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**Datasheet for the decision
of 24 May 2019**

Case Number: T 0221/16 - 3.2.04

Application Number: 03814626.2

Publication Number: 1575413

IPC: A47L15/00, A47L15/44, D06F39/02

Language of the proceedings: EN

Title of invention:
DISPENSER HAVING MULTIPLE MODES OF OPERATION

Patent Proprietor:
ECOLAB INC.

Opponent:
Reckitt Benckiser (Brands) Limited

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 12(4)

Keyword:

Inventive step - (yes)

Late-filed evidence - admitted (no)

Grounds for opposition - fresh ground for opposition -
admitted (no)

Decisions cited:

G 0007/95

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0221/16 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 24 May 2019

Appellant: Reckitt Benckiser (Brands) Limited
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 18 November
2015 rejecting the opposition filed against
European patent No. 1575413 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman G. Martin Gonzalez
Members: C. Kujat
 W. Van der Eijk

Summary of Facts and Submissions

I. The Appellant-Opponent lodged an appeal, received on 28 January 2016, against the decision of the Opposition Division of the European Patent Office posted on 18 November 2015 rejecting the opposition filed against European patent No. 1575413 pursuant to Article 101(2) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 22 March 2016.

II. Opposition was filed under Article 100(a) EPC on the ground of lack of inventive step.

The Opposition Division rejected the opposition having regard inter alia to the following evidence:

(D1) US 4,756,321

(D2) US 5,500,050

(D3) US 5,975,352

III. The Appellant-Opponent filed the following further evidence during appeal proceedings:

(D4) US 5,086,806

IV. The Appellant-Opponent requests that the decision under appeal be set aside and that the European patent No. 1575413 be revoked.

The Respondent-Proprietor requests that the appeal be dismissed, and that the new ground of opposition of lack of novelty and late filed document D4 not be admitted.

V. Oral proceedings were held on 24 May 2019.

VI. The granted independent claims read as follows:

1. "A dispenser for dispensing an ingredient for a machine (10), comprising:

an ingredient feed mechanism (12) operatively coupled to dispense said ingredient to said machine (10) and adapted to receive said ingredient; and a controller (16) capable of controlling an amount of said ingredient delivered to said machine (10) by varying an amount of time said ingredient feed mechanism (12) is active; said controller (16) further having a demand mode adapted to vary said amount of time said ingredient feed mechanism (12) is active as a function of a parameter obtained from said machine (10);

said controller (16) further being adapted to compare said amount of time said ingredient feed mechanism is active with a reference value; characterised by

said controller (16) further being adapted to switch to a timed mode (26) if said amount of time deviates from said reference value beyond a first predetermined deviation and which delivers said ingredient as a function of time."

12. "A method of dispensing ingredient for a machine (10), said machine (10) having an ingredient feed mechanism (12) operatively coupled to dispense said ingredient to said machine (10) and adapted to receive said ingredient; and a controller (16) capable of controlling an amount of said ingredient delivered to said machine (10) by varying an amount of time said ingredient feed mechanism (12) is active, comprising the steps of:

varying, in a demand mode (24), said amount of time said ingredient feed mechanism (12) is active as a function of a concentration of said ingredient in said machine (10); comparing said amount of time said ingredient feed mechanism (12) is active with a reference value; characterised by switching to a timed mode (26) in which said ingredient is delivered as a function of time if said amount of time deviates from said reference value beyond a first predetermined deviation."

VII. The Appellant-Opponent argued as follows:

New document D4 is highly relevant and justified as a response to the arguments of the Opposition Division in the written decision. Therefore, it should be admitted. Also, having regard to D1, D2 and common general knowledge, the subject-matter of claims 1 and 12 lacks an inventive step.

VIII. The Respondent-Proprietor argued as follows

New document D4 should not be admitted as not being more relevant than the documents on file. The Respondent-Proprietor does not agree to the admission of the new ground of novelty, that was not raised in first instance. The subject-matter of claims 1 and 12 involves an inventive step in the light of the cited prior art.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention relates to dispensers of the kind that deliver a quantity of ingredient to a machine, such as a warewashing machine, in response to a parameter of the machine, such as the concentration of the ingredient (e.g. detergent or bleach) in the working liquid, see specification paragraph [0001]. To that end, a controller controls an amount of the ingredient delivered by varying an amount of time an ingredient feed mechanism is active, as a function of the machine parameter (demand mode). The controller of the contested patent also compares the actual amount of dispensing time with a reference value. If the amount of time deviates from the reference value beyond a first predetermined deviation, indicative of malfunction, the controller switches to a timed mode of operation. In the timed mode the feed mechanism is activated according to a preset time schedule instead of allowing the automatic feedback process, see paragraph [0042]. Machine breakdown and other negative consequences due to malfunction of the delivery system, such as too much detergent dispensing, can be so prevented, see paragraphs [0009]-[0011].

3. Novelty

The ground of novelty was not substantiated during opposition and the Respondent-Proprietor has expressly not agreed to its introduction during the present

appeal proceedings. Therefore, as indicated by the Board in its written communication, section 3, in application of **G7/95** (OJ 1996, 626) the Board has no authority to examine it, see Case Law of the Boards of Appeal, 8th edition 2016 (CLBA), IV.D.3.4.1.

4. Document D4 - Admissibility

Insofar as the Appellant-Opponent cites new evidence D4 in relation to inventive step, the admission of such new evidence is at the discretion of the Board, Article 12(4) RPBA. With regard to this issue, during the oral proceedings, the Appellant-Opponent only referred to their written submissions.

As previously noted by the Board in its written communication, the Board was inclined not to admit new evidence D4 for the following reasons.

The main question to answer in respect of admissibility of the new document is whether such new evidence could and should have been submitted already in first instance and whether it is prima-facie highly relevant, see CLBA, IV.C.1.3.7. No clear justification appears to exist for its late filing. Document D4 does also not appear to be more relevant than the documents already on file. D4 describes a dispenser that shuts-off delivery valve 12 in case malfunctioning is detected (see abstract). A back-up shut-off circuit element is provided as a security measure to guarantee that valve 12 is shut-off and dispensing is stopped, see column 9, lines 19-29. Identifying malfunction of the dispenser and stopping dispensing is already known from e.g. D2 (see column 9, lines 58-61). Document D4 does not appear to teach the relevant feature of switching

between different modes of ingredient delivery when malfunction is identified.

Absent any further submissions from the Appellant-Opponent the Board sees no reason to change its point of view. It thus decides to exercise its discretion under Article 12(4) RPBA not to admit late filed document D4 into the proceedings.

5. Inventive step

5.1 The Appellant-Opponent disputes the decision's finding that the subject-matter of both independent claims 1 and 12 involves an inventive step, see written decision, page 3, point 2. It is undisputed that either document D1 or D2 can be regarded as starting point for the inventive step assessment. It is also not under dispute that both documents disclose a detergent dispenser using a demand mode in the sense of the contested patent, i.e. using the feedback of a measured detergent concentration in the wash water of the dishwasher for controlling the amount of detergent delivered, and that the known systems can also identify malfunction of the dispenser. Indeed, D1 discloses that if the detergent pump has been continuously enabled for five minutes it is assumed that something is wrong and an Overfeed Flag is set, see D1, column 18, lines 30-34. It is also described in column 20, lines 12-25, under section DECISIONS of D1, that if the Overfeed Flag is set (box 312 in figure 14A), the detergent pump is turned off (box 304 of figure 14A). D2 discloses that if the Set Point has not been achieved in a reasonable number of detergent feed cycles, a low detergent flag is set which causes all detergent feed processes to be disabled and a sonic alarm and a LED to be turned on (see D2, column 14, lines 13-29).

- 5.2 The Opposition Division held, and the Board agrees, that both the claimed dispenser and the claimed method differ from D1 and D2 in the characterising portion of the claims, that requires a controller adapted to switch to a timed mode which delivers said ingredient as a function of time if the above malfunction of the dispenser is identified.
- 5.3 The Appellant-Opponent argues, to the contrary, that D1 also anticipates the features of the characterising portion of both claim 1 and 12. According to their argument, first submitted in their last letter of 22 March 2019 and further clarified during the oral proceedings, the claimed feature of delivery according to a timed mode must be read in a very broad sense. In this respect, they add, the claims only generally require delivery "as a function of time". The Appellant-Opponent conceded during the oral proceedings that, in D1, after the alarm is triggered, detergent delivery is stopped. However, the stop-process in D1 is not instantaneous but needs a certain amount of time between the moment when the alarm or Overfeed Flag is triggered and actual detergent delivery stop. Consequently detergent is continued to be delivered until a certain time has lapsed, what would anticipate the claimed timed mode delivery.

The Board is however not convinced by the argument of the Appellant-Opponent. As stated in several decisions of the Boards, the person skilled in the art when reading a technical claim does so contextually and interprets terminology according to its usual meaning, see CLBA II.A.6.3.3. In the present case, the independent claims call for actual delivery of the ingredient: claim 1 "...which delivers said

ingredient..." or claim 12 "...in which said ingredient is delivered..." (in a different delivery control mode). The skilled person would thus exclude processes for stopping such delivery from the usual meaning of these words, irrespective of whether the stopping is instantaneous or implies a certain time delay. This interpretation also fully corresponds with the embodiments of the description, which describe timed modes in detail as requiring activating the feed mechanism a length of time previously stored in the controller memory, which activation time length in turn corresponds to full detergent quantity delivery, see paragraphs [0042] and [0053] of the patent specification.

5.4 In sum, the Board holds that neither document D1, D2 discloses switching to a time-based ingredient delivery mode as a back-up for the demand mode upon identification of malfunction in the latter mode. The associated technical problem can thus be formulated as how to handle malfunction of the dispensing system and prevent breakdowns.

5.5 The Appellant-Opponent does not challenge the Division's argument (see impugned decision section 2.3) that a combination with D3 would not result in the claimed subject-matter in an obvious manner.

The Appellant-Opponent argues that switching to a different mode of operation, and continuing delivery in a time mode, is an immediately apparent and straightforward possibility, available to the skilled person from his common general knowledge, that he would then select in order to prevent breakdowns when confronted with handling the malfunction of the system of D1 or D2, as a matter of obviousness.

However, in the Board's view, to continue to operate a malfunctioning system in a different mode is not a straightforward and immediate possibility for the skilled person. A malfunctioning system seems rather to call for stopping the system and/or setting an alarm signal to seek repair. Moreover, as put forward by the Respondent-Proprietor, and the Board agrees, timed delivery modes may be known to the skilled person, but the existence of different dispensing modes in separate devices does not mean that a combination of the two modes in the same device is obvious for the skilled person. The Board thus holds that the skilled person, when confronted with the task to handle the malfunctions of the known dispensing system and prevent breakdowns, does not receive from common general knowledge any clear teaching to continue to deliver detergent, much less that this should specifically involve switching to a timed mode.

- 5.6 The Board thus concludes that the subject-matter of granted claims 1 and 12 is not suggested by D1 and D2, in combination with the common general knowledge of the skilled person in an obvious manner, and thus confirms the conclusions of the Opposition Division that the granted independent claims involve an inventive step in the sense of Article 56 EPC.
6. As all the objections raised by the Appellant-Opponent fail, the Board confirms the decision of the Opposition Division.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



G. Magouliotis

G. Martin Gonzalez

Decision electronically authenticated