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**Datasheet for the decision
of 4 February 2020**

Case Number: T 0243/16 - 3.2.07

Application Number: 09398009.2

Publication Number: 2301860

IPC: B65D77/04

Language of the proceedings: EN

Title of invention:
Pallet container for liquids

Patent Proprietor:
Greif International Holding B.V.

Opponent:
Mauser-Werke GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(a), 54(1), 56, 113(1)
RPBA Art. 15(1), 12(4)
RPBA 2020 Art. 12(8)

Keyword:

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

T 0198/84, T 0279/89

Catchword:



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Case Number: T 0243/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 4 February 2020

Appellant: Greif International Holding B.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 1 December 2015
revoking European patent No. 2301860 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Beckman
K. Poalas

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division revoking European patent No. 2 301 860.

- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division held that the subject-matter of claim 1 of the main request (patent as granted) was not novel in view of the disclosure of D1 (EP 1 289 852 B1) and that the subject-matter of claim 1 of the auxiliary request did not involve an inventive step starting from D1 as closest prior art taken in combination with the common general technical knowledge of the person skilled in the art.

- III. The patent proprietor requested

that the decision under appeal be set aside and that the patent be maintained as granted (main request),
or, in the alternative,
that the patent be maintained in amended form on the basis of the set of claims according to the auxiliary request decided upon in the decision under appeal.

The patent proprietor also subsidiarily requested appointment of oral proceedings.

IV. The opponent (respondent) requested

that the appeal be dismissed.

The opponent further requested the remittal of the case to the opposition division if document FEA 1608801/DC2 was admitted into the proceedings.

As far as the opponent originally requested appointment of oral proceedings, this request was later withdrawn.

V. The following documents of the opposition proceedings are referred to in the present decision:

D1: EP 1 289 852 B1, and
D2: EP 0 734 967 B1.

VI. Claim 1 of the main request (patent as granted) reads as follows:

"A pallet contrar (11) for storage and transportation of liquids, comprising an inner liquid container (12), a cage (13) that encloses the inner container (12) and a pallet (14) with said cage (13) mounted thereto, the cage (13) comprising a plurality of vertical (19) and horizontal (21) tubular bars connected together by welded joints formed at respective intersections (20) between the bars, at least some of said bars comprising indents (22), wherein two indents (22) are formed between two successive intersections (20) so that two indents (22) are formed for each bar intersection (20), on the same bar (19) and on opposite sides of the intersection (20), **characterized in that** said indents (22) are formed, at a distance (a) from the intersections (20) that is substantially equal to or longer than the width (b) of the bars (19, 21), and in

that the indents (20) are only formed on the side (24) of the bars in which the welded joints are formed."

In view of the outcome of the present decision there is no need to give the wording of the independent claim of the auxiliary request.

VII. In order to prepare the oral proceedings scheduled upon both parties' requests, the Board informed the parties of its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2007 dated 8 November 2019. It considered therein *inter alia* that the grounds for opposition pursuant to Article 100(a) EPC seem not to hold against the patent as granted, and that it is not intend to admit FEA 1608801/DC2 into the appeal proceedings. The corresponding parts of said communication read as follows:

"5. *Main request - Novelty*

The patent proprietor argues that, contrary to the finding in the impugned decision, the subject-matter of claim 1 as granted is novel over the disclosure of D1, since D1 does not disclose the characterizing features of claim 1 as granted, i.e. the following features of claim 1 as granted (see feature analysis in patent proprietor's letter dated 28 September 2017):

A. *said indents are formed, at a distance from the intersections that is substantially equal to or longer than the width of the bars, and*

B. *the indents are only formed on the side of the bars in which the welded joints are formed.*

5.1 Feature B: Indents only formed on the side of the bars in which the welded joints are formed

The patent proprietor puts forward that the wording "on the same or/and on the opposite side of the profile" in column 3, lines 3-9, and in column 5, lines 7-17, of D1 merely discloses that the indents are provided on one side of the bar (on the same profile side) and/or on the opposite sides of the bar. There is no disclosure in D1 that said side of the bar is the side on which the welded joints are formed. Indeed, there is no figure of D1 showing the indents only on the side on which the welded joints are formed.

The Board cannot preliminary share this view for the reasons given in the impugned decision, point 3.3.1. Document D1 seems to disclose in column 3, lines 3-9, and in column 5, lines 7-17, that the indents are only formed on the side of the bars in which the welded joints are formed. The wording "on the same or/and on the opposite side of the profile" seems to refer directly to the "welding joints" which are also mentioned in these text passages of D1. Furthermore, the disclosure in column 3, lines 3-9, and in column 5, lines 7-17 of D1 seems to relate to the general part of the disclosure of D1 and, thus, to any embodiment shown in the figures.

Hence, feature B of claim 1 as granted seems to be disclosed in D1.

5.2 Feature A: Indents are formed at a distance from the intersections of the bars that is substantially equal to or longer than the width of the bars

5.2.1 With regard to feature A, the Board is of the preliminary opinion that, contrary to the finding in the impugned decision (see impugned decision, point

3.1.2 of the reasons) and to the opponent's view, D1 fails to show feature A of claim 1 as granted.

The Board concurs with the opponent's argumentation insofar as document D1 discloses in **Figure 7** that indents 34 are spaced apart from the intersection 36 of the bars by at least a distance of one tenth of the bar width (see column 9, lines 17-19, of D1).

However, contrary to the opponent's assertion, the distance of at least one tenth of the bar width disclosed in D1 cannot be construed as anticipating the claimed distance of substantially equal to or longer than the width of the bars. As a matter of fact, the disclosed example in D1 of a value for the distance starting from one tenth of the width of the bar is **ten times smaller** than the claimed value starting from the width of the bar.

Following the patent proprietor's view, there seems to be no explicit or implicit disclosure in D1 of an embodiment where the indent starts at a distance substantially equal to the width of the bars, as contended by the opponent. Thus, D1 does not seem to directly and unambiguously disclose feature A of claim 1 as granted.

Hence, novelty of the claimed subject-matter over the disclosure of D1 could be acknowledged.

5.2.2 As far as the impugned decision refers to parameter ranges (see point 3.1.2 of the reasons), the Board shares the patent proprietor's opinion that the three criteria for the evaluation of novelty of a sub-range selected from a broader range according to the Guidelines G -VI, 8. (ii), with reference to T 198/84

(published in OJ EPO 1985, 209) and T 279/89 (not published in OJ EPO), again discussed in the opponent's reply, seem not to be applicable in the present case because such an evaluation appears to be based on an incorrect assessment of the disclosure of D1. Rather it appears questionable whether feature A can be construed as a selection of a sub-range from a numerical range disclosed in D1 at all.

6. Main request - Inventive step

6.1 The Board shares both parties' view that the embodiment according to Figure 7 of D1 discloses all the features of the preamble of claim 1. Additionally, the embodiment according to Figure 7 of D1 seems to disclose the characterizing feature B of claim 1 (see above under point 5.1).

Therefore, the subject-matter of claim 1 differs from the disclosure of D1 in feature A, i.e. in that the indents are formed at a distance from the intersections that is substantially equal to or longer than the width of the bars (see above under point 5.2.1).

The technical effect of the distinguishing feature A seems to be an enhanced rigidity of the pallet container.

The objective technical problem associated with the distinguishing feature A can be seen in improving resistance to stresses, in particular vibrational stress (see paragraphs [0019] to [0020] of the disputed patent).

As put forward by the patent proprietor, D1 seems to be unsuitable for solving the underlying problem, since D1

teaches away as it discloses that the vertical and horizontal profile bars must have a high vibrational elasticity in dynamics continuous cycling loading (column 10, lines 44-55, of D1). This effect is achieved by providing vertical and horizontal bars with points of considerably higher bending elasticity, so that the bars intersections are relieved from stresses (column 5, lines 14-17, of D1). Thus, any modification of the pallet container according to D1 towards the pallet container of claim 1 appears to go against the teaching of D1 and would not have considered by a skilled person faced with the above mentioned underlying problem.

Hence, starting from D1 as closest prior art the skilled person in the art would not arrive on the basis of the teaching of said document or on the basis of its common general technical knowledge at the subject-matter of claim 1 as granted in an obvious manner.

6.2 The Board notes that the argumentation put forward by the opponent with regard to inventive step of the subject-matter of claim 1 as granted is mainly directed to a denial of the technical effect described in the disputed patent (see letter of reply dated 25 August 2016 under point II.c), and with regard to novelty under points II.b)3.) and II.b)4.).

Since the opponent cannot see any particular technical effect associated with feature A of claim 1, the problem to be solved is identified by the opponent as suggesting another range as the one already disclosed in D1. The skilled person starting from D1 indicating a distance of at least one tenth of the bar width and seeking to arrange the indents at a distance different from the one proposed in D1 would be prompted from the

teaching of D1 to arrange the indents at a distance from the intersections that is substantially equal to or longer than the width of the bars and, thus, it would be lead in an obvious manner to the claimed subject-matter. Additionally, D2 teaches the advantages to arrange the indents in an adequate distance from the intersection, wherein the skilled person would contemplate also to arrange the indents at a distance from the intersections that is substantially equal to or longer than the width of the bars.

The Board is, at present, not convinced by the opponent argumentation.

The Board notes that the patent in suit refers to a plausible technical effect (cf. paragraph [0071]). The Board notes further that neither D1 nor D2 discloses or suggest that the indents are arranged at a distance from the intersections that is substantially equal to or longer than the width of the bars. Furthermore, D1 (or D2) does not address the problem underlying the disputed patent.

As a consequence, the subject-matter of claim 1 as granted seems to involve an inventive step over D1 (or D1 in combination with the teaching of D2), because D1 neither gives an indication with respect to the position of the indents according to the claimed subject-matter nor to the problem to be solved by this positioning.

7. The opponent submitted experimental data with the letter of reply dated 25 August 2016 under point II.b)4.) in order to support its argumentation with regard to missing technical effects of the claimed subject-matter. These data as well as the offer of

evidence by hearing a witness were submitted by the opponent for the first time in the appeal proceedings. The opponent did not provide any explanation why these submissions have not been presented during the opposition proceedings and, in particular, together with the notice of opposition

The patent proprietor requests the experimental data submitted by the opponent be found inadmissible because of their lack of relevance (see patent proprietor's letter dated 28 September 2017, point 6).

The Board notes that even if the opponent's experimental data were admitted and considered under Article 12(4) RPBA, if necessary in the context of a hearing of the witness relied upon by the opponent, in view of the Board's conclusion in respect of novelty and inventive step under points 5 and 6 above, i.e. that D1 neither discloses or suggests feature A of claim 1 of the main request, said consideration would have no influence to the Board's conclusion with regard to the assessment of novelty and inventive step as set out above.

8. Auxiliary request

In view of the above, a Board's preliminary opinion on the auxiliary request seems not to be necessary at the present stage of the proceedings.

For reasons of precaution and completeness, however, the following preliminary opinion in respect of the auxiliary request is given only summarily.

8.1 Admittance into the proceedings of document FEA 1608801/DC2 and request for remittal

8.1.1 Document FEA 1608801/DC2 was filed for the first time by the patent proprietor in the appeal proceedings with the statement setting out the grounds of appeal with respect to the auxiliary request (see statement setting out the grounds of appeal, pages 5 to 9 under section "auxiliary request"). Therefore, its admittance into the appeal proceedings depends on the Board's discretion under Article 12(4) EPC.

For the Board decisive in this respect is whether there exists a justifying reason for the filing of FEA 1608801/DC2 only with the statement setting out the grounds of appeal.

The patent proprietor puts forward that FEA 1608801/DC2 is submitted in order to further support its inventive step argumentation and in order to demonstrate the effect of the indents outside of the claimed range.

The Board notes that the patent proprietor does not bring forward any argument as to why the FEA 1608801 report is submitted for the first time in the appeal proceedings.

At present, the Board is not able to identify any new surprising element in the minutes of the oral proceedings before the opposition division or in the impugned decision that could have justified filing the FEA 1608801/DC2 after opposition proceedings, since the patentability of the subject-matter of claim 1 according to the auxiliary request, to which FEA 1608801/DC2 refers, was already discussed in detail during the opposition proceedings (see minutes under point 3, and impugned decision under point 4 of the reasons).

As a consequence of that, submitting FEA 1608801/DC2 for the first time with the statement setting out the ground of appeal seems not to be justified.

For these reasons, the Board tends not to admit FEA 1608801/DC2 into the appeal proceedings.

8.1.2 Consequently, a Board's opinion on the opponent's request for remittal of the case to the opposition division if document FEA 1608801/DC2 is admitted into the proceedings does not appear to be necessary at the present stage of the proceedings."

VIII. In its submissions dated 21 January 2020 to the aforementioned communication of the Board, the opponent withdrew its request for oral proceedings and indicated that it would not attend the oral proceedings. In said submissions the opponent refrained from presenting any comments or arguments regarding said Board's communication. The patent proprietor did not respond to the aforementioned communication of the Board.

Reasons for the Decision

1. The present decision is taken without holding oral proceedings. The principle of the right to be heard pursuant to Article 113(1) EPC is however observed since that provision only affords the opportunity to be heard. By withdrawing its request for oral proceedings and declaring not to attend the oral proceedings, to which both parties were duly summoned, the opponent effectively chooses not to avail itself of the opportunity to present its observations and counter-

arguments orally but instead to rely on its written case.

The patent proprietor's request for oral proceedings is auxiliary to its main request that the decision under appeal be set aside and that the patent be maintained as granted. Since the patent proprietor's main request is followed by the Board, see order below, the aforementioned auxiliary request does not become active.

As a consequence, the oral proceedings arranged for 7 May 2020 are cancelled and the present decision is taken in the written proceedings on the basis of the parties' requests and their submissions on file in accordance with Article 12(8) RPBA 2020 and Article 113 EPC.

2. Under sections 5 to 7 of its above-mentioned communication pursuant to Article 15(1) RPBA 2007, the Board stated why it considers that the grounds for opposition pursuant to Article 100(a) EPC do not hold against the patent as granted and why it does not intend to admit FEA 1608801/DC2 into the appeal proceedings.

The above-mentioned preliminary finding of the Board has not subsequently been commented on nor has it been contested by the opponent, see point VIII. above.

Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issues - sees no reason to deviate from its above-mentioned finding.

3. As a consequence, the patent proprietor's main request is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated