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**Datasheet for the decision
of 18 January 2017**

Case Number: T 1115/16 - 3.2.07

Application Number: 11784437.3

Publication Number: 2646167

IPC: B05B9/08, B65D83/14, B65D83/16

Language of the proceedings: EN

Title of invention:
HANDHELD APPLICATOR WITH GUN VALVE CONTAINERS

Applicant:
Soudal

Headword:

Relevant legal provisions:
EPC R. 137(3), 115(2)
EPC Art. 56
RPBA Art. 15(3), 12(4)

Keyword:
Inventive step - main request (no)
Auxiliary requests - amendments - consent of the Board (no)

Decisions cited:

G 0010/93, T 1704/06, T 1969/08, T 0980/08

Catchword:



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Case Number: T 1115/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 18 January 2017

Appellant: Soudal
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Representative: Caers, Raphael Frans Ivo
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 17 December 2015 refusing European patent application No. 11784437.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Patton
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (applicant) lodged an appeal against the decision of the Examining Division refusing European patent application 11 784 437.3.
- II. In its decision, the Examining Division held that the subject-matter of claim 1 of the then main request filed with the submission dated 24 August 2015 did not involve an inventive step in view of the combination of the teaching of D4 (EP 0 850 852 A) with the teaching of D5 (WO 2009/147250 A).
- III. In the statement with its grounds of appeal the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims filed with letter of 26 April 2016 as main request and as first to ninth auxiliary requests. As an auxiliary measure it requested oral proceedings.
- IV. In its communication pursuant to Article 15(1) RPBA dated 5 October 2016, annexed to the summons for oral proceedings set for 18 January 2017, the Board gave its provisional opinion concerning the inadmissibility of the first to ninth auxiliary requests and the non-allowability of the main request. The corresponding parts of said communication read as follows:

"3. Admittance of the amended claims into the appeal proceedings

3.1 According to the Case Law of the Boards of Appeal, 8th edition 2016, IV.E.4.3.3 a), Rule 137(3) EPC subjects any amendments of the application other than those made in accordance with Article 123(1) EPC to the

examining division's consent. As made clear by Article 111(1) EPC and Rule 100(1) EPC, this provision applies analogously on appeal against examining division decisions, see T 1969/08, not published in OJ EPO. According to Article 12(4) RPBA, the Board has the power to hold inadmissible requests which could have been presented in the first instance proceedings. The Board views the latter in a less restrictive sense for the applicant as: "should have been presented", since everything in principle "could" have been presented.

3.2 The Board intends to admit the reverse amendment of claim 1 in the main request. The impugned decision on lack of inventive step of the further restricted claim 1 holds a fortiori against this claim.

3.3 Where the auxiliary requests relate to the addition of features having no connection with the impugned decision, or to features prominent in the inventive step discussion, the Board intends not to admit them by application of Rule 137(3) EPC. Moreover, if the appellant would have liked to have them (possibly) included in later appeal proceedings, it should have filed them in the preceding examination proceedings, Article 12(4) RPBA, so as to have them submitted to the decision under appeal. For those auxiliary requests the appeal would no longer be a request for review of the appealed decision but rather be meant to obtain a patent on the basis of subject-matter significantly different from that considered by the examining division.

According to the Case Law of the Boards of Appeal, supra, IV.E.4.1.4, last paragraph, in ex parte cases it is established case law that proceedings before the Boards of Appeal are primarily concerned with examining

the contested decision, see G 10/93, OJ EPO 1995, 172, and not when the requests bring about a new case, see T 980/08, not published in OJ EPO. Where features are introduced into the claim, which were not part of the discussion in examination, these would require the Board to be the first instance to rule on them.

3.4 As concerns the inadmissibility of the auxiliary requests pursuant to Rule 137(3) EPC, the Board remarks as follows:

1st auxiliary request: the fact that the applicator is a one-piece applicator has no relationship with the discussion of inventive step in the impugned decision. The closest prior art D4 shows such a one-piece applicator as well, thus the added feature does not appear to further distinguish the claimed assembly.

2nd auxiliary request: see first auxiliary request. The further added feature of the snapping on top of the container and the use in an upside-down position has no relationship with the discussion of inventive step in the impugned decision. In any case, the applicator of D4 is shown to be snapped-on to the can and can be used in an upside-down position. The latter would, as argued by the appellant itself, be in any case the obvious use of such containers.

3rd auxiliary request: see second auxiliary request. The further added feature of an additional grip surface for a second finger has no relationship with the discussion of inventive step in the impugned decision. In any case, the top part of section 34, above tube 21 in figure 5 of D4, appears to be such an additional grip surface, particularly when used upside-down. The feature of the reversible pivoting of the movable part

around a virtual axis at a particular location has now disappeared from the claim.

4th auxiliary request: see third auxiliary request. The further added feature of the conveying tube has no relationship with the discussion of inventive step in the impugned decision. In any case, the dispenser tube 21 of the assembly of D4 appears to be such a conveying tube as claimed, which can pass between two fingers of the same hand, whether the container is held upside-down or not.

5th auxiliary request: see the fourth auxiliary request. The further added features of the grommet, the hollow cylinder and the interaction with the conveying tube have no relationship with the discussion of inventive step in the impugned decision. The exercise of discretion by the examining division not to admit the auxiliary requests in the oral proceedings, where they relate to the feature of the grommet, etc. does not appear to the Board to be flawed either.

6th auxiliary request: claim 1 of this request creates an entirely fresh case, deleting all amendments of the higher ranking requests and turning to the feature of the safety seal, never before having been an object of the discussion. It neither has a relationship with the discussion of inventive step in the impugned decision.

7th to 9th auxiliary requests: see 6th auxiliary request. The safety seal is further limited and in the 9th auxiliary request the feature of a cavity for providing an accessory object has been introduced, said feature never before having been an object of the discussion. It neither has a relationship with the

discussion of inventive step in the impugned decision.

3.5 In view of the above, the Board intends not to admit the auxiliary requests under Rule 137(3) EPC. Should the applicant wish to have them examined, it might envisage the possibility of filing a divisional application.

4. Main request

The Board concurs with the assessment of inventive step by the examining division in the impugned decision of claim 1 in its further limited version of claim 1 as filed upon entry in the European phase. The reasoning is therefore also applicable to claim 1 of the present main request.

4.1 Pistol grip

The limiting aspect the appellant attributes to the wording "providing a pistol grip" is not shared by the Board. Firstly, "pistol grip" is not necessarily only an "object", such as the grip of a gun or handsaw. It also signifies the result of "gripping", i.e. a "tight grasp" or a "firm hold", "as with a pistol". For the Board, "providing a pistol grip" as a feature is therefore sufficiently fulfilled by the grip as intended to be had on the assembly of D4, where the first section 33 is for contact with the palm and the second section 34 and the second grip 25 are for contacting with the fingers of the hand. As discussed for the 2nd auxiliary request, the upside-down use of such containers does not appear to make a difference. The second argument of the "exactly known position of the hand" with the claimed invention is not supported by features actually present in the claim (or added

thereto in an auxiliary request) and appears in any case moot in view of the assembly of D4. The third argument cannot hold in view of the fact that the container of D4 clearly has to be gripped properly by one hand to actuate the valve, just as the container assembly of the invention. The fourth argument relies on an even further restricted interpretation of "providing a pistol grip" (the fingers have to go all around and have to point rearwards for which there appears to be no basis in the application, nor necessarily when considering "firm hold" or "tight grasp").

4.2 "by pushing the stem of the container valve down into the container contents, by a movement along the axis of symmetry of the valve stem"

The Board considers firstly that the valve 3 of the assembly of D4 is a gun valve, i.e. one that is pushed "down into the container contents, by a movement along the axis of symmetry of the valve stem". This can be derived from the first embodiment, column 4, lines 44 to 52, referring to the downwards movement of the first grip, opening the valve. The same applies to the second embodiment, where the first grip is swung downwards, opening the valve, see column 6, lines 6 to 14. Second, according to the claim it can also be the valve that has the claimed movement, not necessarily the "pushing" has to be such a movement. Third, even if one would accept that D4 does not explicitly disclose a gun valve, but a tilting valve, gun valves are generally known in this field as exemplified by D5. In the present case it is not a question of applying the complete teaching of D5. A gun valve would function just as well in the arrangement of D4, even better.

*Fourth, it may be that in the relevant second embodiment of D4 there is, in the cooperation of the tube seat 23 of the first grip with the top of the gun valve, a force component transverse to the axis of symmetry of the valve stem, which influences actuating the valve. This would result from the fact that the rotation axis of the first grip lies in a plane (when at right angles to this axis) which is distant from the plane in which the tube seat contacts the valve stem. However, claim 1 does not have any technical features that **clearly distinguish** the invention in this respect from the assembly of D4.*

The features added to claim 1 in this respect in the version subject to the impugned decision, do not solve this issue either, since the assembly of D4 can be read onto them.

Indeed, for the assembly of D4 to work, the sheet hinge 36 has to be at the level of the cooperation point 30 between the first grip and the pawl connection 31 and 32. That point provides a virtual rotational axis. That axis can lie in any plane, particularly one running through the point of engagement between the first grip's tube seat 23 and the valve. That rotational axis runs also perpendicular to the axis, i.e. the direction of movement, of the valve stem. According to the wording of page 17, lines 25 to 32, which appears to be the basis for the amendment of claim 1 subject to the impugned decision, it does not have to be the plane of the rotational axis that is perpendicular to the axis of the valve stem. It appears therefore that the feature mentioned in the caption of this paragraph cannot distinguish the claimed assembly from the assembly of D4. Neither appears it possible to further define this feature in the sense as meant by the appellant, particularly since the figures do not even

show where the virtual axis is meant to lie.

Finally, D5 figure 7 clearly shows the need to have the level of contact of the handle 2 with the extension 3 of the valve stem 21 to be at approximately the level at which the rotational axis 8 lies".

- V. With its submission dated 23 December 2016 the appellant informed only the Board that it will not be attending the oral proceedings set for 18 January 2017.
- VI. Oral proceedings before the Board took place as scheduled on 18 January 2017. Since the duly summoned appellant, as announced with its above-mentioned submission did not attend, the oral proceedings were continued without the appellant according to Rule 115(2) EPC and Article 15(3) RPBA.

Reasons for the Decision

- 1. Although the appellant did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 8th edition 2016, section IV.E.4.2.6.d)).
- 2. *Inadmissibility of the first to ninth auxiliary requests and non-allowability of the main request*
 - 2.1 Under the sections 3 and 4 of its above-mentioned communication the Board stated why it considers that the first to ninth auxiliary requests are not

admissible and that the main request is not allowable, see point IV above.

- 2.2 The above-mentioned preliminary finding of the Board has not been commented on nor has it been contested by the appellant during the appeal proceedings, see point V above.
- 2.3 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.
- 2.4 As a consequence, the first to ninth auxiliary requests are considered to be not admissible and the main request is considered to be not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated