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D E C I S I O N
of 14. November 2000

Case Number: T 0899/99 - 3.2.1
Application Number: 89911181.9
Publication Number: 0394399
IPC: B65D 25/00, B65D 77/24,
B65D 81/82

Language of the proceedings: EN

Title of invention:
Prize holding container assemblies

Applicant:
The Coca-Cola Company

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 56

Keyword:
"Inventive step (yes)"

Decisions cited:
-

Catchword:
-



Case Number: T 0899/99 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 14. November 2000

Appellant: The Coca-Cola Company
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 14 July 1999
concerning maintenance of European patent
No. 0 394 399 in amended form.

Composition of the Board:

Chairman: F. Gumbel
Members: S. Crane
J. H. Van Moer

Summary of Facts and Submissions

- I. European patent No. 0 394 399 was granted on 21 December 1994 on the basis of European patent application No. 89 911 181.9.

Claim 1 of the granted patent reads as follows:

- "1. A container assembly (20), for use in association with liquid, semi-liquid and moist products, housing a prize award and for being randomly distributed with non-prize bearing containers without being detected by the consumer prior to opening thereof, said container assembly (20) comprising:
- A. an outer surface defining shell (21)
 - a. identical in appearance to the product bearing shell normally employed for the liquid, semi-liquid or moist product;
 - b. defining an internal retaining zone; and
 - c. comprising at least one entry portal formed at one end thereof;
 - B. closure means (43) cooperatively associated with the outer shell (21) for closing the entry portal thereof;
 - C. means (30) positioned in the retaining zone for providing the container assembly with substantially the sound, weight and feel of the product normally contained therein;
 - D. holding means (78) positioned within the retaining zone in cooperating relationship to the entry portal for securely retaining a prize award, the holding means (78) being movable, in response to opening of the entry portal of the

shell (21), from a first position within the retaining zone to a second position in juxtaposed, exposed relationship with the entry portal; and
E. a prize award retained by the holding means."

Dependent claims 2 to 19 relate to preferred embodiments of the container assembly according to claim 1, claim 20 to a container assembly as claimed in one of claims 1 to 19 in combination with non-prize bearing containers and claim 21 to a method of assembling and using a container as defined in one of claims 1 to 19.

II. The granted patent was opposed on the grounds that its subject-matter lacked novelty and or inventive step (Article 100(a) EPC). The prior art documents relied upon included *inter alia*:

(E0) EP-A-0 079 673,

(E8) US-A-4 424 913,

(E13) US-A-3 547 308.

III. The opponents having withdrawn their opposition with letter dated 24 September 1996 the opposition proceedings were continued pursuant to Rule 60(2) EPC and with its decision posted on 14 July 1999 the Opposition Division held that granted claim 1 lacked inventive step having regard to documents E0, E8 and E13, that claim 1 according to the first auxiliary request contained added subject-matter in contravention of Article 123(2) EPC and that the patent could be

maintained in amended form on the basis of the documents according to the second auxiliary request.

- IV. A notice of appeal against that decision was filed on 17 September 1999 and the fee for appeal paid at the same time.

The statement of grounds of appeal was filed on 24 November 1999.

The appellants (proprietors of the patent) requested that the decision under appeal be set aside and the patent maintained as granted (main request) or in the alternative on the basis of the first auxiliary request rejected by the Opposition Division.

They argued that the Opposition Division had misdirected itself in determining what was the closest state of the art and the technical problem to be solved. In particular, the route chosen to demonstrate that the subject-matter of claim 1 was obvious was tainted by *ex-post facto* analysis.

Reasons for the Decision

1. The appeal complies with the formal requirements of Article 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.
2. As is discussed fully in the introductory part of the present patent specification, it is well known to include prize articles or the like, for example collectible items, in containers as part of a promotional marketing exercise. The prize award may be

of relatively high value, in which case only a small number of containers including such a prize award would be randomly distributed amongst non-prize bearing containers. There are however problems associated with including a prize award in a container with a liquid, semi-liquid or moist product, in particular the fear of degradation to the product and/or prize award, lack of immediate accessibility to the prize award and difficulty in ensuring that the presence of the prize award cannot be easily detected by the consumer without opening the container. With regard to liquid products the awarding of prizes as a promotional ploy has therefore generally been restricted to incorporating concealed prize indicia in or on the container or its closure member, these only becoming visible once the container has been opened. One such proposal is to be found in document E0 where prize information is printed onto the inside of the bottom wall of a two-piece beverage can, the information being visible through the opening in the top wall of the can once the contents have been discharged. However, the immediate impact on the consumer of directly and immediately receiving a prize award is clearly more potent than just being informed of the subsequent possibility of being able to cash in the container or its closure member to obtain the prize. Accordingly, the technical problem with which the invention is concerned is the extension of this promotional ploy to containers for liquids and the like.

The solution to this problem lies in a container which is not what it seems. Although it looks and feels like a normal container filled with the product involved, what it actually delivers to the consumer when opened is a prize award. In particular, as defined in

features D and E of granted claim 1, there are holding means for the prize award within the container which are moved to expose the prize award when the container is opened.

Stating from document E0 as the closest state of the art the Opposition Division considered one of the possible objective technical problems to be solved as being to find an existing container for use in association with liquids and the like which was already suitably equipped for bearing a concealed prize award which would be accessible to the consumer when the container was opened. It saw such containers as being disclosed in documents E8 and E13. Both of these documents relate to beverage cans with means for making the end of a drinking straw, normally held within the can, available to the consumer when the can is opened. In the arrangement of document E8 the flexible drinking straw is normally confined in a bent condition with its upper end positioned in a small spring clip attached to the underside of the pull-tab of the can. When the pull tab is opened the end of the drinking straw is pulled through the aperture in the top wall of the can and can be separated from the pull tab for use. Document E13 discloses various arrangements of both rigid and resilient bellows-like drinking straws the ends of which, when the pull tab is removed, are delivered through the aperture in the top wall of the can either by separate elastic means or the inherent resilience of the drinking straw itself. The Opposition Division argued that the skilled person in the art would immediately recognise that simply replacing the drinking straw with a prize award would result in a complete solution to the technical problem it had identified.

In the opinion of the Board however the person skilled in the art concerned with the question of how prize awards could be efficiently and effectively associated with containers for liquids and the like is unlikely to have had recourse to the teachings of documents E8 and E13 when looking for a solution. Clearly, the drinking straws cannot as such be sensibly equated to prize awards in the normal sense. The purpose of providing the drinking straw within the beverage can is simply to facilitate the consumption of its contents. There will be no attempt to conceal the presence of the drinking straw within the beverage can from the consumer, indeed it can be safely assumed in the circumstances that its presence will be explicitly advertised. As opposed to the container of the present patent, the primary purpose of which is to deliver a prize award to the consumer rather than the normal contents associated with the container, the beverage cans of documents E8 and E13 are just that - the consumer merely obtains the beverage he purchased and a drinking straw to help him drink it. The path followed by the Opposition Division leading via documents E8 and E13 to its conclusion of lack of inventive step has its origin in the formulation of the technical problem to be solved to the effect that all the person skilled in the art was required to do was to look for a container for liquids or the like having means within it for delivering an article of some description to the consumer when the container is opened. That formulation already contains however the seed of the solution to the more general problem with which the person skilled in the art was actually faced, as explained above.

The Board therefore comes to the conclusion that the subject-matter of granted claim 1 cannot be derived in

an obvious manner from the cited state of the art and accordingly involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

s. Fabiani

F. Gumbel