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**Datasheet for the decision
of 26 January 2016**

Case Number: T 1733/13 - 3.2.03

Application Number: 07706011.9

Publication Number: 1991094

IPC: A47G19/22, B67D1/04

Language of the proceedings: EN

Title of invention:

DRINKING VESSEL FILLABLE FROM THE BOTTOM AND APPARATUS FOR
DISPENSING A BEVERAGE THEREIN

Patent Proprietor:

Russell, Charles

Opponents:

Marles, Alan David
Cadman, Timothy Paul

Headword:

Relevant legal provisions:

EPC Art. 54, 54(3), 56, 111(1)

Keyword:

Novelty - (yes)

Inventive step - (yes)

Appeal decision - remittal to the department of first instance
(no)

Decisions cited:

Catchword:



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Case Number: T 1733/13 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 26 January 2016

Appellant: Russell, Charles
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 June 2013
revoking European patent No. 1991094 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Ashley
Members: C. Donnelly
 M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. European patent No 1 991 094 (in the following: "the patent") concerns drinking vessels that can be filled from the bottom.
- II. The patent as a whole was opposed by two opponents (Opponents 1 and 2) on the grounds of Article 100(b) EPC and Article 100(a) EPC, the latter for lack of novelty and inventive step.
- III. The Opposition Division revoked the patent for lack of novelty of the independent claims of both the main request and the auxiliary request before it.
- IV. This decision was appealed by the patent proprietor.
- V. With the summons to oral proceedings, the Board sent a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) informing the parties of its preliminary opinion.
- VI. Oral proceedings before the Board were held on 26 January 2016 without the participation of the duly summoned opponents (Rule 115(2) EPC). Reference is made here to the minutes of the oral proceedings.
- VII. *Requests*

The patent proprietor (the "appellant") requested that the decision under appeal be set aside, and a patent maintained on the basis of the main request corresponding to auxiliary request 1 filed with the statement of grounds.

Respondent 1 (Opponent 1) requested in writing that the appeal be dismissed.

Respondent 2 (Opponent 2) did not make any submissions.

VIII. Cited evidence

In its grounds of appeal, the appellant referred to the following document, which had already been filed in the opposition proceedings and is cited in the decision under appeal:

D4_01: WO 2006/055870 A1

The decision under appeal also refers, among others, to the following prior art documents:

D1_01: GB 2 368 335 A

D5_01: GB 2 137 181 A

D6_01: GB 2 136 882 A

During the opposition proceedings respondent 2 also referred to the following documents when making its case for lack of inventive step:

D1_02: GB 2137181;

D2_02: US 3563413A;

D3_02: US 3094250A;

D4_02: US 3246807;

D5_02: US 3705668;

D6_02: US 2107309;

D7_02: ES 2326609;

D8_02: FR 2657846;

D9_02: US 5312019;

D10_02: US 6209737 B1;

D11_02: DE 3814937;

D12_02: WO 2005058745.

IX. Independent claims 1 and 2 of the main request read as follows:

"1. A method for dispensing a carbonated beverage, comprising the steps of:

providing a drinking vessel (1) having a sealable aperture (5) in or adjacent a base (2) thereof, and a non-return valve (7) is disposed in said aperture (5), wherein the non-return valve (7) allows a carbonated beverage to be dispensed into the vessel (1) through the aperture (5) but prevents the carbonated beverage from escaping from the vessel (1) through the aperture (5);

engaging the non-return valve (7) in or adjacent the base (2) of the drinking vessel (1) with an outlet portion (11) of an apparatus for dispensing a carbonated beverage, the apparatus comprising:

an inlet portion (9) connectable to a pressurized carbonated beverage supply (10);

at least one outlet portion (11) arranged to dispense the carbonated beverage; and

conduit means (12) provided between said inlet portion (9) and said outlet portion (11) to provide a fluid path for said carbonated beverage therebetween; and

operating the apparatus to allow the carbonated beverage to pass from the inlet portion (9) to the outlet portion (11) under pressure through said conduit means (12) to dispense the carbonated beverage into the vessel (1) through the non-return valve (7) in the sealable aperture (5) in or adjacent the base (2) in a substantially upward direction,

wherein engaging the aperture (5) with the outlet portion (11) of the apparatus comprises inserting a

nozzle (14) through the non-return valve (7) of the aperture (5)."

"2. Apparatus for dispensing a carbonated beverage, and a drinking vessel (1) for the carbonated beverage, the drinking vessel (1) comprising a base (2) and at least one wall (3) extending therefrom which together define a chamber (4) for receiving the carbonated beverage, a sealable aperture (5) in or adjacent the base (2) and a non-return valve (7) is disposed in said aperture (5), wherein the valve (7) allows a carbonated beverage to be dispensed into the vessel (1) through the aperture (5) but prevents the carbonated beverage from escaping from the vessel (1) through the aperture (5); the apparatus comprising:

an inlet portion (9) connectable to a pressurized carbonated beverage supply (10);

at least one outlet portion (11) arranged to dispense the carbonated beverage; and

conduit means (12) provided between said inlet portion (9) and said outlet portion (11) to provide a fluid path for said carbonated beverage therebetween;

wherein the or each outlet portion (11) is engageable with the non-return valve (7) in the sealable aperture (5) provided in or adjacent the base (2) of the drinking vessel (1) to dispense the carbonated beverage into the vessel (1) through the non-return valve (7) in the sealable aperture (5) and the apparatus is operable to allow the carbonated beverage to pass from the inlet portion (9) to the outlet portion (11) under pressure through said conduit means (12) such that the carbonated beverage is dispensed at said outlet portion (11) into the vessel (1) through the non-return valve (7) in the sealable aperture (5) in or adjacent the base (2) in a substantially upward direction,

wherein the outlet portion of the dispensing apparatus comprises a nozzle (14) which is insertable through the non-return valve (7) of the aperture (5)."

- X. The arguments of the appellant in the written and oral proceedings, insofar as relevant for the present decision, can be summarised as follows:

Novelty

In all of the embodiments described in D4_01, at no stage does the charging assembly 600 or nipple 610 move into and penetrate the membrane 548b. Therefore, D4_01 does not disclose the feature wherein the outlet portion of the dispensing apparatus comprises a nozzle which is insertable **through** the non-return valve of the aperture

D1_01 fails to disclose the feature of a sealable aperture since in a state in which a needle is not inserted, the membrane does not contain any aperture.

D6_01 does not disclose the features of "an inlet portion connectable to a pressurized beverage supply" and "conduit means provided by said inlet portion and said outlet portion to provide a fluid path for said beverage therebetween". Consequently, D6_01 also does not disclose the method of "operating the apparatus to allow the beverage to pass from the inlet portion to the outlet portion under pressure through said conduit means" (see contested decision paragraph 3.3). Similarly, D5_01 also fails to disclose these features.

Thus, the subject-matter of the independent claims 1 and 2 is novel.

Inventive step

Claims 1 and 2 also meet the requirements of Article 56 EPC since the skilled person would not consider combining the prior art documents in the manner suggested by the respondent-opponents during the opposition procedure without the benefit of hindsight.

- XI. Respondent 1's submissions during the appeal proceedings were limited to stating that "the patentee's main and auxiliary requests are not allowable based on the prior art and arguments set out in the original opposition process".

Respondent 2 made no submissions during the appeal proceedings.

Reasons for the Decision

1. *Relevant provisions of the EPC*

The patent was granted on an application that was pending at the time of the entry into force of the EPC 2000 on 13 December 2007. Where Articles or Rules of the earlier version of the EPC apply in accordance with the relevant transitional provisions (Article 7, paragraph 1, second sentence of the Revision Act and Article 1 of AC Decision of 28 June 2001), their citations are followed by "1973".

2. *Article 123(2) EPC*

The basis for the introduction of the term "through" into claims 1 and 2 in relationship to the nozzle and non-return valve aperture can be found at page 5, lines 4 to 10 and figures 3 and 4 of the original application as published. Therefore, the requirements of Article 123(2) EPC are met. The respondent-opponents raised no objections in this respect.

3. *Novelty*

- 3.1 Article 54 (3) EPC D4_01 was filed as an international application under the PCT on 21 November 2005, i. e. before the priority date of the contested patent (6 March 2006); it was published in English on 26 May 2006, i. e. after the priority date of the contested patent and before its filing date (28 February 2007). All of the (then) EPC contracting states were designated in the international application (30 states) and, upon entry in the European phase, the designation fees were paid for all these designated EPC contracting states (on 21 June 2007).

Therefore, the disclosure of D4_01 constitutes prior art to be considered for assessing novelty under Article 54(3) EPC, Article 54(4) EPC 1973 and Article 158(1) and (2) EPC 1973, which provisions apply to the patent (see OJ EPO 2007, Special Edition no. 1, 197, Article 1, paragraph 1). This was not disputed by the parties.

As pointed out by the opposition division in its decision (see section 4.1), paragraph [0114] of D4_01 states that "the filling nipple may press into the membrane 548b which in turn causes membrane 548b to separate from the annular wall 546b valve insert".

Therefore, although it might be accepted that the nozzle directly engages and opens the non-return valve by entering into it, it does not pass *through* the non-return valve, as now required by the claims of the main request, since it does not emerge on the other side.

3.2 *Novelty, further documents cited in the decision*

As concluded by the opposition division in its decision (see paragraph 3.1), D1_01 fails to disclose the feature of a sealable aperture since, in a state in which a needle is not inserted, the membrane does not contain any aperture. D1_01 also fails to disclose a one-way valve disposed in the aperture through which a nozzle is insertable.

D6_01 and D5_01 do not disclose the features of "an inlet portion connectable to a pressurized beverage supply" and "conduit means provided by said inlet portion and said outlet portion to provide a fluid path for said beverage therebetween" and the corresponding method step of "operating the apparatus to allow the beverage to pass from the inlet portion to the outlet portion under pressure through said conduit means" (see also contested decision paragraph 3.3).

Thus, the subject-matter of the independent claims 1 and 2 is novel and meets the requirements of Article 54 EPC.

4. *Inventive step, Article 56 EPC*

The question of inventive step was not addressed by the opposition division, since it revoked the patent for lack of novelty.

The board has decided to examine this matter under Article 111(1) EPC, which allows it to exercise any power within the competence of the opposition division and also to take into account submissions made during the opposition proceedings. This was made clear to the parties in the communication sent prior to the oral proceedings and no party objected.

It is true that the respondent-opponents made no submissions with regard to this issue during the appeal proceedings and that they did not appear at the oral proceedings. However, pursuant to Rule 115 EPC and Article 15 RPBA, the proceedings may continue without the party who decides not to appear and the board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may be then treated as relying only on its written case.

However, in such a situation where the oppositions are maintained, the board may consider the existing objections as raised during the opposition procedure.

During the opposition proceedings the respondents made the following case for lack of inventive step.

Respondent-opponent 1 argued in its notice of opposition with regard to inventive step that: "In addition, the skilled person would have considered it obvious to use D5_01 or D6_01 in order to modify the filling system of D1_01 by incorporating a one-way valve in the base of the glass of D1_01 and using a filling nozzle instead of the hypodermic needle nozzle of D1-01".

Respondent-opponent 2 essentially argued that documents D1_02 to D5_02 illustrate the widespread use of bottom-

filling mechanisms for open-topped non-drinking vessels. Documents D6_02 to D11_02 disclose the bottom-filling of a drinking vessel wherein the only feature of the method and apparatus of the patent not disclosed is the use of a beverage supply nozzle that is inserted into the base of the drinking vessel in order to fill it.

In particular, respondent-opponent 2 was of the view that taking D1_02 (corresponding to D5_01) as the closest prior art in combination with any of D6_02 to D11_02, but in particular with D11_02, the subject-matter of claims 1 and 2 as granted lacked an inventive step.

The board considers that D1_01 constitutes the most relevant prior art, since this document (in particular figures 4 and 5) concerns an apparatus and method for the bottom-filling of a drinking vessel with a carbonated beverage (see page 3, lines 1 to 3).

However, the board does not accept that the skilled person would have been incited by the teachings of D5_01 or D6_01 to modify the filling system of D1_01 by incorporating a one-way valve in the base of the glass and using a filling nozzle instead of the hypodermic needle nozzle of D5_01.

The idea behind the embodiments shown in figures 4 and 5 of D1_01 is to encourage the formation of bubbles within the liquid to promote the creation of a head on the beverage (see D1_01, page 1, lines 27 to 27 and page 3, lines 12 to 13) by causing a partial vacuum above the liquid when the lid 14 is pulled up (see page 6, lines 2 to 4). Whereas, in the device and method of the patent, the idea is to promote speed of beverage dispensing

whilst limiting the amount of head produced in order to reduce settling time (see patent, paragraph [0005]).

D5_01 and D6_01 deal with the filling of containers with pasty substances such as hair dyes (see D5_01, page 1, lines 3 to 11 and D6_01, page 1, lines 6 to 17), neither of these documents concerns the introduction of a beverage into a drinking vessel nor deals with the problems associated with introducing a similar liquid into a container. Thus, the skilled person confronted with the problem of reducing the amount of head produced during the introduction of a beverage into a drinking vessel would not even think of taking these documents into consideration.

The device shown in figures 4 and 5 of D1_01 is intended to produce a fundamentally different effect from that of the contested patent, and the board is of the opinion that the skilled person would only consider modifying it by incorporating a one-way valve in the base of the glass and using a filling nozzle instead of the hypodermic needle nozzle with the benefit of hindsight.

The board does not accept respondent-opponent 2's suggestion that the skilled person would see D1_02 as the closest prior art since it does not concern a drinking vessel and does not even deal with the problems associated with handling similar liquids. Similar considerations apply to documents D2_02 to D5_02, which also do not concern drinking vessels but rather liquid dispensing apparatus. Further, D11_02 does not deal with the dispensing of a carbonated beverage, but rather with the one-off filling of a wine-glass which is then sealed such that it can be sold to customers who do not wish to purchase a full bottle. Thus, in the board's view the skilled person would not consider combining the

teachings of D1_02 and D11_02, since they concern such disparate devices.

In conclusion, the subject-matter of claims 1 and 2 involves an inventive step and meets the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the following documents:
 - claims 1 to 12 of the main request, formerly auxiliary request 1 filed with the statement of grounds (16 October 2013)
 - the amended description pages 2 to 4 as filed during the oral proceedings
 - figures 1 to 5 of the granted specification.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated