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**Datasheet for the decision
of 18 March 2024**

Case Number: T 2186/21 - 3.2.01

Application Number: 14798220.1

Publication Number: 2996662

IPC: A61J11/02, A61J11/04, A61J9/04

Language of the proceedings: EN

Title of invention:
INFANT FEEDING TEAT

Applicant:
Sepal IP Pty Ltd

Headword:

Relevant legal provisions:
RPBA 2020 Art. 13(2)
EPC Art. 54, 56

Keyword:
Amendment after summons - exceptional circumstances (yes) -
taken into account (yes)
Novelty - main request (yes)
Inventive step - main request (yes)

Decisions cited:

T 2295/19, T 1800/21

Catchword:



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Case Number: T 2186/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 18 March 2024

Appellant: Sepal IP Pty Ltd
(Applicant) 1/35 Gilbert Park Drive
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Representative: Potter, Julian Mark
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 25 May 2021
refusing European patent application No.
14798220.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman V. Vinci
Members: A. Wagner
P. Guntz

Summary of Facts and Submissions

I. The appeal was filed by the applicant against the decision of the examining division to refuse the patent application in suit.

II. In the present decision reference is made to the following documents:

D1: US 2010/0170866 A1

D2: US 2003/0034321 A1

D3: US 2011/0155684 A1

D4: US 6,032,810

D5: US 3,193,125

D10: WO 2012/138592 A1

E1: "Hardness Chart", Hapco, Inc.

D1 to D5 and D10 were cited in the decision under appeal. E1 was submitted by the appellant during appeal proceedings as proof for the skilled person's general knowledge.

III. The examining division refused the application based on a main request and two auxiliary requests. While the main request and auxiliary request 1 were found not to be new over D5, auxiliary request 2 was held not new over D1.

IV. With the statement of the grounds of appeal the appellant requested that the decision under appeal be set aside and a patent be granted on the basis of the main request corresponding to auxiliary request 2 underlying the appealed decision or, as an auxiliary measure, to maintain the patent on the basis of auxiliary request 1 or 2 filed with the statement of

grounds of appeal.

V. In a communication of the Board of Appeal pursuant to Article 15(1) RPBA attached to the summons for oral proceedings, the appellant was informed that - according to a preliminary opinion of the Board and with the requests on file - the appeal was likely to be dismissed.

VI. Oral proceedings were held by videoconference on 18 March 2024.

During oral proceedings the appellant (applicant) filed a new main request and requested to set aside the decision under appeal and to grant a patent on the basis of the following documents:

- Claims 1 to 3 according to the main request filed at the oral proceedings;
- Description pages 1 - 14 as filed at the oral proceedings;
- Figures 1 to 13B as in WO 2014/183163 A1.

VII. Claim 1 of the main request reads as follows (feature numbering added by the Board, amendments to the claim as originally filed are indicated by strikethrough and underlines):

1 A drinking receptacle (10) comprising:

1.1 a container (12) for containing a fluid for drinking; and

1.2 an outlet member [17] having:

1.2.1 an outlet (19) through which the fluid is delivered under a pressure supplied by a user of the receptacle (10); and

1.2.2 a collar portion (18) that attaches to an opening of the container (12) such that an undersurface of the collar portion abuts (18) with an upper surface of the opening of the container (12) to form a ~~substantially~~ sealed engagement between the outlet member and the container;

1.3 wherein, both the undersurface of the collar portion (18) and the upper surface of the opening of the container (12) are formed from a rigid material such that the undersurface of the collar portion (18) and the upper surface of the opening of the container (12) are able to form a hard-to-hard surface engagement, and

1.4 either the undersurface of the collar portion (18) or the upper surface of the opening of the container (12) that abut each other has at least one ~~vent~~ groove formed therein that extends across such abutting surfaces,

1.4.1 the at least one ~~vent~~ groove having dimensions to ensure that the surface tension of the fluid at the at least one groove is maintained to reduce likelihood of fluid passing therethrough and

1.4.2 further being configured such that when said pressure is applied to the outlet member the at least one ~~vent~~ groove member forms a passage that permits the controlled ingress of air into the container to facilitate flow of fluid from the outlet,

1.4.3 and when said pressure is removed the passage formed by the at least one ~~vent~~ groove member ~~substantially~~ prevents the ingress of air into the container to facilitate a controlled vacuum pressure within the container (12),

1.5 wherein the rigid material is a hard plastic material.

Reasons for the Decision

1. Admission of the main request

1.1 The admission of the main request filed during oral proceedings falls under the provisions of Article 13(2) RPBA and therefore required exceptional circumstances justified with cogent reasons by the party concerned.

1.2 The Board admitted the main request. The fact that the amendments made served procedural economy by clearly overcoming the existing objections of the impugned decision without raising new issues, can be regarded as exceptional circumstances within the meaning of Article 13(2) RPBA 2020 (see T 2295/19, Reasons 3.4.12 and 3.4.13). The Board exercised its discretion in view of the additional facts that the amendment did not shift the factual or legal framework of the proceedings and did not require a complete re-assessment of the subject-matter of the proceedings (see T 2295/19, Reasons 3.4, or T 1800/21, Reasons 3.4.6). Additionally, as the present case is an ex-parte case, no legitimate interest of any other party to the proceedings can be negatively affected.

2. Article 123(2) EPC

2.1 The Board is satisfied that the amendments made do not introduce added subject-matter.

2.2 Claim 1 of the main request combines the features of originally filed claims 1, 4, 5 and 6.

The amendments in feature 1.4 are based on original claim 4.

The replacement of the term "vent" by the term "groove" (in singular) in feature 1.4 to 1.4.3 is based on original claim 4 specifying that "*the at least one vent comprises one or more channels*". In the present application, the term "groove" contains the same technical information as the term "channel".

Feature 1.3 is based on original claim 5. The original term "abutting surfaces" is specified by the wording of feature 1.2.2 of original claim 1. Furthermore the omission of the wording "having minimal flexibility" is allowable as the term "rigid" already includes this vague technical information.

Feature 1.4.1 finds basis on page 10, lines 25 to 28. The term "passage" defined in features 1.4.2 and 1.4.3 finds implicit support in the original claim wording and on page 9, line 35 ("provide a path").

2.3 Claim 2 is based on original claim 5 and page 9, lines 29 to 31. Claim 3 includes the optional feature of original claim 6.

2.4 Finally, the description is amended to bring it into conformity with the wording of the amended claims.

3. Novelty and inventive step in view of D1

- 3.1 Claim 1 at least differs from D1 in the combination of features 1.3 and 1.5 and is therefore new over D1.
- 3.1.1 Claim 1 requires in feature 1.3 that both, the undersurface of the collar portion and the upper surface of the opening of the container are formed from a rigid material, specified in feature 1.5 as being a hard plastic material, to form a hard-to-hard surface engagement.
- 3.1.2 D1 discloses in figures 10, 11 and 11A a drinking receptacle with a container (paragraph [0065]), an outlet ("nipple 310") and a collar portion ("mounting portion 314"). The undersurface 380 of the collar portion abuts a top of a bottle to form a sealed engagement (paragraph [0066]). Additionally, the undersurface 380 of the collar portion has a groove ("channel 381a") which functions as a vent.
- 3.1.3 Regarding the container, D1 is silent about the specific kind of material used. For the mounting portion 314, D1 discloses in paragraph [0065], that *"The material of mounting portion 314 is fabricated of a material that may be of about the same or a greater Durometer hardness than nipple portion 312. Here, the mounting portion 314 has a Durometer A hardness that is within the range of about 1 to about 100. More preferably, the material of the mounting portion 314 has a Durometer A hardness that is substantially within the range of about 20 to about 90."*
- 3.1.4 Even if D1 discloses a material for the collar portion that seems to just fall within the range of a hard plastic material (Durometer 100A. i.e. at the very end

of the Shore A scale), there is still no disclosure regarding the hardness of the container.

Furthermore D1 discloses in paragraph [0067], last sentence, that the "*Radial channel part 381a is deep enough that it can be compressed without affecting venting.*" Because of the mentioned compressibility the use of two hard plastic materials is not directly and unambiguously derivable from D1.

3.2 Claim 1 also involves an inventive step when starting from D1 as closest prior art combined with common general knowledge or any other document cited in the impugned decision.

3.2.1 The Shore hardness scales shown in E1 (page 2) represent common general knowledge of the skilled person. The Shore A scale classifies materials from "extra soft" up to "hard". The Shore D scale classifies materials from "medium soft" up to "extra hard". As can be seen from E1, there is an overlap of the two scales. A hardness of Shore 100A corresponds substantially to a hardness of Shore 60D.

From this knowledge, the skilled person differentiates between the general term "hard" and the definition of a "hard plastic material". While "hard" is vague and can comprise "medium hard", "hard" or "extra hard" as indicated in the Shore hardness scales of E1, the definition of a "hard plastic material" is an established term that requires a hardness at the very end of the Shore A scale or above, on the Shore D scale.

3.2.2 The technical effect of the distinguishing feature combination 1.3 and 1.5 is that - upon assembling the device for use - the at least one groove cannot be shut

off by over-tightening. The problem to be solved by the hard-to-hard engagement achieved by the hard plastic material can thus be seen as providing a more reliable venting system in a drinking receptacle.

- 3.2.3 The solution provided in claim 1 is not obvious starting from D1 as closest prior art.
- 3.2.4 For the mounting portion 314, D1 discloses in paragraph [0065] (see point 3.1.3 above) that the material may be the same as for the nipple. According to claim 1 of D1, the nipple is compressible, further specified in paragraph [0012] of D1 by a material having a Shore A hardness below 45. Furthermore, paragraph [0065] teaches away from the upper Shore A limit, but to lower values up to a maximum of Shore 90A. Additionally no attention is drawn to the bottle material at all. D1 is aware of the problem of a possible closing of the groove 381a when compressed during assembling of the device. D1 solves this problem by a sufficient depth of the groove (see paragraph [0067], point 3.1.4 above).
- 3.2.5 From all this information, the skilled person is hinted to use for the mounting portion a material on the lower or medium range of the Shore A scale. Nothing in D1 prompts the skilled person to use two hard plastic materials for the two abutting surfaces to solve the problem posed. The claimed feature combination has the additional advantage that the size of the groove can be kept small which in turn minimizes the problem of leakage reflected in feature 1.4.1.
- 3.2.6 It is noted that also the combination of D1 with any other of the documents cited in the impugned decision (D2 to D5, D10) does not render the claimed subject-matter obvious as none of them disclose the combination

of features 1.3 and 1.5.

In D3 (figures 3 and 11C), the nipple 5 has a flexible sealing ring 65 that abuts the upper surface of the opening of the container. Also in D4 (figure 14), it is a sealing flange 24 of the compressible nipple 6 that abuts the upper surface of the opening of the bottle. D10 (figure 2, page 6, last nine lines) likewise discloses an abutment between a teat flange 66 with deformable skirt 62 and the container.

D2 discloses a rigid plastic material for the collar portion 50, however the venting groove is neither made in its undersurface nor in the upper surface of the bottle 30. Instead an additional ring 44 with recesses 45 is provided (figure 5).

Finally, the disclosure of D5 does not go beyond the disclosure of D1, see following point 4.

4. Novelty and inventive step in view of D5

4.1 Claim 1 at least differs from D5 in the same features as D1, namely the combination of features 1.3 and 1.5. Claim 1 is therefore new over D5.

4.1.1 D5 discloses in figures 2 and 5 a drinking receptacle with a container 39, an outlet and a collar portion ("integral nipple and collar 50"). The undersurface of the collar portion ("base 52") abuts a top of the bottle 39 to form a sealed engagement (column 4, lines 28 to 37). Additionally, the undersurface of the collar portion has a groove 54 which functions as a vent.

4.1.2 Regarding the materials, D5 discloses for the container in column 3, lines 25 to 28, *"a somewhat more rigid thermoplastic material such as polyethylene"*. For the collar of figure 5, it is disclosed that it is made from a thermoplastic material, see column 3, lines

16 to 20 ("*Where the nipple is to be made integral with a fastening collar, the latter need not be made of the nipple material. A thermoplastic connector [...] may [...].*").

Thermoplastic material however does not allow any conclusions about the hardness of the connector. The nipple of D5 is also made of thermoplastics (column 1, lines 56, 57) and is disclosed in column 2, lines 31, as being "*soft and easily compressible*".

Consequently, the only specific material disclosed in D5 is polyethylene from which the skilled person knows that it is not a hard plastic material.

- 4.2 Claim 1 also involves an inventive step when starting from D5 as closest prior art combined with common general knowledge or any other document cited in the impugned decision.
 - 4.2.1 As set out above (point 3.2.2) the objective technical problem can be seen as providing a more reliable venting system in a drinking receptacle.
 - 4.2.2 The solution proposed in claim 1 is not obvious when starting from D5 for similar reasons as for D1. D5 does not include any hint to select for both, the collar portion and the container, a hard plastic material. Even if it might be argued that a specific high-density PE - which is not disclosed as such in D5 - would fall under the general disclosure that might be seen as a hard plastic material, there is still no hint to select a hard plastic material for the collar portion out of the huge range of thermoplastics - in particular as the collar may also be of the same compressible material as the nipple.

4.2.3 The reasoning given under point 3.2.6 concerning the further documents cited in the impugned decision applies mutatis mutandis.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent on the basis of the following documents:
 - Claims 1 to 3 according to the main request filed at the oral proceedings;
 - Description pages 1 to 14 as filed at the oral proceeding;
 - Figures 1 to 13b as in WO 2014/183163 A1.

The Registrar:

The Chairman:



H. Jenney

V. Vinci

Decision electronically authenticated