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**Datasheet for the decision  
of 25 September 2013**

**Case Number:** T 2482/10 - 3.2.07

**Application Number:** 03733623.7

**Publication Number:** 1513741

**IPC:** B65D 81/00, A47J 31/06

**Language of the proceedings:** EN

**Title of invention:**  
Filter for extraction device

**Patent Proprietor:**  
LMTO ELECTRONICS B.V.

**Opponents:**  
SEB S.A.  
MELITTA HAUSHALTSPRODUKTE GmbH & Co.  
Kommanditgesellschaft

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54  
RPBA Art. 13(1), 13(3)

**Keyword:**  
"Novelty - Main request (no)"  
"Late-filed auxiliary requests - Second, third and fourth -  
admitted (no) (need for additional search by the department of  
first instance for features incorporated from the  
description)"

**Decisions cited:**  
-

**Catchword:**  
see points 3.5 to 3.8



Case Number: T 2482/10 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 25 September 2013

**Appellant:**  
(Patent Proprietor)

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted 27 October 2010  
revoking European patent No. 1513741 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 appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 513 741.
- II. Two oppositions had been filed against the patent as a whole based on Article 100(a) EPC on the grounds of lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC), and on Article 100(b) EPC (insufficient disclosure; Article 83 EPC).
- III. The Opposition Division found that the device according to claim 1 of the patent as granted is known from document E1 (EP 0 116 286 A).
- IV. Oral proceedings before the Board took place on 25 September 2013.
  - (a) The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of either the main request or one of the second, third and fourth auxiliary requests filed during the oral proceedings.
  - (b) The respondents (opponents) requested the dismissal of the appeal.
- V. Claim 1 according to the main request. i.e. claim 1 of the patent as granted and the claims 1 according to the second to fourth auxiliary requests read as follows (amendments over claim 1 according to the main request are marked in bold):

Main request

"Device for preparing a liquid extract with a frothy layer from a substance, comprising a holder, with an internal space and with an outflow opening for delivering the extracted liquid, and comprising a removable filter assembly which, at least during use, resides in said holder, in which said filter assembly comprises an upper filter and a lower filter which are mutually detachable, each with an inner part comprising small holes and with a sturdy rim, in which said filter assembly is reusable and refillable with the substance for extraction, in which said filter assembly is made of a washable material, and in which hot water is supplied under pressure through said filter assembly in order to extract the substance contained therein, characterized in that, at least during use, said upper filter and said lower filter abut each other along said sturdy rims, in that the device is provided with a cover, and in that the upper filter and the lower filter are pressed onto each other, at least during use, when said cover is closed".

Second auxiliary request

"Device for preparing a liquid extract with a frothy layer from a substance, comprising a holder, with an internal space and with an outflow opening for delivering the extracted liquid, **comprising pump means** and comprising a removable filter assembly which, at least during use, resides in said holder, in which said filter assembly comprises an upper filter and a lower filter which are mutually detachable, each with an

inner part comprising small holes and with a sturdy rim, in which said filter assembly is reusable and refillable with the substance for extraction, in which said filter assembly is made of a washable material, and in which hot water is supplied under pressure through said filter assembly **by said pump means** in order to extract the substance contained therein, characterized in that, at least during use, said upper filter and said lower filter abut each other along said sturdy rims, in that the device is provided with a cover, and in that the upper filter and the lower filter are pressed onto each other **by said cover**, at least during use, when said cover is closed".

Third auxiliary request

"Device for preparing a liquid extract with a frothy layer from a substance, comprising a holder, with an internal space and with an outflow opening for delivering the extracted liquid, and comprising a removable filter assembly which, at least during use, resides in said holder, in which said filter assembly comprises an upper filter and a lower filter which are mutually detachable, each with an inner part comprising small holes and with a sturdy rim, in which said filter assembly is reusable and refillable with the substance for extraction, in which said filter assembly is made of a washable material, and in which hot water is supplied under pressure through said filter assembly in order to extract the substance contained therein, characterized in that **fastening means are arranged on a top side of the sturdy rim of the lower filter and upper filter, in that** at least during use, said upper filter and said lower filter abut each other along said

sturdy rims, in that the device is provided with a cover, and in that the upper filter and the lower filter are pressed onto each other, at least during use, when said cover is closed".

Fourth auxiliary request

"Device for preparing a liquid extract with a frothy layer from a substance, comprising a holder, with an internal space and with an outflow opening for delivering the extracted liquid, and comprising a removable filter assembly which, at least during use, resides in said holder, in which said filter assembly comprises an upper filter and a lower filter which are mutually detachable, each with an inner part comprising small holes and with a sturdy rim, in which said filter assembly is reusable and refillable with the substance for extraction, in which said filter assembly is made of a washable material, and in which hot water is supplied under pressure through said filter assembly in order to extract the substance contained therein, characterized in that **the lower filter has a top side of the sturdy rim provided with protruding portions and the upper filter has a top side of the sturdy rim provided with recesses into which said protruding parts fit, or vice versa, in that,** at least during use, said upper filter and said lower filter abut each other along said sturdy rims, in that the device is provided with a cover, and in that the upper filter and the lower filter are pressed onto each other, at least during use, when said cover is closed".

A first auxiliary request was discussed and then withdrawn at the oral proceedings.

VI. The appellant argued as follows:

*Claim 1 according to the main request - Novelty,  
Articles 52, 54 EPC*

In the device according to the patent in suit the substance is extracted under "**elevated**" pressure, contrary to E1, which discloses a normal, i.e. infusion coffee-maker in which hot water evidently passes through ground coffee at a pressure level which is only marginally higher than the atmospheric pressure and thus not at an elevated pressure.

E1 discloses a first embodiment with its figure 1, of a first filter assembly with its upper filter being integral with the lid and, hence, not removable from the device. There is no disclosure whatsoever in E1 that the upper filter and lower filter are pressed onto each other during use. On the contrary, figure 1 clearly shows a small gap between the upper filter and the seal to demonstrate that in practice no pressure is exerted by the lid 4 on the filter assembly.

Furthermore, the sentence on page 9, lines 7 to 9 of E1, stating that "from said figure [1] it can be seen that the height of the coffee filter is less than the height of the infusion chamber 3", evidences that the upper horizontal part of the upper filter is not in contact with an internal face of the dispenser part.

E1 further discloses an alternative filter assembly in figure 4 to replace the filter assembly of the device of figure 1. This means that in the device of figure 1 the lower filter, upper filter and seal are all

together replaced by the removable cartridge-type filter assembly of figure 4. There is no information in E1 that, once installed, the lid 4 exerts any pressure on the cartridge and there is no technical reason why such a pressing action should be exerted by the lid.

The last figure of the handout submitted during the oral proceedings is an amended figure 1 of E1 having the first filter assembly replaced by the alternative filter assembly of figure 4. The circumferential rim of the lower filter sits loosely on the upper horizontal surface of the side wall of the infusion chamber 3 and the circumferential rim of the upper filter has no contact with the internal face of the dispenser part 25. This situation evidences that the lid 4 and its internal dispenser 25 do not apply any pressure on the circumferential rim of the upper filter and thus the upper filter and the lower filter are not pressed onto each other when the lid is closed.

Since no precise information exists in E1 about the dimensional configuration of this alternative filter assembly, the skilled person, when incorporating it into the coffee-maker of the first embodiment as shown in the last figure of the handout, would position said alternative filter assembly, due to lack of information, as loosely sitting on the upper horizontal surface of the side wall of the infusion chamber 3. Such a coffee-maker / filter assembly combination would not work and its arrangement would in any case not be able to question the novelty of the subject-matter of claim 1, since the upper filter and the lower filter would not be pressed onto each other.



*Admissibility of the second, third and fourth auxiliary requests*

The second, third and fourth auxiliary requests represent the appellant's response to the Board's communication annexed to the summons to oral proceedings.

The claims 1 of said requests present several additional features over claim 1 according to the main request which have been extracted from the description as originally filed.

Although each of said auxiliary requests presents subject-matter which might necessitate an additional search the appellant considers that the respondents have had enough time to carry out an additional search for at least the claims 1 of the third and fourth auxiliary request, since they were aware of said claims three weeks before the oral proceedings.

The Board should therefore apply its discretionary power in favour of the appellant and admit these requests into the proceedings.

VII. The respondents argued as follows:

*Claim 1 according to the main request - Novelty, Articles 52 and 54 EPC*

The coffee-maker known from E1 has, besides the other features of claim 1, also the features that hot water is supplied under pressure through the filter assembly, and that the upper filter and the lower filter are

pressed onto each other, at least during use, when the cover is closed. This also applies for the incorporation of the alternative filter assembly in the coffee-maker of figure 1.

*Admissibility of the second, third and fourth auxiliary requests*

Claims 1 of the second, third and fourth auxiliary requests being filed late should not be admitted into the appeal proceedings.

The late filing of these auxiliary requests is not justified in view of the fact that no further objections or evidence which were not already part of the decision under appeal have been raised in writing during the appeal proceedings by the Board or the respondents.

Claim 1 according to the second auxiliary request does not overcome the lack of novelty objection over E1, said objection being the basis of the impugned decision. The claims 1 of the third and fourth auxiliary requests involve added subject-matter which gives rise to new objections based on Article 123(2) EPC.

Moreover, the claims 1 of all auxiliary requests concern subject-matters which necessitate an additional search. Since the respondents were confronted only three weeks before the oral proceedings with these auxiliary requests they had not enough time for carrying out an additional search on this subject-matter, since the patentability of said amended claims had not until then been an issue in the proceedings.

This applies all the more to claim 1 according to the second auxiliary request, which is filed for the first time during the oral proceedings. Therefore, if these requests are admitted into the proceedings, the oral proceedings should be adjourned in order to give the respondents a fair opportunity to carry out an additional search.

### **Reasons for the Decision**

1. *Claim 1 according to the main request - Novelty, Articles 52 and 54 EPC*
- 1.1 The appellant disputes that the features of claim 1, that
  - a) hot water is supplied under pressure through the filter assembly, and that
  - b) the upper and lower filters are pressed onto each other, at least during use, when the cover is closed, are known from E1.
- 1.2 Concerning feature a) the appellant argues that in the device according to the patent in suit the substance is extracted under **"elevated"** pressure, whereas E1 concerns a normal, i.e. infusion, coffee-maker which evidently passes hot water through ground coffee practically at **near atmospheric pressure**, i.e. not at **elevated** pressure.
- 1.3 The Board cannot follow this argument since on the one hand an **"elevated"** pressure is not claimed in claim 1 and on the other hand hot water **under pressure** (due to heating in boiler chamber 7) is in any case supplied through the filter assembly of E1 in order to extract

the substance contained therein, see page 9, lines 24-25. That the water is under pressure can also be derived from the identically operating system of E2 (EP 0 880 927 A) which relates to a "pressure coffee machine", see title and claim 1.

1.4 In order to support its contention that feature b) is absent in the coffee-maker known from E1 the appellant filed during the oral proceedings a handout of 3 drawings with a modified figure 1 of E1 having the first filter assembly replaced by the alternative filter assembly of figure 4. According to said modified figure the circumferential rim of the lower filter 33 would sit loosely on the upper horizontal surface of the side wall of the infusion chamber 3 and the circumferential rim of the upper filter would have no contact with the internal face of the dispenser part 25. This modified figure is considered by the appellant as evidencing that the lid 4 and its internal dispenser 25 do not apply any pressure on the circumferential rim of the upper filter and thus that the upper and lower filters are not pressed onto each other, at least during use, when the lid is closed.

1.5 The Board cannot follow the above-mentioned appellant's argument for the following reasons.

1.6 The first filter assembly 17 depicted in figure 1 of E1 consists of three parts: the lower filter having a substantially cylindrical side wall 18 with a first circumferential rim and a lower perforated wall 19, the upper filter consisting of the perforated upper wall 20 having a second circumferential rim, and the seal 21 positioned between said two circumferential rims.

The upper filter is thereby incorporated in, or forms part of the lid 4. When the lid is closed the circumferential rims of the upper and lower filters together with the seal positioned therebetween are compressed between the inner surface of the internal dispenser 25 and the upper horizontal surface of the infusion chamber 3. This configuration allows a direct upward flow (under pressure) of the hot water through the filter assembly 17, the quieting chamber 32, the aperture 28, the dispensing chamber 23 and out through the output channel 24. This configuration prevents at the same time any leakage by means of the bayonet connecting system 22. This bayonet connecting system clamps the circumferential rims of the upper and lower filters (and the seal therebetween) between the inner surface of the internal dispenser and the upper horizontal surface of the substantially cylindrical side wall of the infusion chamber.

- 1.7 Under these circumstances it is evident that when the first filter assembly is replaced by the alternative filter assembly the same functional principles and restrictions must apply. For this reason, the skilled person would choose the dimensional configuration of this alternative filter assembly or possibly the thickness of an additional sealing ring such that when the lid is closed the circumferential rims of the upper and lower filter parts would again be clamped, i.e. compressed, between the inner surface of the internal dispenser and the upper horizontal surface of the substantially cylindrical side wall of the infusion chamber in order to prevent any leakage of hot water towards and out of the bayonet connecting system.

- 1.8 The appellant argues further that since no precise information exists in E1 about the dimensional configuration of the alternative filter assembly, the skilled person, when incorporating it into the coffee-maker shown in figure 1, would position said alternative filter assembly, due to lack of further information, loosely sitting on the upper horizontal surface of the side wall of the infusion chamber. Such a coffee-maker / filter assembly combination would not work and it would in any case not be able to put the novelty of the subject-matter of claim 1 in question, since the upper filter and the lower filter would not be pressed onto each other.
- 1.9 The Board, however, considers in this respect that the skilled person reads a technical document with a mind willing to understand the technical teaching of said document and to implement the structural and functional principles and restrictions disclosed therein. When a specific part of a machine is indentified as being replaceable by another part mentioned in said document, then the aim of such replacement will always be the construction of a machine which properly functions with said other part and not the construction of a **non-functioning** machine, as argued by the appellant. In the present case, when incorporating the alternative filter assembly into the coffee-maker depicted in figure 1 of E1, the skilled person would proceed as described under point 1.7 above.
- 1.10 As far as it concerns the conclusions drawn by the appellant from the small gap depicted on the left-hand side of figure 1 as being present between the upper

filter and the seal and from the content of lines 7 to 9 of page 9 of E1, the Board comments as follows.

1.11 Firstly, the figures of E1 are schematic figures not allowing to extract therefrom precise dimensions or distances between the different parts depicted therein. Given the fact that on the one hand on the right-hand side of figure 1 no gap is present, so that the circumferential rim of the upper filter is in direct contact with the seal, and on the other hand the presence of a gap would cancel the sealing effect intended to be provided by clamping the sealing between the circumferential rims of the upper and lower filter, the Board considers the presence of a gap on the left-hand side of figure 1 as graphical inaccuracy having no impact to the interpretation of the functioning of the coffee-maker given under point 1.6 above.

1.12 Secondly, figure 1 of E1 shows that the infusion chamber 3 has a lower part extending underneath the bottom wall 19 of the filter, see also page 9, lines 10 to 18 of E1. This fact is mirrored in the sentence on page 9, lines 7 to 9 of E1 stating that "from said figure [1] it can be seen that the height of the coffee filter is less than the height of the infusion chamber 3". Therefore, said sentence of E1 cannot be considered as evidencing that the upper filter is not in contact with the internal face of the dispenser part 25, as argued by the appellant.

1.13 For the above-mentioned reasons features a) and b) mentioned under point 1.1 are known from E1. Since it is undisputed that the remaining features of claim 1 are also known from E1 the Board concludes that the

device according to claim 1 of the main request is not novel over the coffee-maker known from E1.

2. *Admissibility of the second, third and fourth auxiliary requests*

2.1 The claims 1 of the second, third and fourth auxiliary requests were submitted during the oral proceedings, whereby the claims 1 of the third and fourth auxiliary requests were filed for the first time on 23 August 2013 as part of the then auxiliary requests I and II. In any case, said three auxiliary requests were filed after the filing of the statement of grounds of appeal with the letter of 3 March 2011 and after oral proceedings had been arranged. These requests have therefore been filed late.

2.2 According to Article 12(2) RPBA, the statement of grounds of appeal must contain the appellant's complete case. This includes the appellant's requests. Furthermore, reference is made to Article 13(1) RPBA stating that it is at the Board's discretion to admit any amendment to the appellant's case after it has filed its statement of grounds of appeal. Here, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy are some of the factors to be taken into account.

Amended claims may be admitted into the proceedings, if the introduced amendments are properly justified, e.g. can be seen as a (timely) response to objections or evidence which were not part of the decision under appeal or were raised in the response to the appeal or by the Board. The later they are filed, such as at the



oral proceedings (the present second auxiliary request) or one month before the oral proceedings (the present third and fourth auxiliary requests), the more "clearly allowable" they should be.

Such is the case when the Board can quickly ascertain that they do not give rise to new objections and that they overcome all outstanding objections, see Case Law of the Boards of Appeal, 7<sup>th</sup> edition, 2013, IV.E.4.4.2, first paragraph.

Moreover, according to Article 13(3) RPBA amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings.

2.3 According to the impugned decision, the patent was revoked due to lack of novelty of the subject-matter of claim 1 of the main request over E1. The appellant requested with the statement of grounds of appeal the setting aside of the impugned decision and the maintenance of the patent on the basis of the main request refused by the Opposition Division.

2.4 In their replies to the statement of grounds of appeal the respondents upheld their objections as raised during the opposition proceedings concerning lack of novelty of the subject-matter of claim 1 of the main request over E1 and the Board stated under point 1 of its communication annexed to the summons to oral proceedings that it could not see "why the opposition division was wrong in its reasons in chapter "Article 100(a)/Article 52(1) and 54 EPC (Novelty)" with respect to E1/F1".

- 2.5 Since no new objections were raised nor new evidence was introduced, the Board cannot see any change in the case which would justify submitting these auxiliary requests at such a late stage of the proceedings, i.e. after oral proceedings had been arranged or even at the oral proceedings themselves. The fact that a Board confirms a conclusion reached in the impugned decision is not a change in the proceedings.
3. The Board also does not share the appellant's view that the late filing of these auxiliary requests was justified as a response to the Board's communication. The Board cannot find in its communication any invitation or directions for the appellant to file new requests. To the contrary, the Board stated under point 5 of its communication that "[t]he admittance of facts and evidence is still subject to the provisions of Article 114(2) EPC and Articles 12 and 13 of the Rules of Procedure of the Boards of Appeal". It is true that in some cases a reaction to the communication with amended requests is admitted. However, this is always under the proviso that they are "clearly allowable".
- 3.1 As far as it concerns the "clear allowability" of the claims 1 of the second, third and fourth auxiliary requests the Board finds as follows.
- 3.2 In respect with the amendments introduced into claim 1 of the second auxiliary request, see point IV above (the "pump means" and the cover pressing the upper and lower filters onto each other), the Board follows the respondents' argument that the combination of heating

chamber 7, the longitudinal chamber 14 and the upper infusion chamber 3 used for supplying hot water upwards, i.e. under pressure through the filter assembly of the coffee-maker known from E1 can be considered as "pump means". It considers further that in the device of E1 the upper filter and the lower filter are pressed onto each other by the lid, i.e. the cover, and concludes from the above that the amendments introduced into claim 1 of the second auxiliary request do not *prima facie* establish novelty of the subject-matter of claim 1 over E1.

3.3 In respect with the amendments introduced into claim 1 of the third and fourth auxiliary requests, see point IV above (the fasting means on the sturdy rim), the Board follows again the respondents' argument that in this additional feature of the claims 1 of said requests the feature concerning the "top side of the **sturdy rim** of the lower/upper filter" appears to be an inadmissible generalisation of the "top side of the **outer edge** of the lower/upper filter" present as only possible basis in lines 22 to 30 of page 3 of the description as originally filed. The Board concludes that such a generalisation, having no basis in the originally filed application, *prima facie* violates the requirements of Article 123(2) EPC.

3.4 For the reasons mentioned under points 3.2 and 3.3 above these three auxiliary requests do not result in clearly allowable subject-matter and therefore the need for procedural economy speaks clearly against their admission.

- 3.5 According to constant case law of the Boards of Appeal, if an additional search is needed to assess patentability of claims amended with features from the description at such a late state that either the oral proceedings must be adjourned or the case must be remitted to the department of first instance for further prosecution, Article 13(3) RPBA speaks against the admissibility of such claim requests, see also Case Law of the Boards of Appeal, 7<sup>th</sup> edition, 2013, IV.E.4.4.7, second paragraph.
- 3.6 The additional features introduced into the claims 1 according to the second, third and fourth auxiliary requests were, as acknowledged by the appellant, extracted from the description. Due to this fact the Board considers, in agreement with all parties, that said auxiliary requests involve subject-matter which necessitates an additional search.
- 3.7 Where an auxiliary request with a reasonable incorporation of dependent claims into the independent claim may have to be expected by an opponent/respondent and may lead to the latter being required to perform such a search if sufficient time is available, the Board finds the present case to be different. The features now taken from the description could hardly be expected by the opponents/respondents and therefore the burden of the additional search would have to fall on the department of first instance, which can only be achieved via remittal of the case. Article 13(3) RPBA speaks against such remittal.
- 3.8 In view of the above negative conclusions regarding admissibility of these late filed requests, the Board

decides, in accordance with Articles 13(1) and 13(3) RPBA, not to admit the second, third and fourth auxiliary requests into the proceedings.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders