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**Datasheet for the decision
of 9 September 2016**

Case Number: T 0415/12 - 3.2.04

Application Number: 08020408.4

Publication Number: 2047779

IPC: A47J31/44, A47J31/60

Language of the proceedings: EN

Title of invention:

Coffee machine

Patent Proprietor:

De'Longhi SpA

Opponents:

Saeco International Group S.P.A.
Caffitaly System S.P.A.

Headword:

Relevant legal provisions:

EPC Art. 56, 76(1), 123(2), 123(3)
RPBA Art. 13(3)

Keyword:

Added subject-matter - main and first to third auxiliary requests (yes)

Added subject-matter - fourth auxiliary request (no)

Inventive step - fourth auxiliary request (yes)

Admissibility of late submission (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0415/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 9 September 2016

Appellant 1:
(Patent Proprietor)

De'Longhi SpA
Via L. Seitz, 47
31100 Treviso (IT)

Representative:

Rapisardi, Mariacristina
Ufficio Brevetti Rapisardi S.r.l.
Via Serbelloni 12
20122 Milano (IT)

Appellant 2:
(Opponent 1)

Saeco International Group S.P.A.
Via Torretta, 240
40041 Gaggio Montana (IT)

Representative:

Mannucci, Michele
Ufficio Tecnico Ing.A. Mannucci S.r.l.
Via della Scala 4
50123 Firenze (IT)

Party as of right:
(Opponent 2)

Caffitaly System S.P.A.
Via Panigali 38
40041 Gaggio Montano (BO) (IT)

Representative:

Ponchiroli, Simone
Ruffini Ponchiroli e Associati S.r.l.
Via Caprera, 6
37126 Verona (IT)

Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 December 2011 concerning maintenance of the
European Patent No. 2047779 in amended form.

Composition of the Board:

Chairman A. de Vries
Members: E. Frank
 T. Bokor

Summary of Facts and Submissions

- I. The appeals lie from the interlocutory decision of the opposition division, dated 21 November 2011 and posted on 16 December 2011, to maintain the European patent No. 2 047 779 in amended form pursuant to Article 101(3)(a) EPC. The appellant proprietor filed a notice of appeal on 13 February 2012, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 16 April 2012. The appellant opponent 1 filed a notice of appeal on 14 February 2012, also paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 16 April 2012.
- II. Two oppositions were filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56, and Article 100(c) in conjunction with Article 76(1) EPC.

The opposition division held that the auxiliary request submitted during the oral proceedings met the requirements of the EPC. In its decision the division considered the following prior art, amongst others:

E1 = WO 01/26520 A2
E2 = US 5,473,972
E3 = US 5,628,239
E4 = US 5,423,245
E5 = EP 1 374 748 A2
E6 = EP 0 919 176 A1
E7 = DE 44 45 436 A1
E8 = WO 03/043472 A1
E9 = EP 0 195 750 A2

- III. A communication pursuant to Article 15(1) RPBA was issued 5 July 2016 after a summons dated

17 February 2016 to attend oral proceedings, which were duly held on 9 September 2016. As announced by letter dated 4 August 2016 no one was present on behalf of the opponent 2.

- IV. The appellant proprietor requests that the decision under appeal be set aside and the patent be upheld as granted (as main request), or alternatively that the decision under appeal be set aside and the patent be maintained in an amended form on the basis of any of the first to third auxiliary requests filed with letter dated 9 August 2016, or as a fourth auxiliary request, the dismissal of the appeal of the opponent 1.

The appellant opponent 1 requests that the decision under appeal be set aside, and the patent be revoked.

The opponent 2, as party as of right and respondent to the appeal of the proprietor, did not make any submissions or file requests.

- V. The wording of claim 1 of the requests reads as follows:

Main request (as granted):

"Coffee machine having a steam or hot water dispenser (5) and a dispenser group for dispensing brewed coffee in a cup positionable in a zone below said dispenser group, and a device for producing a milk-based drink, said device comprising an inlet pathway (4) into which said steam or water dispenser (5) is horizontally introduced and a container (2) for the milk including a cover (26) integrally formed with a collector body (3) that defines an inner recess (300) into which a connection pathway (401) to said dispenser (5), a milk

suction pathway (7) in said container (2) and an air suction pathway (10) open, said discharge nozzle.[sic] (9) being connected to a discharge pathway (8) of said collector body (3), wherein in a working position said discharge nozzle (9) is directed towards said zone below said dispenser group for conveying the milk into said cup to be mixed with said brewed coffee, said container (2) being removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said contained [sic] (2)."

First auxiliary request:

Claim 1 is as in the main request, but omits the wording "in a working position" immediately following "wherein". .

Second auxiliary request:

Claim 1 is as in the main request, but adds at its end the following text:

"... wherein said container (2) is removably associated with said dispenser (5) so as to be able to be separated from it for conservation of the milk present in said container (2) together with said cover (26), said collector body (3) and said discharge nozzle (9)."

Third auxiliary request:

Claim 1 is as in the Second auxiliary request, but omits the wording "in a working position" (see main request above, text underlined by the Board).

Fourth auxiliary request (as upheld):

Claim 1 is as in the main request, but adds at its end the following text:

"...wherein said discharge nozzle (9) is rotatably supported between a rest position adjacent to a side wall (14) of said container (2) and said working position distant from said side wall (14) of said container (2)."

VI. The appellant proprietor argued as follows:

Amendments

The term "working position" in present claim 1 should be construed as labelling the position where milk and coffee are provided from the coffee machine, cf. parent application WO 2005/102126 A2, page 17, lines 3-4, and had no further technical effect. Therefore, the milk discharge nozzle did not need to be rotated from a "rest position" to the working position and, thus, this feature was optional only, see for example claim 28 of the parent as filed. Moreover, the contribution of a "horizontal introduction" of the dispenser 5 into the inlet pathway 4 could be seen in the ease of assembly. As to this, a rotation of the inlet pathway 4 with respect to the dispenser 5 was impossible, based on the tight alignment shown between these two respective parts along a considerable length, see figures of the earlier application. There was also no functional or structural relationship between "horizontally introduced" and other parts visible in the drawings, e.g. the scraping means would also work if insertion was vertical. Therefore, the subject-matter of present claim 1 of the main and auxiliary requests did not infringe Article 76(1) EPC.

Inventive step: fourth auxiliary request

E2 (see figure 7 embodiment: discharge nozzle 7, milk container 25) did not disclose that the discharge nozzle was rotatably supported between a rest position and a working position, adjacent to and distant from, respectively, a side wall of the horizontally connected milk container. E1 (see figure 5 embodiment), on the other hand, suggested a vertical connection of the steam dispenser. The entire construction group would have to be rotated 90 degrees. Apart from that, when the jet/nozzle 25 was rotated 90 degrees into the non-working "rest" position, the jet/nozzle was rather more distant from the side wall of the container. Thus, whether starting from E1 or E2 the skilled person when combining their teachings would not arrive at the subject-matter of claim 1 of the fourth auxiliary request. E3 also taught to introduce the steam dispenser vertically, while the milk foaming devices of E4 to E9, did not relate to coffee machines and thus differed completely from the claimed invention. Therefore claim 1 of the fourth auxiliary request involved an inventive step.

Late filed submission: fourth auxiliary request

The Article 76(1) EPC objection was extremely late. Since the rotation of the discharge nozzle is not linked to how the container is introduced into the machine as was clear from the parent application as filed, the belated submission was prima facie irrelevant. Thus the latter should not be admitted to the proceedings.

VII. The appellant opponent 1 argued as follows:

Amendments

In the parent application as filed, the feature "working position" was indicated as a position of the milk discharge nozzle with respect to the milk container. This working position always referred to a "rest position" of a rotatably supported milk discharge nozzle. Thus, a working position was not disclosed independently from this rest position of the nozzle. Furthermore, based on the direction of insertion indicated by the arrow in figure 4 of the earlier application, there was no unambiguous disclosure how the inlet axis might be inclined prior to being inserted. Moreover, many parts, such as the scraping means shown in the original figures and used to carry out an efficient cleaning scrape, were functionally and structurally related to the feature of horizontal alignment added to claim 1. These parts were missing from claim 1 of the requests on file, which had thus been generalized. For these reasons, the subject-matter of claim 1 of the main and auxiliary requests did not comply with Article 76(1) EPC.

Inventive step: fourth auxiliary request

Starting from E2 (see figure 7), once the skilled person learned from E1 (see figure 5) that the milk spout can be supported by the cover of the milk container, all he needed to do was to remove the milk spout of E2 from the machine, and put it onto the cover of E2's milk container in order to simplify the use of the apparatus. Moreover, starting from E1, the skilled person would try to reduce the complexity of the mechanism, and would consider a horizontal insertion as was suggested by E2 or E3, or by means of horizontal

connection as in E4 to E9. Therefore, claim 1 of the fourth auxiliary request was not inventive in the light of the prior art.

Late filed submission: fourth auxiliary request

In new claim 1 horizontal orientation and movement between positions were now combined, which led to an intermediate generalization of claim 1 of the fourth auxiliary request. Thus, this Article 76 (1) EPC objection should be admitted.

Reasons for the Decision

1. The appeal is admissible.
2. Added subject-matter: main, first to third auxiliary requests
 - 2.1 Vis-a-vis the parent application as filed, which is published as WO 2005/102126 A2, the following "wherein" clause has been added to claim 1 of the main and auxiliary requests:

"..., wherein in a working position said discharge nozzle is directed towards said zone below said dispenser group ...".

In claim 1 of the first and third auxiliary requests the clause has been modified in that the wording "in a working position" has been omitted.
 - 2.2 As to the basis of these amendments, the appellant proprietor argues that the term "working position" boiled down to the matter of mere labelling of the

position where milk and coffee are provided from the coffee machine. In other words, in a working position, a coffee cup must be positioned below the dispenser group of the coffee machine prior to the preparation of the drink. This was readily derivable from page 17, lines 3-4, and lines 10-12 of the published parent application. Thus, the milk discharge nozzle, directed towards the zone below the coffee dispensing group, did not need to be rotated from a rest position to a working position. This feature was optional only, see for example page 7, lines 13-16, or claim 28 of the parent.

- 2.3 However, the Board shares the appellant opponent 1's view that, throughout the parent application as filed, the feature "working position" is indicated as a position of the milk discharge nozzle with respect to the milk container. Moreover, this working position is always mentioned in conjunction with a "rest position" of the rotatably supported milk discharge nozzle. The rest position is in turn also defined in relation to the container.

In particular the working position is not disclosed independently from the rest position of a rotatable discharge nozzle. Rather, based on the original disclosure, the fact of directing the discharge nozzle towards the dispensing zone is consistently described or shown in the published parent application in connection with a rotation from a rest position, cf. page 6, lines 22-25, page 7, lines 1-2, claim 28, and figures 1 and 5. These passages are not so much concerned with the simple fact that there are two different positions, but also specify what the discharge nozzle actually does in those positions and that it is to be rotated between the two. It follows

therefrom that the working position is defined structurally and functionally in relation to the rest position (and vice versa), and that therefore the two cannot be considered in isolation from one another. Finally, it is not evident from the wording, see page 7, lines 13-16 of the parent application, that the rest position might be optional.

- 2.4 In the earlier application, therefore, the term "working position" cannot be simply construed as a general label where the coffee cup is positioned during coffee brewing, but has a clear technical meaning together with the "rest position" of a rotatable discharge nozzle. This technical context, however, is missing from the amended present claim 1.

Thus, the subject-matter of claim 1 of the main and second auxiliary request contravenes Article 76(1) EPC.

- 2.5 Moreover, the feature "directing of said discharge nozzle towards said zone below said dispenser group" of claim 1 is also functionally and structurally, i.e. inextricably, linked with that of the nozzle being rotatably supported so that it can be moved from a "rest position" to a "working position", see above. Thus, the simple deletion of the passage "in a working position", while retaining in the claim the action of directing of the discharge nozzle towards the dispensing zone in the wording of claim 1, in like manner results in a generalization of a specific disclosure of the parent as filed for which there is no basis.

Therefore, the subject-matter of claim 1 of the first and third auxiliary requests also does not comply with the requirements of Article 76(1) EPC.

3. Amendments: fourth auxiliary request

3.1 Claim 1 of the fourth auxiliary request is as in the main request (as granted), but adds at its end the features of claim 28 of the parent application as filed corresponding to claim 3 of the current divisional application as filed. Thus, the technical relationship between a "working position" and "rest position" of a rotatable discharge nozzle originally disclosed, see above, now forms part of the subject-matter of claim 1.

3.2 Moreover, in present claim 1 of the fourth auxiliary request the feature "... an inlet pathway into which said steam or water dispenser is horizontally introduced ..." has been added.

Having regard to this amendment, the appellant opponent 1 concedes that, based on figure 4 (see direction indicated by the arrow) of the earlier application, at the end of insertion of the inlet pathway 4 into the steam or water dispenser 5, an inclination of the inlet axis to the horizontal was, in fact, impossible. However, the appellant opponent 1 argues that there was no unambiguous disclosure in the parent application how the inlet axis might be inclined prior to being inserted.

Furthermore, the argument continues, if the inlet pathway 4 of the milk container device is horizontally aligned with the steam dispenser 5 during insertion, many parts, such as the first scraping means 402 shown in the figures to carry out an efficient cleaning scrape, are then linked to this horizontal alignment: cf. published parent application, page 1, lines 16-18, page 8, lines 4-6, figures 1-3 and 12-16. Thus, since

the horizontally arranged cleaning system on top of the steam nozzle 5 was originally disclosed in the technical context of the horizontal introduction of the inlet pathway 4, but was missing from the amended present claim 1, the teaching of the patent had been generalized as compared with the parent application.

Thus, in any case, the addition of the feature "horizontally introduced" in claim 1 in the present form had no basis in the original disclosure of the parent application.

3.3 The Board concurs with the appellant proprietor that the contribution of a "horizontal introduction" can be seen in the ease of assembly, i.e., to provide a simple operation of connecting two components.

This is based on figures 1 to 3 of the parent application, where the inlet pathway 4 and dispenser 5 are shown in an assembled condition with the milk suction pathway 7 at right angle to them. The milk suction pathway 7 lies on the same axis as the vertical supply channel 23 of the container 2, cf. parent application, figure 7, and page 7, lines 17-20. Consequently, prior to being fixed in its assembled state, the dispenser 5 must have been inserted horizontally. This is irrespective of whether the arrow indicated in figure 4 of the parent application can form a basis for the unambiguous disclosure of a horizontal insertion of the dispenser, or not. As to whether or not before the end of insertion a rotation (tilting) of the inlet pathway 4 with respect to the dispenser 5 could take place, based on the tight alignment shown between these two respective parts along a considerable length (see also the plurality of

toroidal rings as sealing elements), such a rotation does not seem to be suggested, or even possible.

Moreover, the Board also follows the appellant proprietor's view in that there is no close functional or structural relationship between "horizontally introduced" and the other parts visible in the drawings. For example, whether or not the disclosed scraping means would still work is not considered to be inextricably linked to the direction of introduction. As argued by the appellant proprietor, if insertion would be vertical, the various scraping means of, cf. figures 1 to 3 (elastically engaging scraping tooth 413) or figures 6 and 7 (manually controlled leverism 27), would also work.

3.4 To conclude, the Board holds that the addition of the feature "horizontally introduced" in present claim 1 of the fourth auxiliary request does not extend beyond the content of the earlier application as filed and, therefore, complies with the requirements of Article 76 (1) EPC.

3.5 The Board therefore confirms the findings of the decision under appeal as regards the requirements of Article 76(1) EPC. As regards the requirements of Article 123(2) EPC no objections have been raised by the appellant opponent 1, nor does the Board have any compelling reason to deviate from the decision's positive finding in this regard. In particular it appears that the relevant passages are also included in the divisional application as filed so that the above arguments discussed for Article 76(1) EPC also apply in respect of Article 123(2) EPC.

3.6 Finally, as the amendments are by way of further limitations, there is no doubt that the requirements of Article 123(3) EPC are also met.

4. Inventive step: fourth auxiliary request

4.1 Novelty of claim 1 (as upheld) is not in dispute. Having regard to the assessment of inventive step of claim 1, it is common ground that document E2 forms a suitable starting point.

The cappuccino coffee maker of E2, see figure 7 embodiment, discloses a milk container 25 having a container top 29 which is secured to the venturi unit above by means of a latch 23. Thus, the milk container 25 and the venturi unit are detachable as a unit, and so form a cover of the milk container 25, which appears to be integrally formed with the collector body (i.e. the venturi unit) as required by claim 1 as upheld. See E2, column 2, lines 18-20 and lines 55-61.

4.2 The subject-matter of claim 1 differs from E2's disclosure at least in that

- said discharge nozzle is rotatably supported between a rest position adjacent to a side wall of said container and said working position distant from said side wall of said container.

The underlying problem of these distinguishing features can thus be seen as how to simplify the use of the apparatus, cf. patent paragraph 0007.

4.3 Document E1 concerns a coffee machine with an integrated steam delivery device, see E1, abstract and figure 5. It furthermore describes a discharge nozzle

(jet 25) which can be rotatably turned by 90 degrees, thus to open a bore 37 between the steam intake 26 and an internal jet 35. In so doing, steam is directed into the receptacle 5 via the internal jet 35, so that foamed milk can be manually added to each cup of coffee, cf. also E1, page 6, line 31 to page 7, line 10. Thus, as argued by the appellant proprietor, this turned position can hardly be interpreted as a "rest position adjacent to a side wall of the container (receptacle 5)" as opposed to a "working position distant from said side wall".

- 4.4 The appellant opponent 1 argues that, once the skilled person learned from E1 that the milk spout can be supported by the cover of the milk container, rather than be integrated in the machine, all he needed to do was to remove the milk spout of E2 from the machine (cf. E2 figure 7), and put it onto the cover of E2's milk container in order to simplify the use of the apparatus of E2.

However, the Board holds that, even if the transversely turned jet 25 of E1 was considered to form a "rest position" within the meaning of claim 1, starting from E2 the skilled person would not, without exercising inventive skill, somehow adapt E2's milk spout 7, which is fixedly integrated into the housing 2 of E2's cappuccino maker, such that it would be rotatably mounted as in E1. The less so, since E1 teaches a complex function of the rotatable jet 25: it suggests that, when having been turned in its transversal "rest position", a bore 37 of the jet 25 is opened, thus to direct the steam intake of the cappuccino maker into the milk container (receptacle 5) by means of an internal jet 35, see above.

4.5 Moreover, the appellant opponent 1 argues that starting from E1, the skilled person would try to reduce the complexity of the mechanism, whilst maintaining the remaining advantages of the device, and would consider horizontal insertion movements as was suggested by E2 or E3, or by the horizontal connections known from E4 to E9.

In the Boards view, however, starting from E1 and taking into consideration E2's horizontally attached unit shown in figure 7, the skilled person would not deviate from the core concept of E1's vertical steam intake 26, let alone from the advantageously taught rotatable bore to connect the vertical steam intake 26 with an internal jet 35 for the receptacle 5. Finally, it also holds that the remaining documents cited (E3 to E9) would not have led the skilled person to adapt E1 in such a way that he would arrive at a horizontal insertion of E1's steam dispenser (intake pipe 26): the coffee maker of E3 (see figure 4) suggests a vertical introduction of the inlet pipe unit 3 only. The Board considers the milk foaming devices of E4 to E9 to be too technically remote, and thus less relevant when starting from a coffee machine comprising a removably associated milk container.

4.6 Thus, as also advanced by the appellant proprietor, in the light of the manifestly different structural concepts of E1 and E2 (or the other documents cited) the skilled person would not arrive, without hindsight, at the subject-matter of claim 1.

Therefore the subject-matter of claim 1 of the fourth auxiliary request (as upheld) involves an inventive step, Article 56 EPC.

5. Late filed submission: fourth auxiliary request

The appellant opponent 1 belatedly alleges an intermediate generalisation of the feature "horizontally introduced" of claim 1 presently on file, using a new line of argument. However, the Board shares the appellant proprietor's view that, on the face of it, there is no indication in the original disclosure, that the particular manner of rotation of the discharge nozzle in claim 28 might be linked to the horizontal introduction movement.

Thus, without prejudice to the question of whether or not its belated filing is justified at that very late stage during the oral proceedings, the Board holds that this new Article 76(1) EPC objection is prima facie irrelevant as to claim 1 of the fourth auxiliary request. For this reason, it decided to exercise its discretion not to admit the late submission into the proceedings, Article 13(3) RPBA.

6. In conclusion the Board finds that the appellant proprietor's main and first to third auxiliary requests are not allowable. It also finds that the appellant opponent's contentions against the patent as upheld in amended form corresponding to the fourth auxiliary request are without merit. Neither appeal succeeds and the Board thus confirms the decision under appeal.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated