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**Datasheet for the decision
of 1 March 2021**

Case Number: T 2090/18 - 3.2.07

Application Number: 11815582.9

Publication Number: 2655245

IPC: B67C3/20

Language of the proceedings: EN

Title of invention:

SYSTEM AND METHOD FOR FILLING A CONTAINER WITH A POURABLE
PRODUCT

Patent Proprietor:

Sidel S.p.A. Con Socio Unico

Opponent:

Endress + Hauser Flowtec AG

Headword:

Relevant legal provisions:

EPC Art. 56, 113(1)
EPC R. 103(1)(a), 115(2)
RPBA Art. 12(4)
RPBA 2020 Art. 12(2), 15(3)

Keyword:

Inventive step - problem and solution approach

Substantial procedural violation - reimbursement of appeal fee
(no)

Amendment to case - amendment within meaning of Art. 12(4) RPBA
2020

Decisions cited:

R 0012/09

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2090/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 1 March 2021

Appellant: Endress + Hauser Flowtec AG
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Respondent: Sidel S.p.A. Con Socio Unico
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 June 2018
rejecting the opposition filed against European
patent No. 2655245 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
K. Poalas

Summary of Facts and Submissions

- I. An appeal was filed by the opponent (appellant) in the prescribed form and within the prescribed time limit against the decision of the opposition division rejecting the opposition to European patent No. 2 655 245.
- II. In the present decision reference is made to the following documents mentioned during opposition proceedings:

D1: JP-A-11342994,
D1a: Translation of D1,
D2: VDI/VOE-Richtlinien VDI/VDE 2643,
D4: Sworn statement by Dr. R. Höcker [DE]
D5: "Handbuch der Fülltechnik", pages 262, 280-282,
340-344, 450-451,
D5a: "Handbuch der Fülltechnik", page 9,
D5b: "Handbuch der Fülltechnik", page 262,
D5c: "Handbuch der Fülltechnik", page 355.

The following documents have been submitted with the statement setting out the grounds for appeal.

D5d: "Handbuch der Fülltechnik", page 429,
D13: "Neue Verpackung", 11.2002, page 60,
D14: DE 93 21 223 U1,
D15: DE 602 07 782 T2,
D16: WO 2008/089843 A1
D17: WO 2005/019090 A1
D18: Extract from "Füllanlagen für Getränke",
D19: extract from "Flow handbook".

III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020.

In this communication the Board indicated *i.a.* that the arguments presented by the appellant regarding the incorrectness of the decision under review appeared not to be convincing.

The patent proprietor (respondent) communicated with letter dated 14 January 2021 their intention not to attend the oral proceedings.

IV. Oral proceedings before the Board took place on 1 March 2021 in the respondent's absence in accordance with Rule 115(2) EPC and Article 15(3) RPBA 2020. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

The lines of argument of the parties are dealt with in detail in the reasons for the decision.

V. The final requests of the parties are as follows,

for the appellant:

that the appealed decision be set aside and
that the patent be revoked and
that the appeal fee be reimbursed.

for the respondent:

that the appeal be dismissed,
i.e. that the patent be maintained as granted,

or, in the alternative,
when setting aside the decision under appeal,
that the patent be maintained in amended form
according to the auxiliary request submitted with
letter dated 14 March 2019.

VI. Independent claim 1 according to the main request, *i.e.*
according to the patent as granted, reads as follows:

"A method for filling a container (2) with a pourable
product, in particular a pourable product having an
electrical conductivity below 15 μ S, comprising the
steps of:

- filling said container (2) with said pourable product
by means of a filling valve (15), which is selectively
available in a position in which it allows the filling
of said container (2) with said pourable product; and

- feeding said pourable product contained in a tank
(10) by means of a duct (20) towards said filling valve
(15) ;

said filling step comprising the step of measuring the
flow rate of said pourable product by means of a vortex
flowmeter (30) interposed along said duct (20); said
vortex flowmeter (30) comprising an inlet mouth (32)
and an outlet mouth (33);

characterized in that said duct (20) and said vortex
flowmeter (30) are dimensioned so that the pressure, in
use, at said outlet mouth (33) is at least 5 times the
hydraulic head between said inlet and outlet mouths
(32, 33)."

Reasons for the Decision

1. Right to be heard

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 (CLB), 9th edition 2019, sections III.B.2.7.3 b)).

2. D13 to D17 - Admissibility

2.1 According to the appellant, documents D13 to D17 were to be taken into account by the Board when discussing inventive step because these documents gave information related to the knowledge of a skilled person, particularly in relation to the values for the counter-pressure to be used when bottling carbonated beverages (3 to 11 bar).

2.2 Article 12(4) RPBA 2007 gives the Board discretion not to admit, on appeal, documents that could and should have been presented in the opposition proceedings.

D13 to D17 were mentioned in the statement setting out the grounds of appeal for the first time, without justifying reasons for such a late filing, and in particular without explaining why these documents could not have been filed earlier, in particular together with D5a-D5c.

The Board notes that the appealed decision was already taken under the assumption that it was known to bottle carbonated beverages using counter-pressure values ranging from 3 to 11 bar (see the appealed decision, points 4.4.2 and 4.4.5), as a corresponding allegation based on D5 and D5a-D5c was already submitted during opposition.

It is not clear why D13 to D17, submitted in appeal as further evidence for the same allegation, were not already filed together with D5a-D5a.

As a consequence, the Board concludes that filing documents D13 to D17 in appeal should not be considered as an appropriate and immediate reaction to developments in the previous proceedings (see the CLB, *supra*, V.A.4.13.1).

Accordingly, the Board decided not to admit documents D13 to D17 into the proceedings in accordance with Article 12(4) RPBA 2007.

3. D5d, D18 - Admissibility

- 3.1 The appellant filed documents D5d and D18 to show that the normal vertical distance between a ring bowl and the filler head should be, when filling carbonated beverages, below 1 m.

The appellant justifies the late filing with the argument that D5d and D18 were filed to support a line of argument which was discussed during oral proceedings before the opposition division (see the letter of the appellant dated 28 June 2018, with which a correction of the minutes was requested, point 1.f) and first

presented by the appellant in its letter dated 18 December 2017 (see point 2.3, third paragraph).

- 3.2 As already noted above, it is within the competences of a Board to perform a judicial review of the contested decision in accordance with Article 12(2) RPBA 2020 in conjunction with Article 12 (4) RPBA 2007.

Because the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner a party's appeal case should be directed to facts, objections, arguments and evidence on which the contested decision was based (Article 12(2) RPBA 2020).

The Board notes that the appellant failed to explain why documents D5d and D18 were not already filed when the appellant first submitted that the normal vertical distance between a ring bowl and the filler head should be, when filling carbonated beverages, below 1 m (letter dated 18 December 2017).

It is therefore not apparent from the arguments submitted in appeal how the submission of D5d and D18 first with the statement of grounds of appeal could be considered as a timely reaction to developments in the previous proceedings.

The Board therefore decides not to admit D5d and D18 into the proceedings in accordance with Article 12(4) RPBA 2007.

4. D19 - Admissibility

- 4.1 The appellant submitted that document D19 was first submitted in appeal in reaction to an alleged lack of consideration given by the opposition division to

document D4, with the motivation that it was not proven that the content thereof was publicly available (decision, point 4 May 2014).

The technical content of D19 reflected the content of D4, as table 4 of D19 was a graphical representation of the formula given in D4.

- 4.2 The Board notes that the issue of public availability of D4 was first raised with the summons to oral proceedings issued by the opposition division (see point 2.7.2 of the annex to the summons).

Based on the above, D19 could and should have been filed in reaction thereto, *i.e.* during opposition proceedings.

As a consequence, the Board considers that filing document D19 with the statement of grounds of appeal cannot be considered as a timely response to doubts which were already raised by the opposition division in the summons to oral proceedings.

The Board therefore decides not to admit D19 into the proceedings in accordance with Article 12(4) RPBA 2007.

5. Inventive step of claim 1, D1+D2
- 5.1 The appellant raised an inventive step objection based on the combination of the teachings of documents D1 and D2, while additionally taking account of the teaching of document D5 with regard to the material/substance parameters and to the filling pressures.

According to the appellant, a skilled person starting from D1 would have taken D2 into account, because this document taught how to avoid cavitation.

By applying the teaching of D2, and in particular the formula given under point 9.2.4 thereof, the skilled person would have inevitably dimensioned the system of D1 so as to achieve the result that the pressure, in use, at the outlet mouth is at least 5 times the hydraulic head between inlet and outlet mouths (see pages 7 and 8 of the statement setting out the grounds of appeal, and point 5. of the letter dated dated 30 September 2019).

This was because D2, when teaching how much the minimum pressure must be above the steam pressure to avoid cavitation, set a stricter requirement under typical operating conditions, when compared with the distinguishing features of claim 1.

With particular reference to the 3 graphs submitted during oral proceedings the appellant made clear that this requirement was stricter under the assumption that standard values of counter-pressure (at least 3 bar) and of vertical distance between the ring bowl and the filling head (less than 1 m), as shown by D5 and D5a-D5c, were used.

- 5.2 The Board is not convinced by the above argumentation. The opposition division acknowledged inventive step because the appellant did not explain why a skilled person would have, based on the teaching of D2, designed the installation of D1 according to parameters which are not even mentioned in this document, thereby arriving at the claimed pressure ratio, instead of applying the formula of D2 based on hydraulic head

difference and vapour pressure (appealed decision, point 4.5.12).

Such an explanation was also not provided before the Board. The arguments of the appellant focused on demonstrating that the formula of D2 sets a stricter requirement than the distinguishing features under the assumption that certain values for certain parameters were selected, and that these values were customary in the technical field of the patent in suit.

This cannot however explain why a skilled person would have modified the filling system of D1, by adding features which are not even mentioned in D2, such as those of the characterizing portion of granted claim 1.

As a consequence of the above the Board concludes that the appellant failed to demonstrate that the opposition division did not assess correctly inventive step of granted claim 1 starting from D1 and taking the teaching of D2 and the general knowledge derivable from D5 into account.

6. Inventive step of claim 1, D1+D4
 - 6.1 The appellant also argued that inventive step of granted claim 1 should be denied in view of the combination of the teachings of D1 and D4 (see page 7 of the statement setting out the grounds of appeal, and point 4. of the letter dated dated 30 September 2019).
 - 6.2 According to the appealed decision, D4 could not be considered as belonging to the state of the art, because it was not proven that the contents thereof were publicly available (decision under appeal, Reasons point 4.5.14).

The Board notes that the appellant failed to address this specific point in appeal, as, for example, no evidence and no arguments have been submitted to show that the conclusions of the opposition division on public availability were not correct.

7. Inventive step of claim 9

7.1 The appellant explicitly stated that the above inventive step objections raised against claim 1 as granted also applied to claim 9 as granted, *mutatis mutandis*.

7.2 The Board is not convinced by the above objection.

As discussed above, the arguments submitted against claim 1 were not found to be suitable to demonstrate that the inventive step assessment made by the opposition division was not correct.

The Board notes that no arguments were submitted by the appellant, which were specifically formulated against claim 9. The appellant failed to provide any explanation on why the arguments submitted against claim 1, when directed against claim 9, should lead to setting aside the appealed decision.

As a consequence of the above the Board sees no reason to deviate from the conclusions of the opposition division (see point 4.5.22) that the subject-matter of granted claim 9 involves an inventive step for the same reasons already discussed in relation to granted claim 1.

8. Allegation of procedural violation - Request for reimbursement of the appeal fee

8.1 The appellant argues that the opposition division by not allowing its request to hear the author of D4 (Mr. R. Höcker) as a witness violated its right to be heard.

That is why the appellant requested that the appeal fee be reimbursed.

8.2 The Board disagrees.

The opposition division did not commit any procedural violation in the above mentioned circumstances which would justify the appeal fee to be reimbursed pursuant to Rule 103(1)(a) EPC.

This is because the opposition division issued a preliminary opinion noting that as public availability of the content (the formulas) of D4 was not even alleged by the appellant, the testimony of Mr. Höcker could not have provided evidence in that respect (see point 2.7 thereof).

The appealed decision, as the opposition division noted, was not based on the conclusion that the formulas of D4 were not correct, but on the lack of proof that these formulas were publicly available (see point 4.5.14).

The appellant failed to submit a proven allegation that D4 was a piece of prior art and, when requesting the reimbursement of the appeal fee did not even put forward that the above conclusion of the opposition division was not correct.

In order for a decision to comply with Article 113(1) EPC it is sufficient that the party concerned had an adequate opportunity to present its point of view to the opposition division before the decision was taken, that the opposition division considers the arguments presented by the party and that the decision is based on a line of reasoning that can be said to have been in the proceedings, either as a result of having been submitted by a party or raised by the opposition division (see the summary of prior jurisprudence in R 12/09 of 15 January 2010, point 11 of the Reasons).

Taking account of the decision under appeal and of the minutes of the oral proceedings before the opposition division, this was clearly the case in the proceedings leading to the appealed decision, because the appellant's arguments regarding D4 were discussed (see the minutes, page 2, third paragraph) and dealt with by the opposition division in its decision (see points 4.2, 4.3, 4.5.14, 4.5.15).

9. Conclusion

In conclusion, the Board finds that the arguments relied upon by the appellant to demonstrate the incorrectness of the decision under review with respect to the right to be heard, and to novelty and inventive step of the subject-matter of granted claims 1 and 9 are not convincing.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated