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**Datasheet for the decision
of 29 October 2014**

Case Number: T 2418/13 - 3.2.07

Application Number: 00936554.5

Publication Number: 1210288

IPC: B65D1/12, B67D1/00, B65D8/00,
B65D85/72

Language of the proceedings: EN

Title of invention:
BEER CONTAINER

Applicant:
Ecokeg Pty Ltd

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - added subject-matter (no)

Decisions cited:
G 0002/10, T 0383/88

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 2418/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 29 October 2014

Appellant: Ecokeg Pty Ltd
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 29 May 2013
refusing European patent application No.
00936554.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: G. Patton
C. Brandt

Summary of Facts and Submissions

- I. The applicant (appellant) lodged an appeal against the decision of the Examining Division to refuse the European patent application No. 00 936 554.5.
- II. According to the impugned decision:
- the claims 1 of the then main request and auxiliary requests 1, 3 and 4 contain subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC) (point 2.1); and
 - claim 1 of the then auxiliary request 2 lacks clarity (Article 84 EPC) (point 2.2).

In "additional comments" (point 3), i.e. an "*Obiter Dictum*" not belonging to the decision as such, inventive step of the subject-matter of the claims 1 of each of these requests is denied on the basis of D1(=WO-A-91/12196) and the application of the common general knowledge by the skilled person. These latter objections were not discussed during the oral proceedings before the Examining Division as it is clear from the minutes.

- III. The appellant requests that the decision be set aside and the case be remitted to the department of first instance for further prosecution on the basis of the request filed with the statement of grounds of appeal.

The main request and auxiliary requests 1 to 4 underlying the impugned decision are no longer pursued.

- IV. Claim 1 of the now valid request reads as follows (in bold the amendments with respect to claim 1 of the application as originally filed; emphasis added by the Board):

"A beer container comprising:
an inner hollow shell **(11)** of blow moulded PET to hold beer;
an outer hollow shell **(12)** of moulded high density polyethylene enclosing and supporting the inner shell **(11)**; and
a spear structure **(13)** including a dispenser tube **(14)** extending from a bottom interior region of the inner shell **(11)** through to a dispensing outlet **(16)** at the top of the outer shell **(12)**, **a valve (25) for supply of pressurising CO₂ gas into the interior of the inner shell and a beer dispenser valve (26) at the dispensing outlet (16).**"

V. The submissions of the appellant are essentially as follows:

When examining added subject-matter, it should also be taken into consideration what the skilled person would derive as being implicitly disclosed in the application as originally filed, taken as a whole.

The impugned decision lacks justification with respect to its objection of an inadmissible intermediate generalisation. The material of the valves is not functionally nor structurally linked to the rest of the features of claim 1 of the request so that it can be isolated from the originally disclosed combination of features. Further, the omission of the valves being formed of PET satisfies the essentiality test for the deletion of a feature.

The type of material for the spear structure is not relevant to the invention as disclosed in the application as filed, the same being necessarily true

for the valves to be incorporated in the spear structure.

Reasons for the Decision

1. *Lack of clarity* (Article 84 EPC)

According to the impugned decision, claim 1 of the then auxiliary request 2, point 2.2, was regarded as lacking clarity in view of the expression "...wherein the inner hollow shell (11), outer hollow shell (12) and spear structure (13) are fully recyclable".

Since the claims of the present request do not comprise this expression, the lack of clarity objection need not be further discussed in the present decision.

2. *Added subject-matter* (Article 123(2) EPC)

2.1 According to the impugned decision, the subject-matter of the claims 1 of the then main request and auxiliary requests 1, 3 and 4 did not comply with the requirements of Article 123(2) EPC for the reason that all requests comprise the feature:

"...a spear structure (13)...including...a valve (25) for supply of pressurising gas into the interior of the inner shell and a beer dispenser valve (26) at the dispensing outlet (16)".

However, said feature has been disclosed in the application as originally filed **in combination** with the following feature (page 2, lines 18-21 and claim 3 of the application as originally filed):

"...both valves being formed of PET."

The examining division considered that the omission of this latter feature from said claims 1 resulted in that the valves in said claims 1 may be of any material, although the application as originally filed does not provide any explicit indication to use materials for the valves different from PET. According to the disclosure of the application as originally filed, if the valves are present, they are formed of PET. The features have thus been isolated from an originally disclosed combination of features.

2.2 The Board notes that claim 1 of the present request has been amended with respect to the claims 1 of all requests underlying the impugned decision (see statement of grounds of appeal, point 3.1). However, these amendments concern other parts of the claim and as such would not be able to overcome the objection of added subject-matter since claim 1 still does not comprise the above mentioned omitted feature that both valves are formed of PET.

2.3 According to the established jurisprudence, amendments are permitted within the limits of what the skilled person would derive directly and unambiguously, using common general knowledge from the application as originally filed (Case Law of the Boards of Appeal, 7th Edition, 2013, II.E.1). The skilled person may not be presented with new technical information (G 2/10, OJ EPO 2012, 376, point 4.5 of the reasons).

It further must be taken into account, as indicated in T 383/88 (not published in OJ EPO, point 2.2.2 of the reasons), that the slightest doubt as to the derivability of the amendment from the application as originally filed would rule out the amendment.

2.4 The Board considers that the following combinations of features are **explicitly** disclosed in the application as originally filed:

- a) - a beer container comprising a spear structure, without mention of material for the latter and without mention of valves (claim 1);
- b) - a beer container comprising a spear structure in PET, without mention of valves (claim 2);
- c) - a beer container comprising a spear structure, without mention of material for the latter, with both valves in PET incorporated (page 2, lines 18-21); and
- d) - a beer container comprising a spear structure in PET, with both valves in PET incorporated (embodiment, page 3, line 19 to page 6, line 31; claims 2 and 3).

Therefore, as correctly put forward in the impugned decision, there is indeed **no explicit disclosure** that the valves, if incorporated in the spear structure, can be of any type of material.

However, the question remains to be answered whether this disclosure can be regarded as **implicit** from the application as originally filed taken as a whole, such that the skilled person would directly and unambiguously come to the conclusion that the valves can be of any type of material.

2.5 According to the general disclosure of the application as originally filed and the general wording of claim 1 in this respect, the spear structure is not fixed to the inner hollow shell. This is only a preferred embodiment as illustrated by dependent claim 4.

From this, the skilled person will derive that in view of the mentioned problem to be solved of having the beer keg "fully recyclable" (page 1, line 27 to page 2, line 2; page 6, lines 32-37), i.e. including the spear structure, it is not necessary to have the spear structure of the same material as the inner hollow shell, i.e. in PET, since it is detachable. This is also illustrated by the fact that a PET spear structure is only claimed in dependent claim 2.

It would appear therefore contradictory to the skilled person that the valves, which are to be incorporated in the spear structure according to the wording of dependent claim 3, would need to be in PET for solving the said problem. He would rather derive that the valves could be in any type of material, like the spear structure, according to the broadest disclosure of the application as originally filed (claim 1).

Therefore, the Board considers that having the valves in any type of material, if incorporated in the spear structure of the beer container of claim 1, is directly and unambiguously derivable by the skilled person, using normal deduction skills, from the application as filed. Indeed, this does not appear to be a new technical information.

Further, as put forward by the appellant, the material of the valves is not functionally nor structurally linked to the rest of the features of claim 1 of the request.

- 2.6 The other amendments in claim 1 concern the fact that the pressurising gas is CO₂ and is supplied to the interior of the inner shell, which is derivable from page 6, lines 1 to 7, and the spear structure further

comprises a beer dispenser at the dispensing outlet, which is derivable from the same passage, both of the application as originally filed (see also page 2, lines 18-21 and claim 3).

- 2.7 Therefore, the requirements of Article 123(2) EPC are fulfilled.

3. In view of the appellant's request for remittal and of the lack of discussion on inventive step of the claimed subject-matter during the oral proceedings before the Examining Division as well as in the actual reasons for the impugned decision, the Board considers it appropriate to remit the case to the department of first instance for further prosecution on the basis of the request filed with the statement of grounds of appeal (Articles 111(1), (2) EPC).

4. In view of the fact that the filing of the present application took place in 2000 and the decision to refuse the application exclusively on Article 123(2) EPC was taken as late as 2013, it is suggested to continue with the further prosecution without further delay.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of the request filed with the statement of grounds of appeal.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated