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**Datasheet for the decision
of 8 August 2012**

Case Number: T 1070/10 - 3.2.07

Application Number: 03004198.2

Publication Number: 1323644

IPC: B65D 83/16

Language of the proceedings: EN

Title of invention:

Sprayhead

Patentee:

Unilever PLC
Unilever N.V.

Opponents:

Seaquist Perfect Dispensing GmbH
The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 76(1), 123(2)(3), 100(c)

Keyword:

"Amendments (main request and auxiliary requests 1 to 10): not allowable"

"Extension of the scope of protection (auxiliary requests 8 to 11): yes"

Decisions cited:

G 0001/93, G 0001/03

Catchword:

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Case Number: T 1070/10 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 8 August 2012

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 12 March 2010
revoking European patent No. 1323644 pursuant
to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
 E. Kossonakou

Summary of Facts and Submissions

- I. The appellants (patent proprietors) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 323 644.
- II. Two oppositions had been filed against the patent as a whole, based on Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) EPC (insufficient disclosure) and Article 100(c) EPC (unallowable amendments).
- III. The Opposition Division found that the ground of opposition of Article 100(c) EPC (unallowable amendments) holds against the subject-matter of claim 1 according to the main request and that the subject-matter of claim 1 according to the then valid auxiliary requests 1 to 9 does not meet the requirements of Article 123(2) EPC. It found further that claim 1 according to auxiliary requests 8 and 9 does not meet the requirements of Article 84 EPC.
- IV. The appellants requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the opposition proceedings be allowed to progress to a discussion of novelty and inventive step, preferably before the opposition division. Auxiliary requests 1 to 11 were also filed, together with the statement of grounds of appeal. The Board considers the latter part to mean that after establishing compliance of the main request or anyone of the auxiliary requests with the requirements of Article 84, 123 and 76 EPC, the Board

- should remit the case for further prosecution to the department of first instance.
- V. The respondents (opponent I and opponent II) requested the dismissal of the appeal. Oral proceedings were requested as a precautionary measure. With its letter dated 16 November 2011 respondent I requested to "expedite the proceedings".
- VI. With its communication dated 25 June 2012 the Board summoned the parties to oral proceedings on 12 September 2012. The annex to said summons reflected the Board's provisional opinion that the ground of opposition under Article 100(c) EPC held against the subject-matter of claim 1 according to the main request and that claim 1 of the auxiliary requests 1 to 10 did not meet the requirements of Article 123(2) EPC respectively Article 76(1) EPC. It was further mentioned that claim 1 of (among others) auxiliary request 11 contravened the requirements of Article 123(3) EPC. This preliminary opinion was accompanied by substantive arguments, which can be found in the reasons for the decision.
- VII. With its letter dated 3 August 2012 the appellants informed the Board that they will not be attending the oral proceedings scheduled and that they will not be making any additional submissions in support of their appeal.
- VIII. As the present decision could, as a consequence, be arrived at without holding the scheduled oral proceedings, the Board cancelled them.

IX. The independent claims 1 according to the main and auxiliary requests 1 to 11 read as follows (contested features are depicted in bold):

Main request

"A sprayhead comprising:
a support comprising a base (2) and a top (3), the base (2) being mountable on a fluid container and the top (3) being mounted on the base (2) and rotatable relative thereto;
a passageway (14), mounted on and **extending within the support [feature A]** that is connectable to a switchable source of fluid and incorporating a fluid outlet (12), the passageway (14) being moveable between a first, non-operative position and a second position in which it switches the source to supply fluid to the outlet (12) via the passageway (14); and
a member (17) secured relative to the support being moveable between a first non-operative position in which the member (17) is held in a raised position and supported by a cam means (11,22) on the support and a further position in which the member can be depressed whereby the passageway (14) may switch the source to supply fluid;
characterized in that the base (2) and top (3) provide complementary cam means (11,12), **the member (17) is selectively lockable by a lock and held in a raised position [feature B]** in its first non-operative position thereby preventing the member from urging the passageway to its second position unless the lock is released, the lock comprising the complementary cam means (11,12), such that movement of the top (3) relative to the base (2) moves the corresponding cam

means (11,22) relative to each other between a first position of the cam means in which the member (17) is in its said first non-operative position and a second position of the cam means in which the member (17) is in its said further position and **the top (3) having** a body portion that has an opening (24) for cooperation with the fluid outlet (12) and **a section that can face the fluid outlet to completely close it by relative rotation of the top to the base [feature C]**".

Auxiliary request 1

The expression of claim 1 according to the main request that

"the member (17) is selectively lockable by a lock and **held in a raised position** in its first non-operative position thereby preventing the member from urging the passageway to its second position unless the lock is released"

has been replaced by the expression:

"the member (17) is selectively lockable by a lock and that **a cam follower (22) held in a raised position** by a cam profile (11) and prevents depression of member (17) and thus prevents activation of the sprayhead (1)".

Auxiliary request 2

The expression of claim 1 according to the main request that

"the top (3) having a body portion that has an opening (24) for cooperation with the fluid outlet (12) and **a section that can face the fluid outlet to completely close it by relative rotation of the top to the base"**

has been replaced by the expression:

"as the top (3) is rotated an opening (24) moves around with the top (3) until, in the completely closed position, the opening (24) corresponds to an outlet closure plate (10) and the fluid outlet (12) faces a section of the body portion (16) for completely closure of the fluid outlet (12)".

Auxiliary request 3

Claim 1 is a combination of claims 1 of the first and second auxiliary requests.

Auxiliary request 4

Feature A of claim 1 according to the main request reading:

"a passageway (14), mounted on and extending within the support"

has been replaced by amended feature A:

"a passageway (14), mounted on the support and extending within an upper part of the base from a periphery to the central axis".

Auxiliary request 5

Claim 1 is a combination of claims 1 of auxiliary requests 1 and 4.

Auxiliary request 6

Claim 1 is a combination of claims 1 of auxiliary requests 2 and 4.

Auxiliary request 7

Claim 1 is a combination of claims 1 of auxiliary requests 1, 2 and 4.

Auxiliary request 8

Feature A of claim 1 according to the main request reading:

"a passageway (14), mounted on and extending within the support"

has been replaced by further amended feature A:

"a passageway (14), mounted on the support".

Auxiliary request 9

Claim 1 is a combination of claims 1 of auxiliary requests 1 and 8.

Auxiliary request 10

Claim 1 is a combination of claims 1 of auxiliary requests 2 and 8.

Auxiliary request 11

Claim 1 is a combination of claims 1 of auxiliary requests 1, 2 and 8.

X. The appellants argued essentially as follows:

Amendments - Claim 1: Main request and Auxiliary requests 1 to 10

Feature A: "a passageway ... extending within the support"

Feature A makes no technical contribution to the subject-matter of the claimed invention and merely excludes protection for a part of the subject matter claimed in the application as first filed which should be allowed, see G 01/03, OJ EPO 2004, 413.

The invention claimed in the contested patent concerns a means for preventing accidental discharge of a spray container, see column 1, lines 14 to 17 of the patent specification. The solution to this problem involves the use of a sprayhead which is switchable between operative and non-operative positions; this being achieved by means of complementary cams on the top and the base, see claim 1 and related sections of the description.

The exact nature of the spray passageway is not in the least involved in the claimed invention. Thus, limiting claim 1 to sprayheads in which the passageway extends within the support is merely excluding protection for a feature that makes no technical contribution to the subject matter of the claimed invention.

The nature of the passageway detailed in claim 1 as granted is not "a limiting feature creating an inventive selection" (see G 01/03, *supra*, paragraph 16 of the reasons).

Feature B: "the member ... is held in a raised position".

The member must be held in a raised position for the invention to work at all. It is implicit within the description of the invention that this must be the case.

As mentioned above, the invention concerns a means for preventing accidental discharge of a spray container, see column 1, lines 14 to 17 of the patent specification. Activation of the sprayhead is done by pressing down on the depressor member, see column 5, line 3. Were the depressor member not held in a raised position in the first non-operative position, it is clear that the invention could not function.

Feature C: "to completely close it by relative rotation".

Basis for this feature may be found in paragraph [0034] of the published European application, where it is stated that "As the top 3 is rotated ... for complete closure of the fluid outlet 12".

Amended Feature A (auxiliary requests 4 to 7):

A "passageway mounted on the support and extending within an upper part of the base from a periphery to the central axis" has figure 2 as the basis for this amendment.

Extension of protection - Claim 1 of the auxiliary requests 8 to 11 - Article 123(3) EPC

Further amended feature A:

There are at least two conflicting interpretations for the word "within" present in feature A. First, the passageway could be structurally surrounded by the support and indeed, this surrounding could be either partial or complete. Secondly, the passageway could make up a further component of the support, perhaps existing between the base and the top.

In the second interpretation, merely having the passageway "mounted on the support" would mean that it could arguably be "within" the support. Thus, describing the passageway as "mounted on and extending within the support" is no more limiting than describing it as "mounted on the support", as in the application as filed. Furthermore, any passageway must "extend" in order to be considered a passageway.

Since the term "extending within the support" is ambiguous and lacking in definitive technical meaning its deletion for the "further amended feature A" is not in contravention of Article 123(3) EPC.

XI. Respondent I argued essentially as follows:

Amendments - Claim 1: Main request and Auxiliary requests 1 to 10

Feature A

Feature A relates to the arrangement/location of the passageway. This is a technical teaching specifying the sprayhead, namely its construction, so that it results in a technical contribution. The appellants' assertion

that this feature does not create any inventive selection is irrelevant.

Feature B

The appellants' argument that the member must be held in a raised position for the invention to work at all is not convincing. The member could be blocked in an intermediate position and/or could be moved into a side position for preventing discharge.

Feature C

Feature C contains the aspect that the fluid outlet may be closed during rotation. This is not originally disclosed.

Amended feature A:

Amended feature A includes the alternative that the passageway extends within a wall of the base. This is not originally disclosed and, thus, goes beyond the initial content.

Further, figure 2, which seems to form the only potential basis for disclosure, shows a passageway 14 which extends horizontally at the upper end of base 2. This does not disclose that the passageway extends within the base. In addition, figure 2 does not show that the passageway extends to a central axis.

Thus, Article 100(c) EPC holds against the subject-matter of claim 1 according to the main request and claim 1 of auxiliary requests 1 to 10 does not meet the

requirements of Article 123(2) EPC, respectively Article 76(1) EPC.

Extension of protection - Claim 1 of the auxiliary requests 8 to 11 - Article 123(3) EPC

Further amended feature A:

The appellants' two interpretations of the word "within" do not exclude each other. Further, these interpretations have a technical meaning specifying the claimed subject matter.

Consequently, the deletion of "and extending within" in further amended feature A in claim 1 of auxiliary requests 8 to 11 results in an extension of protection and contravenes Article 123(3) EPC.

XII. Respondent II did not present any arguments during the appeal proceedings.

Reasons for the Decision

1. *Amendments - Claim 1: Main request and auxiliary requests 1 to 10*

As far as it concerns the amendments made in claim 1 of the main request and of the auxiliary requests 1 to 10 the Board stated under section 2 of its annex to the summons to oral proceedings the following:

"2. *As far as it concerns Article 100(c) EPC (Article 123(2) EPC respectively Article 76(1) EPC) the*

Board comments as follows:

2.1 *Since the figures and the part of the description referring to the figures of the grandparent and the parent (first divisional) application are identical with the corresponding figures and parts of the present divisional application as originally filed and as published, references to passages of the description in the present Board's communication refer to the present published European application of the patent in suit as it was also practiced in the parties' submissions.*

2.2 *Feature A:*

The appellants do not contest that feature A was not disclosed in the application as originally filed, i.e. in the originally filed grandparent application.

The appellant, though mentioning G 1/03, has clearly relied upon the decision G 1/93 (OJ EPO 1994, 541) and argued that feature A merely excludes protection for part of the subject-matter of the claimed invention as covered by the application as filed. Thus, the opposition ground according to Article 100(c) EPC would not hold against the subject-matter of claim 1 disclosing said amendment.

The Board considers that feature A relates to the arrangement/positioning of the passageway and that accordingly it relates to a technical teaching specifying the sprayhead, namely its construction

and the positioning of the passageway in the support. Thus, feature A has obviously a technical meaning restricting at the same time the scope of protection defined in claim 1.

The appellants' argument that the "exact nature of the spray passageway is not in the least involved in the claimed invention" cannot be followed by the Board. In the originally filed claim 1 of the grandparent application (and of the present divisional application) the claimed passageway is mounted on the support, is connectable to a switchable source of fluid, incorporates a fluid outlet, and is moveable between a first, non-operative position and a second position in which it switches the source to supply fluid to the outlet via the passageway.

Feature A defines now in addition to the above-claimed technical characteristics of the passageway the further technical characteristic that the passageway extends, i.e. is positioned, within the support.

The appellants argued further that the feature in question certainly did not create an inventive selection in the sense of G 1/93.

However, according to decision G 1/93 such a selection invention is only mentioned as a "typical example" (see pt. 16 of the reasons) of when such an added feature could give rise to an unwarranted advantage to the patent proprietor. This does not exclude other examples of an

unwarranted advantage. For instance, during the life span of the patent it may occur that further prior art becomes known, for which this technical feature could prove to be of advantage to the patent proprietor, either in distinguishing the invention (further) from the prior art, or by better setting off the invention in the discussion of inventive step. For this feature that is not unimaginable. For this reason the Board is of the opinion that G 1/93 cannot find application. Consequently, it seems that feature A cannot be regarded as a mere limitation of the protection but it has to be considered as subject-matter which extends beyond the content of the application as originally filed.

2.3 Feature B:

In paragraph [0033] of the published European application and in particular column 5, lines 35 to 38 it is stated that: "The cam follower 22 is held in a raised position by the cam profile 11 and prevents depression of the depressor means (member) 17 and thus prevents activation of the sprayhead 1".

Accordingly, said text teaches only that the cam follower is held in a raised position and that the member is prevented from depression. The text does not specify - and the drawings do not give further details - that any rigid connection between the cam follower 22 and the member 17 is mandatory and consequently it does not exclude flexibility in the material linking the cam follower and the

member, thus permitting relative movement of the member relative to the cam follower. Therefore, the fact that the member is prevented from depression does not mean that the member is held in a raised position. The member could for example be blocked in an intermediate position and/or could be moved into a side position for preventing discharge.

The appellants did not provide any evidence or textual support for their assertion that the member must be held in raised position for the invention to work at all. The Board considers therefore said appellant's argument as an unsubstantiated allegation which has to be disregarded.

As a consequence, it seems that feature B has not been disclosed in the application as originally filed.

2.4 Feature C:

Paragraph [0034] of the published European application reads: "As the top is rotated, the opening 24 moves around with the top 3 until, in the completely closed position, the opening 24 corresponds to the outlet closure plate 10 and the fluid outlet 12 faces a section of the body portion 16 for complete closure of the fluid outlet 12".

This means that a section of the body portion 16 faces the fluid outlet 12 for complete closure

only after the top has been rotated. Paragraph [0034] establishes further an interrelationship between the "completely closed position" and "the opening 24 corresponds to the outlet closure plate 10".

Feature C encompasses also the possibility that the complete closure is already achieved when the top is only slightly rotated (i.e. already during rotation) and not only as that the top 3 has been rotated to a final position with the opening facing the plate 10. The skilled person cannot read from drawing 3 that the fluid outlet is completely closed when the opening 24 has been partly shifted by rotation but has not reached the fully rotated position facing the plate 10.

It seems therefore that feature C has not been disclosed in the application as originally filed.

2.5 Amended feature A

Figure 2, which seems to form the only basis for potential disclosure of said amendment, shows a passageway 14 which extends horizontally at the upper end of base 2. However, figure 2 does not show that the passageway extends to a central axis; none such axis is drawn, nor is the extension completely to the centre, if present. According to paragraph [0029] of the published European application the passageway appears to extend to the valve connector 15 arranged centrally in the base and not to a central axis.

The same problem is present for the "from a periphery"; it appears that the passageway extends from a fluid outlet 12, which is not necessarily at the periphery in figure 2.

It seems therefore that amended feature A has not been disclosed in the application as originally filed.

- 2.6 At least one of the features A, B, C and amended feature A is present in the main request and in the auxiliary requests 1 to 10.*
- 2.7 Accordingly, Article 100(c) EPC holds against the subject-matter of claim 1 according of the main request and claim 1 of auxiliary requests 1 to 10 does not meet the requirements of Article 123(2) EPC respectively Article 76(1) EPC".*
- 1.1 The above-mentioned opinion of the Board has neither been commented on nor contested by the appellants, see their letter dated 3 August 2012.

Under these circumstances, the Board having once again taken into consideration all the relevant aspects of the case maintains its opinion as expressed in said annex. Thus, Article 100(c) EPC holds against the subject-matter of claim 1 according of the main request and claim 1 of auxiliary requests 1 to 10 does not meet the requirements of Article 123(2) EPC respectively Article 76(1) EPC.

2. *Extension of protection - Claim 1 of the auxiliary requests 8 to 11 - Article 123(3) EPC*

2.1 As far as it concerns the deletion in the feature A in claim 1 of the auxiliary request 11 the Board gave under sections 3.1, 3.4 and 3.5 of its annex to the summons to oral proceedings the following preliminary opinion on the deletion in amended feature A:

"3.1 Deletion of feature A

The appellants argue that the word "within" of feature A has at least two interpretations. First, the passageway could be structurally surrounded by the support and this surrounding could be either partial or complete. Secondly, the passageway could make up a further component of the support, perhaps extending between the base and the top. The Board considers that these do not seem to exclude each other and that they have a specific technical meaning specifying the claimed subject-matter.

Consequently, it seems that the deletion of feature A extends the scope of protection of claim 1 as granted.

.....

3.4 *In the auxiliary requests 8 to 11 feature A has been deleted. At least one of the amended features B and C is present in the main request and in the auxiliary requests 2, 3, 5, 6, 7, 9, 10 and 11.*

3.5 *Accordingly, it seems that claim 1 of auxiliary requests 2, 3, 5, 6, 7, 8, 9, 10 and 11 contravenes the requirements of Article 123(3) EPC".*

2.2 The above-mentioned opinion of the Board has neither been commented on nor contested by the appellants, see their letter dated 3 August 2012.

Under these circumstances, the Board having once again taken into consideration all the relevant aspects of the case maintains its opinion as expressed in said annex. Thus, claim 1 of auxiliary requests 8 to 11 contravenes the requirements of Article 123(3) EPC.

2.3 Neither the main request nor any of the auxiliary requests can be acceded to, with the result that the decision under appeal cannot be set aside, let alone can a remittal take place. The appellants' appeal will therefore have to be dismissed.

3. *Oral proceedings*

Since this decision is as requested by the respondents, it could be arrived at without holding the oral proceedings which were requested only by the respondents and only as an auxiliary measure.

The oral proceedings are therefore to be cancelled.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders