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**Datasheet for the decision
of 3 April 2009**

Case Number: T 1581/08 - 3.2.07

Application Number: 02380132.7

Publication Number: 1270498

IPC: B67C 3/00

Language of the proceedings: EN

Title of invention:

Pipe for filling bottles and the like, with an incorporated cleaning device

Patentee:

Gallardo Gonzalez, Antonio

Opponent:

IRUNDIN, S.L.

Headword:

-

Relevant legal provisions:

EPC Art. 108
EPC R. 99, 101(1)
RPBA Art. 12(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Admissibility of appeal (no) - insufficient grounds of appeal"

Decisions cited:

T 0220/83, T 0213/85, T 0145/88, T 0922/05

Catchword:

-



Case Number: T 1581/08 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 3 April 2009

Appellant: IRUNDIN, S.L.
(Opponent) Pol. Ind. Soroxarta, 15-A B Anaka
ES-20301 IRUN (Guipuzcua) (ES)

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Respondent: Gallardo Gonzalez, Antonio
(Patent Proprietor) Gibeleta, 6 1-C
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Representative: Carpintero Lopez, Francisco
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 June 2008
rejecting the opposition filed against European
patent No. 1270498 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (opponent) contests the decision of the Opposition Division dated 11 June 2008 rejecting its opposition against the European patent EP 1 270 498.
- II. On 7 August 2008, the appellant filed a notice of appeal of two pages referring to the application number (02 380 132.7) as well as the publication number (1270498) of the patent in suit. Neither the impugned decision nor a request defining the subject of the appeal were mentioned, just: "We refer this written in the name of my client IRUNDIN, S.A in relation with the Appeal (provisional) already filed against the Concession of EP No. 02380132.7-1261 in the name of Antonio GALLARDO GONZALEZ". Under the heading "Grounds" the appellant submitted the following listing of arguments:
- "a) The way in which it is coupled to an opening made in the base (2) of a liquid container is similar to the one made by IRUNDIN, since although it cannot be seen in this cross-section drawing (fig. 2), it is fastened by means of a screw located in the middle of 2 pipes that presses down on a metal flat surface which, in turn, fastens the body (6) to the liquid container (2).
 - b) That screw that is not visible in the cross-section drawing (fig. 2) is the one described in point a) above.
 - c) The integrated tube supplied with a retractable unit is totally similar to the one made by IRUNDIN.

- d) Compressed by an elastic membrane (3) that is totally similar to the one made by IRUNDIN.
- e) Executable (5)? I'm not sure what that means, but part 5 is a part injected into the elastic membrane that is totally similar to the ones made by IRUNDIN.
- f) The pipe (9), stopper (10) and opening (raising) and closing (lowering) systems allowing the liquid to pass through are totally similar to those of IRUNDIN.
- g) The pot (13) for washing the pipe in automatic mode is totally similar to the one made by IRUNDIN.
- h) Our pot is hinged and located in the same position in the inner part of the pipe and 90° from it, the difference is that our turning system for the pot is mechanical.
- i) Exactly the same as that of IRUNDIN.
- j) Exactly the same as that of IRUNDIN.
- k) The tubular box (22) is exactly the same as the IRUNDIN system. I don't know what against the end of the ground means, but it is absolutely similar to that of IRUNDIN, since that is its function, i.e. to create an inner closed chamber in which the pipe can be purified by immersion in the liquid.

Exactly the same as that of IRUNDIN, with the same purpose."

In addition, the appellant requested a "deadline to extend time limit and to expand the grounds exhibit more technical", but did not file any further submissions within the applicable time limit set out in Article 108, 3rd sent. EPC.

III. The patent in suit was published on 16 June 2004. The opposition had been filed by the appellant on 11 March 2005.

In its notice of opposition (EPO Form 2300.1), the appellant ticked off as the only ground of opposition that the patent in suit was not new (Articles 52(1), 54 EPC). In its trilingual statement of facts and arguments in support of the opposition, the appellant requested the revocation of the patent in suit for lack of inventive step based essentially on documents D1 and D2; document D3 (claim 1 and figures 1 and 2) was referred to only in respect of dependent claim 5. Only with letter of 2 June 2006 the appellant filed arguments that the subject-matter of claims 1 to 5 of the patent in suit lacked novelty and inventive step using document D3.

IV. The Opposition Division in its decision of 11 June 2008 rejected the opposition on the basis that documents D1 and D2 did not disclose all features of claim 1 of the opposed patent, that neither D1 nor D2 could question inventive step of this subject-matter and that therefore the subject-matter of claim 1 and claims 2 to 5 depending therefrom fulfilled the requirements with regard to novelty and inventive step. Furthermore, it held that the arguments filed with letter of 2 June 2006 related to a new ground for opposition filed after the nine months period in which a notice of opposition should be filed and substantiated, would not be taken into account pursuant to Article 114(2) EPC. Document D3, used as the novelty destroying document, would not prima facie disclose all features of the pipe for

filling bottles according to claim 1 of the patent in suit.

V. In its communication of 14 January 2009 the Board expressed its preliminary opinion that it would be inclined to consider the appellant's letter of 7 August 2008 as a notice of appeal according to Article 108, 1st sent. EPC and Rule 99(1) EPC as well as a statement of grounds of appeal, as the time limit to file the latter had expired. However, this statement would appear to lack the reasoning necessary to fulfil the requirements of Article 108, 3rd sent. EPC and Rule 99(2) EPC, in the sense that it did not give the reasons why the appellant requested the cancellation of the decision under appeal.

VI. The appellant did not file any request but submitted in its reply to the Board's communication dated 6 March 2009 that:

"It is also easy to understand from the mentioned and inferred arguments in the communicate that this party, as it was mentioned in the documents D1 and D2 and also in figure 3 in document D3 (which does not require translation), claims for the obvious object of the patent through the reading of an expert on the matter. The opponent (who at this point ignores the D3 annex provided in the opposition report) believes that the Opposition Division did not consider that through those elements it was obvious for an expert on the matter the creation of the invention filed regarding the present appealed patent. The lack of inventive activity was not an argument introduced later; it was present in the

opposition report. Moreover, the three annexes were introduced in that procedure.

On the basis of the documents initially provided by the opponent with the opposition document the Art. 56 of CPE has seized to apply. According to this part, this was necessary to evaluate the inventive activity.

Therefore, as a result of the submitted documents of the opposition we acknowledge that elements e) and f) presented by the Board of Appeal in point 4.3, third paragraph, are perfectly deductible and evident for the expert on the matter by taking into account their own technical knowledge. Indeed they tend to be incorporated on behalf of the owner's competitors of the patent in their own achievements."

VII. The respondent, expressing its agreement with the Board's preliminary view, requested with letter of 3 March 2009 that the appeal be rejected as inadmissible. Furthermore, the respondent requested oral proceedings should the Board allow the appeal.

Reasons for the Decision

1. According to Article 108 EPC a notice of appeal must be filed in writing within two months after the date of notification of the decision appealed from. The notice shall not be deemed to have been filed until after the fee for appeal has been paid.

Under Rule 99(1)(a) EPC, the notice of appeal must contain the name and address of the appellant, under

Rule 99(1)(b) EPC an indication of the decision which is impugned, and under Rule 99(1)(c) EPC a request defining the subject of the appeal.

A statement setting out the grounds of appeal must be filed in accordance with Article 108, 3rd sent. EPC and Rule 99(2) EPC within four months after the date of notification of the decision appealed from.

According to Rule 99(2) EPC the statement of grounds of appeal shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, as well as the facts and evidence on which the appeal is based.

If the extent to which cancellation of the decision is requested is not expressly stated in the notice of appeal, the competent Board has to examine whether the relevant information can be determined from the totality of the appellant's submissions (cf. Case Law of the Boards of Appeal, 5th edition, 2006, VII.D.7.4.1(b)).

If the statement of grounds of appeal is found to lack such reasoning, the appeal is to be rejected as inadmissible (Rule 101(1) EPC).

2. The letter dated 7 August 2008 expressly mentions only the name of the appellant but neither its address nor a statement identifying the decision which is impugned and the extent to which amendment or cancellation of that decision is requested.

However, since the application number of the patent in suit and its publication number are stated, there had been only one opposition filed against that patent, the decision was to reject the opposition and the professional representative acting on behalf of the appellant is identical to the one who filed the notice of opposition and who represented the appellant during the opposition proceedings, the identity of the appellant and the impugned decision can be established by the Board.

As the opposition had been rejected by the Opposition Division with the impugned decision, the Board can also determine from the appellant's submissions that it requests that the decision under appeal be set aside and that the European Patent N° EP 1 270 498 be revoked.

3. Whereas the letter of 7 August 2008 can be understood to serve as a valid notice of appeal by the appellant, it cannot serve as the statement of grounds of appeal as required by Article 108, 3rd sent. EPC and Rule 99(2) EPC because it lacks the necessary reasoning why the appellant seeks the cancellation of the decision under appeal and the revocation of the patent.

Sufficiency of grounds of appeal is not a question of form, but of substance. The mere existence of some argumentation and carrying the heading "Statement of the Grounds of Appeal" or "Grounds" does not automatically pass the threshold of Article 108 EPC, even if clearly relating to the substance of the impugned decision (cf. T 145/88, OJ EPO 1991, 251, Headnote). On the other hand, sufficiency is also not a

question of volume. There is no minimum requirement as to the length or the fullness of detail of the argumentation which is necessary for an admissible appeal. In this context a distinction is to be drawn between insufficiency for the purposes of admissibility and insufficiency as far as the persuasiveness of the grounds is concerned which - if the arguments are not convincing - results in the dismissal of the appeal (cf. T 922/05 not published in OJ EPO, point 2 of the reasons).

According to the established case law of the Boards of Appeal the grounds for appeal should specify the legal or factual reasons on which the case for setting aside the contested decision is based. The arguments must be clearly and concisely presented to enable the Board and the other party or parties to understand immediately why the decision is alleged to be incorrect, and on what facts the appellant bases his arguments, without first having to make investigations of their own (cf. T 220/83, OJ EPO 1986, 249, point 4 of the reasons and Case Law, *supra*, VII.D.7.5.1).

This principle is also mirrored in Article 12(2) RPBA: "The statement of grounds of appeal ...shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed..., and should specify expressly all the facts, arguments and evidence relied on."

Further, to be sufficient for the admissibility of an appeal the grounds must be analysed in detail vis-à-vis

the main reasons given for the contested decision (cf. T 213/85, OJ EPO 1987, 482, point 3 of the reasons).

If no or insufficient relationship between the two can be established, the Board considers that the appeal is inadmissible.

4. The case law allowing exceptions to the principles enumerated above (cf. Case Law, *supra*, VII.D.7.5.2) is not applicable to the present appeal for the reasons that follow.

4.1 It is assumed to the benefit of the appellant that the letter dated 7 August 2008 refers for the grounds of appeal to the numbering of the features a) to k) of claim 1 as stated in point 12 of the decision under appeal, the last phrase: "Exactly the same as that of IRUNDIN, with the same purpose." probably being related to feature l). However, the actual technical features of the patent in suit are not discussed as such. The listing a) to l) could be understood as a rudimentary allegation that the subject-matter of claim 1 of the patent in suit lacks novelty over a document, which is, however, not mentioned.

Even assuming it relates to the ground of opposition of lack of novelty based on document D3, which had been raised by the appellant only with its letter of 2 June 2006, i.e. after the time limit for filing an opposition under Article 99(1) EPC had expired and which was not taken into account by the Opposition Division for this reason, the listing does not involve any legal and/or technical arguments why the features

of claim 1 can be clearly and unambiguously derived from document D3.

The appellant alleges that certain features of the pipe of claim 1 are "similar" to the pipe made by itself ("Irundin") but does not define the related content of the Spanish document D3, which is filed without translation into one of the official languages of the EPO, nor does it compare the claimed invention of the patent in suit with the prior art thus defined. The appellant even admits that it does not understand certain features of claim 1 of the patent in suit (features e) and k)) and, when referring to figure 2 of D3, it acknowledges that some features of claim 1 of the patent in suit are not visible (i.e. disclosed) in D3. With this, the appellant leaves it for the Board to not only provide itself a translation of this document in one of the official languages of the EPO, but also to analyse it and to compare the features allegedly disclosed in that document with the features of claim 1 of the patent in suit.

Arguments why the decision under appeal is not correct, thus, are neither clearly and concisely presented by the appellant with its letter of 7 August 2008 in a way to enable the Board and the respondent to understand why the decision of the Opposition Division is wrong, nor is it apparent upon reading the decision of the Opposition Division and the written statements of the appellant for which reasons the decision should be set aside.

- 4.2 The fact that the appellant in its notice of appeal requested a "deadline to extend time limit and to

expand the grounds exhibit more technical" has no effect on this assessment of the admissibility. The request has no legal basis because the time limit for filing the statement of grounds of appeal pursuant to Article 108, 3rd sent. EPC is not extendable, nor is further processing available. Apart from that, the appellant filed no further submissions before issue of the Board's communication regarding the question of the lacking admissibility of the appeal.

- 4.3 Although this was brought to the appellant's attention by way of this communication, the appellant in its reply dated 6 March 2009 has not submitted persuasive arguments to convince the Board otherwise.

The appellant merely repeats its allegation that the patent in suit would lack inventive step over D1, D2 and figure 3 of D3 without further technical explanation. Apart from the fact that it probably referred to figure 2 of D3 in its letter of 7 August 2008 and now mentions figure 3 for the first time in the opposition and appeal proceedings, the reply contains in essence nothing but the appellant's assertion that the invention of the patent in suit would be obvious "through the reading of an expert". However, it remains a secret what the elements are which the Opposition Division did not consider correctly but which were obvious for an expert on the matter. The fact that the appellant conceded in its letter of 7 August 2008 that it did not understand features e) and k) raises doubts as to the exact qualification of the expert referred to by the appellant.

5. Since the appellant has not filed a sufficient statement setting out the grounds of appeal with which the appellant seeks to have the decision under appeal to be set aside and the patent in suit to be revoked the appeal has to be rejected as inadmissible pursuant to Article 108, 3rd sent. EPC in combination with Rules 99(2) and 101(1) EPC.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders