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**Datasheet for the decision
of 29 June 2009**

Case Number: T 1477/07 - 3.2.07

Application Number: 01938819.8

Publication Number: 1289874

IPC: B67D 1/08

Language of the proceedings: EN

Title of invention:
Beverage tapping device

Patentee:
HEINEKEN TECHNICAL SERVICES B.V.

Opponent:
Carlsberg Breweries A/S

Headword:

-

Relevant legal provisions:
EPC Art. 111(1), 114(2), 125

Relevant legal provisions (EPC 1973):

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Keyword:
"Late filed documents (admitted)"
"Remittal (yes)"

Decisions cited:
G 0001/99

Catchword:

-



Case Number: T 1477/07 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 29 June 2009

Appellant: Carlsberg Breweries A/S
(Opponent) Ny Carlsberg Vej 100
DK-1760 Copenhagen V (DK)

Representative: Nielsen, Henrik Sten
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Respondent: HEINEKEN TECHNICAL SERVICES B.V.
(Patent Proprietor) 2e Weteringplantsoen 21
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Representative: Prins, Adrianus Willem Vereenigde
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 2 July 2007
rejecting the opposition filed against European
patent No. 1289874 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. O'Reilly
Members: K. Poalas
E. DufRASne

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the Opposition Division to reject the opposition against the European patent No. 1 289 874.

Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step), and on Article 100(c) EPC (unallowable amendments).

The Opposition Division held that the grounds of opposition under Articles 100(a) and (c) EPC did not prejudice the maintenance of the patent as granted.

II. The following documents are mentioned in the present decision:

D1 : US-A-2 257 070
D11: US-A-3 889 487
D12: US-A-2 377 261
D13: DE-U-296 04 703
D14: GB-A-396 637
D15: GB-A-484 952
D16: SE-C2-516 679
D17: US-A-3 625 399
D18: US-RE-20 981
D19: GB-A-2 358 854.

III. Oral proceedings before the Board took place on 29 June 2009.

- (a) The appellant requested that the decision under appeal be set aside and that the European patent No. 1 289 874 be revoked.
- (b) The respondent (patent proprietor) requested that the appeal be dismissed or in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of one of the auxiliary requests filed with letter dated 29 May 2009.
- (c) Documents D11 and D12 having been admitted into the proceedings, both parties requested remittal of the case to the department of first instance for further prosecution.

IV. The appellant argued essentially as follows:

Admittance of documents D11 to D19 into the proceedings

The decision under appeal concluded that the subject-matter of granted independent claim 21 was new over D1 due to a restrictive interpretation of the definition of the term "a guide tube" and also due to the fact that this document did not disclose a "flexible tapping line", see chapter 9.1, point ii) of the impugned decision.

D11, which discloses a flexible tapping line (conduit 16), is a novelty destroying document for the subject-matter of granted claims 21 and 26.

D12 in combination with D1 or D11 renders the subject-matter of granted claim 1 not inventive.

D13 to D18 were filed in order to support inventive step arguments against the granted dependent claims.

D19 was filed in order to support inventive step arguments against the respondent's auxiliary requests filed during the appeal proceedings.

V. The respondent argued essentially as follows:

Admittance of documents D11 to D19 into the proceedings

Documents D11 and D12, published in 1975 and 1944 respectively, were filed for the first time together with the grounds of appeal and are therefore late filed documents. Since these documents are of questionable relevance the Board should disregard them.

An admittance of these documents into the proceedings would lead not to challenge the decision of the Opposition Division but to an opposition proceedings *de novo*, which is contrary to the rules of procedure of the Boards of Appeal and also contrary to the case law of the Boards of Appeal. It also does not take into account the principles of procedural law generally recognised in the Contracting States, contradicting thereby the requirements of Article 125 EPC.

The respondent's disadvantage due to the option open to the appellant to file later on a request for the revocation of the patent in suit at the national level

has to be balanced by not admitting documents D11 to D19 into the proceedings before the EPO, see point 4.1 of G 1/99, OJ EPO 2001, 381.

Reasons for the decision

1. *Admittance of documents D11 and D12 into the proceedings*
 - 1.1 Documents D11 and D12 were filed together with the grounds of appeal as reaction to the Opposition Division's argumentation in its decision.
 - 1.2 D1 was the main document in that decision as far as it concerns novelty and inventive step of the subject-matter of the granted independent claims. Furthermore, a "flexible tapping line" is a feature which was clearly decisive for the decision of the Opposition Division, at least as far as it concerns independent claim 21, see chapter 9.1, point ii) of the impugned decision. Also the interpretation of the definition of the term "a guide tube" expressed in chapter 7.2 of the impugned decision was of paramount importance by the evaluation of novelty and inventive step of the granted independent claims in said decision.
 - 1.3 On the basis of a *prima facie* consideration of documents D11 and D12 introduced in appeal the Board concludes that there is at least an arguable case that these documents substantiate the appellant's assertions.

1.4 In this sense, the need for filing documents D11 to D12 arises from the reasoning given in the decision under appeal and these documents are too relevant to be disregarded.

1.5 Therefore, the Board admits D11 and D12 into the proceedings in accordance with Article 114(2) EPC.

1.6 The respondent argued that the admittance of D11 and D12 into the proceedings goes against the rules of procedure of the Boards of Appeal.

Since the respondent neither referred to a specific rule of procedure of the Boards of Appeal being violated by admitting said documents into the proceedings, nor did it elaborate further this statement, the Board cannot agree with this argument which is an uncorroborated allegation.

1.7 The respondent argued further that the admittance of D11 and D12 into the proceedings is not in line with the case law of the Boards of Appeal.

This argument cannot succeed for the following reasons:

It is established case law of the Boards of Appeal that where documents are filed with the statement of grounds of appeal but the need for filing them arose from the reasoning given in the decision under appeal, and they are too relevant to be disregarded under Article 114(2) EPC, the Board admits them into the proceedings, see Case Law of the Boards of Appeal of the European Patent Office, 5th edition, 2006, VI.F.3 - 3.1.5, fourth paragraph.

The Board is therefore satisfied that its findings and its conclusion under points 1.1 to 1.5 above are in line with the above mentioned established case law of the Boards of Appeal.

- 1.8 A further argument put forward by the respondent was that by applying Article 125 EPC the Board should take into account the principles of procedural law generally recognised in the Contracting States, by not-admitting thereby the late filed documents D11 and D12.

Also this argument cannot be followed by the Board since Article 125 EPC instructs the European Patent Office to take into account the principles of procedural law generally recognised in the Contracting States only in the absence of procedural provisions. In the present situation there are procedural provisions foreseen in the EPC, see Articles 111(1) and 114(2) EPC, so that no need for considering the principles of procedural law generally recognised in the Contracting States exists. Furthermore, neither a reference to a specific principle of procedural law generally recognised in the Contracting States was made by the respondent, nor was any evidence related to the violation of such a principle presented by the respondent.

- 1.9 Finally, making reference to point 4.1 of G 1/99, see *supra*, the respondent argued that given the fact that the appellant has the option open to file later on a request for the revocation of the maintained patent at the national level and in order to keep in balance the procedural rights of the parties, the present Board

should not admit the late filed documents D11 and D12 into the proceedings.

Firstly, G 1/99, see *supra*, does not deal with the admittance of late filed documents into the proceedings but concerns the prohibition of *reformatio in peius* as applied to the proprietor. G 1/99 is therefore not applicable to the present case.

Secondly, in the view of the Board, it is responsible for keeping in balance the parties' procedural rights within the opposition/appeal proceedings by treating the parties equally and giving them the opportunity to present their complete case before the responsible instances of the EPO. The mere fact that the appellant has the option of attacking the patent also at national level is, in the view of the Board, not a sufficient reason for not allowing into the proceedings documents which have been filed late but nevertheless during the proceedings, when said documents in a *prima facie* evaluation by the Board have been considered to be pertinent.

2. *Non-admittance of documents D13 to D19 into the proceedings*

As it was stated by the appellant, D13 to D18 had been filed in order to support inventive step arguments against the granted dependent claims and document D19 had been filed in order to support inventive step arguments against the respondent's auxiliary requests.

Since these documents are indisputably not pertinent with respect to the novelty and inventive step of

granted independent claims they are not at present admitted into the proceedings.

3. *Procedural matters*

In order not to deprive the parties of the opportunity to argue the new situation before two instances and following also the common request of both parties for remittal, the Board considers it appropriate to make use of its power under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

The Board deliberately refrains from going into the merits of the parties' arguments relating to the interpretation of the documents D11 and D12 in order not to pre-empt the consideration of these matters by the department of first instance.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

P. O'Reilly