volatile material from the active dispenser into the atmosphere and vent openings to release the volatile dispersible material from the

passive dispenser to the atmosphere (cf. page 3, first and second paragraph; figures 1, 2: outer shell 11).

5. *Distinguishing features*

- 5.1 The subject-matter of claim 1 is distinguished from the assembly according to document D3 essentially in three aspects.

The first aspect concerns the means to control volatilisation of the volatile dispersible material in the second reservoir. According to feature (e) this includes a removable vapour impermeable membrane, whereby said volatilisation can be initiated by removal of said membrane, whereas according to D3 this means includes a sealing top in the form of a screw cap liberating a hole in the outer shell as indicated in point 4.2 above.

The second aspect concerns the structure of the second reservoir and its cooperation with the spray container of the active dispenser according to features (f) and (g), whereas the third aspect concerns the cooperation of both the active and the passive dispenser with the shell according to feature (h).

- 5.2 According to features (f) and (g) the second reservoir is a twin gel cartridge comprising a pair of reservoir enclosures, which have the structure as defined by these features. As indicated above (cf. point 4.2) the second reservoir according to D3 is in the form of a ring-shaped element surrounding the upper portion of the spray container.

5.3 According to feature (h) the structure and arrangement according to features (f) and (g) assist in holding a refill unit of the spray container and the cartridge in position in the shell, and more of the content of the cartridge trays is allowed to contact the vapour permeable membrane, as well as bringing the vapour permeable membrane in closer proximity to the vent openings of the shell.

5.4 Although the assembly of the active and the passive dispenser according to D3 can be considered as constituting a refill unit, such a unit cannot be considered as one held in position in the shell provided by D3 (cf. point 4.3 above).

6. *Problem / Solution*

6.1 Since the first aspect referred to above (point 5) is independent of the second and third aspect the two latter can be discussed first.

Apart from the direct effects of the distinguishing features (d) and (f) referred to in feature (h) a further effect of these distinguishing features is to enable the second reservoir to have an increased volume in that the gel cartridges according to features (f) and (g) overlay a substantial portion of the diameter and length of the spray container (column 9, line 56 - column 10, line 3 of the patent in suit).

6.2 Based on these effects, starting from the assembly of D3, the problem underlying the subject-matter of claim 1 can be seen in providing an assembly of the kind concerned comprising an active and a passive

dispenser, wherein the passive dispenser is of an increased volume.

This problem is solved by the subject-matter of claim 1 in that the second reservoir has, as indicated above in point 5.2, the structure as defined by features (f) and (g) is arranged with respect to the spray container in the manner as claimed.

7. *Obviousness*

As indicated above (cf. point 4.2) document D3 discloses an assembly within which the second reservoir is ring-shaped and arranged such that it rests on the upper portion of the spray container. Due to the different structure of the second reservoir and the resulting different cooperation with the spray container, the Board supports the opinion of appellant 01 that D3 considered on its own does not give any indication leading to the assembly according to claim 1.

Considering D10 as further prior art it has to be taking into account that, as indicated by appellant 01, although this document discloses a twin gel cartridge comprising a pair of reservoir enclosures in the form of a tray and closed by a vapour permeable membrane, it does not give any indication towards a shape fitting about the side of the spray container and accepting the circumference thereof, nor to the provision of a central hinge portion having a centering hole necessary to let through the means to actively disperse the actively dispersible material.

Furthermore no indication is made available towards the use of the twin gel cartridge according to D10 in combination with an active dispenser as known from D3. In this respect the Board considers the opinion of appellant 01 as being correct in that the person skilled in the art, starting from the assembly according to D3, would, in an attempt to solve the underlying problem (cf. point 6.2), have no reason to abandon the known arrangement of the active dispenser with the passive dispenser on top of it, as the latter could be increased in volume without any particular design skills, namely by increasing its height.

Consequently, and since the other documents referred to in the impugned decision and the grounds of appeal of appellant 02, in particular documents D16 and D17, do not come closer than D10, the subject-matter of claim 1, which for the reasons given above also cannot be considered as the mere result of a normal design choice (cf. point VII above), involves an inventive step (Article 56 EPC).

Since the two aspects discussed above already support inventive step the first aspect (see point 5) needs no further discussion.



**Order**

**For these reasons it is decided that:**

1. The appeal of appellant 02 is dismissed.
2. The decision under appeal is set aside.
3. The case is remitted to the department of first instance with the order to maintain the patent on the basis of claim 1 filed as main request at the oral proceedings with the dependent claims 2 to 19, description and drawings of the patent as granted to be adapted.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders