

BESCHWERDEKAMMERN  
DES EUROPÄISCHEN  
PATENTAMTS

BOARDS OF APPEAL OF  
THE EUROPEAN PATENT  
OFFICE

CHAMBRES DE RECOURS  
DE L'OFFICE EUROPEEN  
DES BREVETS

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [ ] To Chairmen and Members  
(C) [X] To Chairmen

**D E C I S I O N**  
**of 24 September 1997**

**Case Number:** T 0003/95 - 3.2.4

**Application Number:** 84901985.6

**Publication Number:** 0181328

**IPC:** A01G 9/02

**Language of the proceedings:** EN

**Title of invention:**  
Flowerpot

**Patentee:**  
OS Plastic A/S

**Opponent:**  
Billund Plast A/S

**Headword:**  
Flowerpot/OS

**Relevant legal provisions:**  
EPC Art. 56, 100, 114(2)

**Keyword:**  
"Admissibility of opposition"  
"Admissibility of appeal"  
"Late filed public prior use"  
"Inventive step (yes)"

**Decisions cited:**  
T 0222/85, G 0009/91, T 0093/89, T 0550/89

**Catchword:**  
-



Europäisches  
Patentamt

European  
Patent Office

Office européen  
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: T 0003/95 - 3.2.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.4  
of 24 September 1997

**Appellant:**  
(Opponent)

Larsen, Hans Ole  
Larsen & Birkeholm A/S  
Banegaardspladsen 1  
P.O. Box 362  
1570 Copenhagen V (DK)

**Representative:**

Larsen, Hans Ole  
Larsen & Birkeholm A/S  
Banegaardspladsen 1  
P.O. Box 362  
1570 Copenhagen V (DK)

**Respondent:**  
(Proprietor of the patent)

OS Plastic A/S  
Bygmarken 25  
3520 Farum (DK)

**Representative:**

Liska, Horst, Dr.-Ing.  
Patentanwälte  
H. Weickmann, Dr K. Fincke  
F. A. Weickmann, B. Huber  
Dr H. Liska, Dr J. Prechtel, Dr B. Böhm  
Dr W. Weiss, Dr M. Herzog  
Postfach 860 820  
81635 München (DE)

**Decision under appeal:**

Decision of the Opposition Division of the  
European Patent Office posted on 4 November 1994  
rejecting the opposition filed against European  
patent No. 0 181 328 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** M. G. Hatherly  
**Members:** P. Petti  
M. Lewénton

## Summary of Facts and Submissions

- I. An opposition based only upon Article 100(a) EPC was filed against the European patent No. 0 181 328.

The arguments brought forward by the opponent in the notice of opposition related to Article 56 EPC and were based upon the following documents:

- D1: Price list "Testadur" of April 1982,  
D2: DS 717, Danish Standard, 2nd edition 1966,  
D3: DS 717, Danish Standard, 3rd edition 1979.

The opposition was rejected by the decision of the opposition division dispatched on 4 November 1994.

The independent Claims 1 to 4 of the patent as granted read as follows:

- "1. A flowerpot comprising a shell (10), a plane bottom (14) in which are provided first openings (28), transversely extending channels (18) having access openings (20) in said shell (10) which are the only openings (20) in said shell (10), each channel (18) being open downwardly and having only one plane upper wall (24) upwardly displaced from the bottom, (14) said upper walls (24) are each provided with second openings (26), said channels (18) terminate at end walls (22) connecting their upper wall (24) to said bottom (14), and supporting feet (16) are provided at the lower side of said bottom (14) along the edge of said bottom (14) (Fig. 1 to 3) said supporting feet (16) being such that the flowerpot can be used for selective watering according to the mat-principle or the flood/ebb-principle.

2. A flowerpot comprising a shell (10), a plane bottom (14) in which are provided first openings (28), transversely extending channels (18a) having access openings (20) in said shell (10), which are the only openings (20) in said shell (10), each channel (18a) being open downwardly and having only one plane upper wall (24) upwardly displaced from the bottom (14), said upper walls (24) are each provided with second openings (26), said channels (18a) are through-going and intersect each other and supporting feet (16a) are provided at the lower side of said bottom (14) along the edge of said bottom (14) (Fig. 4 and 5), said supporting feet (16a) being such that the flower pot can be used for selective watering according to the mat-principle or the flood/ebb-principle.
  
3. A flowerpot comprising a shell (10), a plane bottom (14) in which are provided first openings (28), a channel (18b) being open downwardly and having only one plane upper wall (24) upwardly displaced from the bottom (14) in which are provided second openings (26), said channel (18b) being annular and limited outwardly by annular wall sections forming supporting feet (16b) extending from said upper wall (24) of said channel (18b) and leaving free access openings (20) between them, and limited inwardly by an annular wall (22b) connecting said bottom (14) with said upper wall (24) of said channel (18b), and additional supporting feet (16b') are provided at the lower side of said bottom (14) along the edge of said bottom (14) (Fig. 6 to 8), said supporting feet (16b and 16b') being such that the flower pot can be used for selective watering according to the mat-principle or the flood/ebb-principle.

4. A flowerpot comprising a shell (10), a central plane bottom (14) in which are provided first openings (28), channels (18c), being open downwardly and having only one plane upper wall (24) upwardly displaced from the bottom (14) in which are provided second openings (26), said upper wall (24) being a ring wall, said channels (18c) terminating at an annular end wall (22c) connecting the upper wall (24) of each channel (18c) to said central bottom (14), and side walls (16c) of the channels (18c) and additional walls (16c') between said side walls (16c) extending inwardly and forming feet (16c, 16c') are provided at the lower side of said ring wall and said central bottom (14) distributed along the edge of said bottom (14), said supporting feet (16c and 16c') being such that the flower pot can be used for selective watering according to the mat-principle or the flood/ebb-principle (Fig. 9 to 11)."

II. On 29 December 1994 the appellant (opponent) lodged an appeal against this decision and simultaneously paid the appeal fee. The statement of grounds of appeal was received on 22 February 1995.

III. With the letter dated 19 August 1997 the appellant filed the document US-A-4 173 097. Moreover, with the facsimile dated 21 August 1997 the appellant filed a declaration by Mr van Eeden dated 21 August 1997 and an annexed sheet of drawings, this submission concerning the alleged public prior use of a flowerpot.

IV. Oral proceedings were held on 24 September 1997.

During the oral proceedings the appellant based its arguments only on documents D1 to D3 and argued that, starting from a flowerpot as described in document D1

(the closest prior art) and having regard to documents D2 and D3, the subject-matter of Claims 1 to 4 did not involve an inventive step as required by Article 56 EPC.

The respondent challenged the admissibility of the opposition and the appeal and requested that each should be declared inadmissible. The respondent furthermore challenged the arguments of the appellant relating to inventive step.

- V. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested as a main request that the appeal be dismissed and that the patent be maintained as granted. Auxiliarily, the respondent requested the maintenance of the patent on the basis of the amended four independent claims filed with the letter of 6 August 1996.

## Reasons for the Decision

### 1. *Admissibility of the opposition*

- 1.1 The notice of opposition filed on 17 December 1993 is clearly based on the ground that the claimed subject-matter does not involve an inventive step (see the second sheet of the notice of opposition, form 2330.2). It can be understood from the "opponent's facts and arguments" filed with the notice of opposition that document D1, mentioned in the description of the patent, is considered as being the closest prior art, that according to the description of the patent a technical problem arises since the flowerpot according to document D1 is not suitable for mat watering, and

that this problem is considered to be solved by providing the flowerpot with supporting feet. With regard to the features on which the claimed solution is considered to be based, the "opponent's facts and arguments" refer to documents D2 and D3 that describe flowerpots provided with supporting feet.

- 1.2 The respondent challenged the admissibility of the opposition by arguing that a notice of opposition should deal with the claims under attack feature by feature unless it was clear from the context why all features of a claim in their combination were known from or rendered obvious by the cited state of the art. The present notice of opposition however only referred to documents D1 to D3 which provided very little information. Thus it was not clear that the ground invoked for the opposition was sufficiently reasoned i.e. it was not clear how a skilled person could arrive at the whole of the claimed subject-matter in an obvious way.

The respondent pointed out that the notice of opposition firstly referred to document D1 as describing a flowerpot provided with four supporting "feet" each having a relatively small supporting bottom surface, which, if the flowerpot were to be watered according to the mat principle, would exert too high a pressure onto the mat and thereby close the pores of the mat, and secondly referred to documents D2 and D3 as showing flowerpots provided with supporting feet. In this respect, the respondent argued that the statements of the opponent in the notice of opposition did not challenge the inventivity of the claimed subject-matter, especially because the supporting feet according to documents D2 and D3 were smaller than those according to document D1. Therefore the respondent concluded that these statements did not give sufficient reasoning.

- 1.3 The board however cannot accept the respondent's arguments concerning the admissibility of the opposition. These arguments clearly relate to whether the arguments brought forward in the notice of opposition are convincing or not. The **sufficiency** of the notice of opposition however must be distinguished from the **strength** of the opponent's case (see decision T 222/85, OJ EPO 1988, 128, section 5).

In the present case, having regard to the relatively low level of complexity of the claimed subject-matter, the board considers that the "opponent's facts and arguments" enable the reader to understand sufficiently why the claimed subject-matter is considered to lack an inventive step.

- 1.4 Therefore, according to the board, the opposition is admissible.

2. *Admissibility of the appeal*

- 2.1 On page 4 of the appeal's statement of grounds it is clearly requested that the decision under appeal be reconsidered and the patent revoked in its entirety, on the ground that "the subject-matter of claims 1 to 4 does not involve an inventive step as laid down by Article 56 EPC." In support of this request the appellant essentially brings forward two arguments. The first argument is that the problem to be solved as defined in the decision under appeal and in the patent, in so far as it relates to the compression of the watering mat, was not disclosed in the application as originally filed. The second argument is that the problem defined in the decision under appeal is not solved by the claimed subject-matter and that the requirements of Article 83 EPC are not met.



2.2 The respondent, referring to the decision G 9/91 (OJ EPO 1993, 408), argued that the two arguments brought forward by the appellant in the appeal's statement of grounds did not relate to Article 100(a) EPC but to grounds according to Articles 100(c) and 100(b) EPC respectively. The respondent stated that it did not agree to these new grounds for opposition being considered.

The respondent maintained that, since the statement of grounds of appeal did not question the inventive step of the claimed subject-matter (the sole original ground), the appeal was inadmissible.

2.3 The board agrees with the respondent that the appellant's first argument relates to the ground according to Article 100(c) EPC which, according to the decision G 9/91, may not be introduced into the appeal proceedings without the agreement of the respondent. However, the appellant's second argument, although specifically referring to Article 83 EPC, does not relate only to the sufficiency of the disclosure but also to inventive step, in so far as the problem and solution approach applied for assessing inventive step requires that the problem to be solved be defined objectively, i.e. in such a way that it is credible that this problem is solved by the claimed subject-matter.

2.3 In the present case, therefore, the statement of grounds of appeal, in so far as it explicitly refers to the Article 56 EPC, defines the legal reason why the appeal should be allowed and, in so far as it relates to the problem to be solved as defined in the decision under appeal, states the factual reason (in relationship to the legal one) why the decision under appeal should be set aside.

The board therefore finds the appeal to be admissible.

3. *Late filed evidence*

- 3.1 During the oral proceedings the appellant stated that US-A-4 173 097 was not extremely relevant and withdrew its request to introduce this document into the proceedings.

According to the board, this document, that was already acknowledged in column 2, lines 33 to 54 of the description of the present patent is not relevant for the findings of the present decision.

- 3.2 The alleged public prior use referred to by the appellant with the facsimile dated 21 August 1997 is based upon a declaration signed by Mr van Eeden on the same date and referring to an annex having two sketched drawings.

According to this declaration, flowerpots having a bottom and four sides as shown in said drawings were manufactured and sold "during the years 1972 until 1982" by Technische Kunststoffen-Industrie Rubox B.V. which employs Mr van Eeden as deputy managing director.

According to the case law of the boards of appeal of the EPO, "prior public use is adequately substantiated only if sufficiently specific details are given of **what** was made available to the public, **where, when, how** and by whom" (decision T 93/89, OJ EPO 1992, 718, section 8.1; emphasis added) and allegations of public prior use which are late filed and insufficiently substantiated can be disregarded according to Article 114(2) EPC (see for instance decision T 550/89, unpublished, section 2).

In the present case in which the alleged public prior use, according to the filed declaration, relates to many articles manufactured and sold by a firm, neither invoices concerning the sale of these articles nor technical drawings concerning the manufactured articles have been submitted.

Moreover, the allegation that the firm concerned has sold flowerpots would not necessarily imply a sale without obligation to maintain secrecy and the indication that the articles concerned were sold "during the years 1972 until 1982" does not represent a clear statement of the time of the public prior use.

Furthermore, the general idea upon which the subject-matter claimed in the patent in suit is based, i.e. the idea of designing supporting feet for a flowerpot so as to use the flowerpot for selective watering according to the mat-principle or the flood/ebb-principle, cannot be derived either from the declaration or from the annexed drawings.

Having regard to the comments above, the alleged public prior use is not sufficiently substantiated, is not relevant and the evidence has been filed late. It is therefore disregarded.

4. *Novelty (main request)*

The novelty of the subject-matter of the granted Claims 1 to 4 was not disputed by the appellant and also the board finds this subject-matter novel within the meaning of Article 54(2) EPC.

5. *Problem and solution (main request)*

- 5.1 The board and both parties consider the pots of the type referred to in document D1 under the title "Ecktöpfe" (article numbers 605 to 618 and 606W to 618W) as being the closest prior art.

This type of pot comprises a shell and four supporting "feet", each foot having a flat bottom surface, wherein all said bottom surfaces in combination define a plane bottom, a hole being provided in each of said bottom surfaces. Moreover, this pot comprises a horizontal circular wall upwardly displaced from said surfaces defining the bottom, the circular wall having four horizontal extensions which form transversely extending channels having access opening in the shell, each channel being open downwardly, each extension being upwardly displaced from the surfaces defining the bottom, wherein four further holes are provided in the upper wall formed by said circular wall and said extensions.

- 5.2 According to the respondent and as can be understood from the description of the patent (column 1, lines 51 to column 2, line 2), if a flowerpot of this type were to be watered according to the mat-principle, it would exert - due to the small surface of the pot bottom - too high a pressure on the mat and thereby close the pores of the mat. Moreover, according to the respondent, if a flowerpot of this type were to be watered according to the flood/ebb-principle, only the holes provided in the upper wall would allow a quick removal of the water during the ebb phase, and the draining of the water from that part of the pot filling which is under the level of said upper wall would be hindered.

The board can accept that the flowerpot according to the closest prior art suffers from these drawbacks.

Thus, the problem to be solved essentially consists in the elimination of these drawbacks, i.e. in providing a flowerpot which can be watered in an efficient way according to the mat-principle or to flood/ebb-principle.

5.3 The subject-matter of each independent claim differs from the closest prior art at least in that **supporting feet are provided at the lower side of the bottom, the supporting feet being such that the flowerpot can be used for selective watering according to the mat-principle or the flood/ebb-principle.**

5.4 According to the respondent, when a flowerpot according to each of the independent Claims 1 to 4 is watered according to the flood/ebb-principle the flow of water through the lower holes during the ebb-phase is not hindered, and when this flowerpot is watered according to the mat-principle the compression of the mat in the regions surrounding the lower holes is avoided without hindering the flow of water from the mat towards the filling of the flowerpot.

In this respect, it must be considered that the distinguishing features referred to in the above section 5.3 implicitly define the design and in particular the height of the supporting feet. In other words, the design of the feet should be chosen so as to avoid the compression of the mat in the regions surrounding the lower holes when the pot is watered according to the mat-principle and to allow a certain flow of water through the lower holes during the ebb-phase when the pot is watered according to the flood/ebb-principle.

The board can accept that these results are achieved by the subject-matter of each of the independent Claims 1 to 4, i.e. that the problem referred to in section 5.2 above is solved.

6. *Inventive step (main request)*

6.1 It has to be considered that the cited prior art does not relate to the technical problem to be solved, in particular as far as this problem concerns the phenomenon of compressing a watering mat and thereby closing its pores.

Document D2 relates to flowerpots having a bottom provided with drain holes and having a supporting edge with openings, which edge can be considered as defining a plurality of supporting feet whose height is at least 1 mm. Document D3 relates to similar flowerpots also provided with structural elements which can also be considered as being supporting feet with a height between 1.4 mm and 1.6 mm.

However, neither document D2 nor document D3 indicates the function of the supporting feet. In particular, the idea of designing and dimensioning the supporting feet such that the flowerpot can be used for selective watering according to the mat-principle or the flood/ebb-principle cannot be derived from either document D2 or D3.

Therefore, because of the absence of any link between document D2 or D3 and the problem to be solved, the skilled person would not be led to provide a flowerpot according to document D1 with supporting feet as shown in document D2 or D3.

6.2 The appellant argued that a skilled person, starting from the flowerpot according to the closest prior art and concerned with further developing this flowerpot while being aware that this flowerpot is also to be sold in Denmark, would provide this flowerpot with supporting feet because documents D2 and D3, being Danish Standards, lay down that he shall provide these feet. That the supporting feet would be such that the flowerpot could be used for mat-watering and flood/ebb-watering would be the inevitable result of this step, i.e. a discovery rather than an invention.

The board cannot accept this argument of the appellant because documents D2 and D3 cannot be considered as binding upon the flowerpot designer. In any case, even if they were binding, the provision of the feet according to these Standards would be compulsory only for the types of flowerpot referred to the Standards and not for other types of flowerpot such as the flowerpot according to the closest prior art.

The fact that a flowerpot of the type according to document D1 - when provided with additional supporting feet - could be used without inconvenience for mat-watering and flood/ebb-watering could only be discovered after that this flowerpot has been provided with supporting feet which are adequately designed and dimensioned. Therefore, the appellant's argument is clearly the result of an *ex post facto* analysis.

6.3 The further arguments put forward by the appellant in the written proceedings relied on documents which were commented upon by the board in the annex to the summons to attend oral proceedings but these arguments were not brought forward any more during the oral proceedings. Furthermore these arguments are not relevant for the findings of the present decision.

6.4 Therefore the board finds that the subject-matter of the independent Claims 1 to 4 of the patent as granted, upon which the main request of the respondent is based, is not obvious to a person skilled in the art and thus considers it as involving the inventive step required by Article 56 EPC.

7. The patent can therefore be maintained as granted. The respondent's subsidiary request does not need to be considered.

### Order

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:



N. Maslin

The Chairman:



M. Hatherly