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**Datasheet for the decision
of 20 October 2010**

Case Number: T 0154/09 - 3.2.04

Application Number: 98870244.5

Publication Number: 1000577

IPC: A47K 10/42

Language of the proceedings: EN

Title of invention:

A container

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

SEIDE, Günter

Headword:

-

Relevant legal provisions:

EPC Art. 108

EPC R. 99(2)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Form of appeal - grounds - substantiation (no)"

Decisions cited:

T 0922/05

Catchword:

-



Case Number: T 0154/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 20 October 2010

Appellant:
(Opponent)

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Respondent:
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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 5 November 2008
rejecting the opposition filed against European
patent No. 1000577 pursuant to Article 101(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal, received 15 January 2009, against the decision of the Opposition Division posted 5 November 2008 to reject the opposition against European Patent No. 1 000 577. The appeal fee was paid 14 January 2009. The statement setting out the grounds was received 2 March 2009.
- II. The opposition was based originally on added subject-matter, and lack of novelty and inventive step in view of 41 citations numbered D1 to D41. In its decision the Opposition Division held that none of these grounds prejudiced maintenance of the patent as granted.
- III. Oral proceedings were duly held before this Board on 20 October 2010.
- IV. The Appellant (Opponent) requests that the decision under appeal be set aside and the patent be revoked in its entirety.

The Respondent (Proprietor) requests, as main request, that the appeal be dismissed and the patent be maintained as granted, or in the alternative, that the patent be maintained in amended form on the basis of the auxiliary request filed with letter of 18 October 2010.

- V. With regard to the admissibility of the appeal the Appellant argued essentially as follows:

The grounds of appeal contests novelty and inventive step, as well as allowability of amendments. Reference

to the first instance submissions is not insufficient, as they adequately address the underlying grounds of the decision.

Nor is reference to an examination report issued for a divisional of the present patent insufficient. The objections raised by an examiner in the divisional also address the underlying grounds as they are an EPO examiner's arguments against novelty and inventive step of almost identical claims. Thus, for example, this report supports a novelty attack against claim 1 of the present patent based on D3.

VI. The Respondent argued as follows:

It is well-established case law that a mere reference to first instance arguments normally does not suffice in stating the Appellant's complete case why the decision should be set aside. The decision demonstrably considers these arguments. Exceptional circumstances that might justify a simple reference have not been demonstrated.

The grounds further fail to establish a clear link between the examination report issued in a different case prior to the contested decision and the grounds of that decision and which might call those grounds into question. The claims of the divisional and of the patent are not the same, nor is there any link with the original arguments. The arguments listed in the Appellant's most recent submission in reply to the Board's communication for example are not the same as those made before the first instance or even those put forward in the examination report. The Respondent can

only guess as to what attacks are exactly being made against the patent.

Reasons for the Decision

1. Admissibility of the Appeal
 - 1.1 Article 108 EPC, third sentence, in conjunction with Rule 99(2) EPC requires a statement of grounds to indicate the reasons for setting aside the decision, and facts and evidence on which the appeal is based. In established case law this is understood to mean that the statement of grounds must be sufficiently substantiated in particular with a view to enabling the board and the other party to understand immediately and with little investigative effort why the decision is considered to be incorrect, see the general principles set out in the Case Law of the Boards of Appeal, 6th edition, 2010 (CLBA hereinafter), VII.E.7.6.1; see also T 922/05, reasons 2 to 5. For this reason also an appellant is required to state his complete case in the statement of grounds, Article 12(2) of the Rules of Procedure of the Boards of Appeal.
 - 1.2 In the present case the statement of grounds comprises three sections I, II and III, at least one of which might provide the requisite reasons, facts and evidence as to why the decision under appeal should be set aside. In the following the Board considers each section separately.
 - 1.3 Section I refers generally to submissions made before the first instance : "Opponent will not repeat detailed

arguments regarding lack of novelty, inventive step ... laid down in letters of Dec. 23, 2006 and Sept.12, 2008 [and he] maintains these arguments."

1.3.1 According to established case law, see for example the decisions cited in CLBA, VII.E.7.6.4, a statement of grounds which merely refers generally to previous submissions made in first instance proceedings is in principle not sufficient. Only in special cases, where these submissions adequately address the decision's underlying grounds, might such a general reference constitute sufficient reasoning. In this Board's view this would be the case if a straightforward comparison of the decision and the previous submissions reveals clear and serious flaws in the decision's reasoning. For example, if a decision does not correctly reflect or represent important submissions, or addresses them only in part or not at all, and this is immediately apparent, then an adequate basis exists for a judicial review of the appealed decision.

1.3.2 In the present case a comparison of the decision and the submissions referred to in the grounds appeal, section I, does not reveal any such flaws.

1.3.3 The previous submissions referred to in the grounds of appeal (the letter of 23 December 2006 is taken to relate to the notice of opposition dated 13 December 2006) relate on one hand to lack of novelty in view of **D1**, see subsection b) of section I of the notice of opposition and section I of the letter of 12 September 2008. The decision under appeal addresses novelty in section 3 of the reasons. There it finds that **D1** constitutes prior art under Article 54(3) EPC only for

the second set of granted claims for contracting states validly designated in D1 and the patent, but that it does not disclose the claimed features of silicone elastomer (paragraphs 3.4, 3.5, 3.7).

- 1.3.4 Where the earlier submissions discuss inventive step they do so in view of a combination of **D2 to D4** with any one of **D5 to D8**, or alternatively of one of **D5 to D8** with one of **D2 to D4 and D9 to D14**, see the notice of opposition, page 8, penultimate paragraph and page 11, first paragraph, and section II of the letter of 12 September 2008. The decision under appeal addresses inventive step in section 4 of the reasons. There it discusses each of documents **D2 to D14** in detail, see paragraphs 4.2 to 4.13, concluding that none of these documents discloses or suggests the use of a compressed gasket seal so that the claimed subject-matter involves an inventive step, paragraph 4.14.
- 1.3.5 From the above it is clear to the Board that the decision addresses in detail and thus duly considers the earlier submissions on novelty and inventive step referred to in the grounds of appeal. Nor is there anything in the appealed decision's reasoning that strikes the Board as so flawed as to justify a review. Section I of the grounds therefore does not allow the Board to understand why the decision might be incorrect.
- 1.4 Section II relies on a second examination report issued for a divisional - EP 1 654 970 - of the present patent, which is said to support the Opponent's arguments regarding lack of novelty and inventive step. The report, annexed to the grounds together with the divisional claims, was issued 2 July 2008 before the

date of the decision under appeal. Section II indicates how parent and divisional claims correspond, see the table on pages 2 and 3, and outlines the main objections raised against the divisional claims, see page 2.

- 1.4.1 In the Board's view an examination report issued in a *different case* than the present one by *another division* than issued the decision under appeal and *before* its date of issue will normally not have a direct bearing on that decision. Only very rarely might a report in one case have relevance to a decision in another in a way that is immediately apparent to the Board or other parties. This might exceptionally happen if, say, the relationship between the claims of the other case and those in the case under dispute is self-evident and the objections raised in the report are so clear and complete that the Board and other parties will understand with little investigative effort how the report calls into question the findings of the appealed decision.

- 1.4.2 This is not the case here. The claims of the divisional application and the disputed patent are clearly different as follows also from the explanatory remarks in section II. If the Board nevertheless then attempts to determine which specific attacks against the patent claims might be inferred from the report it is unable to do so without considerable effort on its part, even when it considers the further explanations in section II. Any lines of attack that might be gleaned appear to differ substantially from those presented at first instance and appear to be insufficiently reasoned.

1.4.3 In more detail section II fails to expressly identify the specific combination of documents, much less the particular parts of the report that form some line of reasoning or that might lead to a conclusion of lack of inventive step. This is left entirely to the reader to work out from the table of correspondence between parent and divisional claims and the outline of attacks against the divisional claims.

For example, while page 3 of section II states that *parent* claim 1 (second set) corresponds to *divisional* claims 1 (set 1), 5, 9 and 13, page 2 of section II then groups citations in the report against groups of divisional claims. To find out which individual citations the report cites against individual claims the reader must himself consult the report. He finds for example that D1, D2 and D3 (divisional notation) are cited against claim 1 (set 1), see paragraphs 2.1 and 2.2, D1 or D3 against claim 9, D2 against claim 5 and D7 against claim 13 of the divisional, paragraph 2.3. This implies a combination of at least three documents - D1 or D3, D2, D7 - against the combination of divisional claims 1 (set 1), 5, 9 and 13 making up parent claim 1 (set 2). The diligent reader must then convert back to the parent notation, which finally gives him the combination of **D10 or D9** with **D3** and **D7**. That combination does not correspond to any of the Appellant's attacks in first instance.

Nor do the relevant parts of the report then add up to a complete chain of reasoning. The relevant passages only indicate which features are disclosed in which document. There is however no explanation why the skilled person would combine these documents. Without

any reasoning as to his motivation for combining these teachings - say, in terms of a problem to be solved or an effect to be achieved - these passages amount to no more than a bland assertion.

1.4.4 The reader must invest considerable effort to determine which and why documents are combined. This constitutes an undue burden and the Board can but conclude that section II also fails to indicate the reasons for setting aside the decision to the required standard.

1.5 Section III, finally, deals with an allegation by the patentee before the first instance that "there is no opposition to claims for UK, FR, NL, SE", that is the first of two different country versions of the granted claims. This is taken to refer to the patentee's contention in opposition that the ground of lack of novelty was insufficiently substantiated, cf. the patentee's letter of 16 August 2007 under the heading "Novelty". The decision under appeal does not expressly address the issue of substantiation, but rather decides the question of novelty on the merits of the case. In so doing the decision under appeal adopts a position that is in effect favourable to the Appellant regarding substantiation. The Appellant's arguments against a point, which, favourably to him, has been left undecided by the appealed decision cannot reflect on why the decision might be in error.

2. Sections I, II and III of the grounds of appeal do not provide the necessary reasons, facts and evidence for setting aside the decision. The Board therefore finds that the grounds of appeal as filed fails to meet the requirement of Rule 99(2) EPC. As this deficiency was

not remedied within the period of four months specified in Article 108 EPC for filing the grounds of appeal, the Board must reject the appeal as inadmissible pursuant to Rule 101(1) EPC.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar

The Chairman

G. Magouliotis

M. Ceyte