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**Datasheet for the decision
of 21 January 2010**

Case Number: T 2140/09 - 3.2.07

Application Number: 02756955.7

Publication Number: 1434719

IPC: B65D 37/00

Language of the proceedings: EN

Title of invention:
Disposable syringe dispenser system

Applicant:
Brewer Science, Inc.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (EPC 1973):
EPC Art. 109(1), 111(1)

Keyword:
"Interlocutory revision: yes, should have been granted"

Decisions cited:
T 0139/87

Catchword:
-



Case Number: T 2140/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 21 January 2010

Appellant: Brewer Science, Inc.
201 Brewer Drive
Rolla, MO 65401-9926 (US)

Representative: UEXKÜLL & STOLBERT
Patentanwälte
Beselerstrasse 4
D-22607 Hamburg (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 10 June 2009
refusing European application No. 02756955.7
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. European patent application No. 02 756 955.7, based on the international application PCT/US02/24755 (published as WO-A-03/016160) filed on 31 July 2002, was refused by decision of the Examining Division dated 10 June 2009.

- II. In its decision the Examining Division found that claim 1 received on 11 December 2008 did not fulfil the requirements of Article 123(2) EPC. In the reasons for its decision the Examining Division pointed out that in amended claim 1 still "the features chamber 32 and material piston 114 have been omitted" and "the objected features such as knob 128 and spring 118 were not introduced in the claim", see point 2.4 of the reasons for the decision. The Examining Division argued further that "[a]s the features such as knob 128 and spring 118 are not found in amended claim 1, it does not fulfill the requirements of Article 123(2) EPC either", see point 2.5 of the reasons for the decision.

- III. The appellant filed an appeal against this decision on 6 August 2009, paying the fee for appeal and submitting a statement of grounds in good time. In the statement of grounds for appeal the appellant: (i) asked that a European patent be granted on the basis of a new claim 1 having the features "chamber 32", "material piston 114", "knob 128" and "spring 118" introduced, (ii) expressed the view that "the new claim 1 has removed all deficiencies outlined in the reasons for the Decision to refuse a European Patent application", and (iii) requested interlocutory revision in accordance with Article 109 EPC.

Reasons for the decision

1. The application having been filed on 31 July 2002 the provisions of Articles 109(1) and 111(1) EPC 1973 as well as Article 123(2) EPC 2000 apply to the present case, in view of Article 7(1) second sentence of the Act revising the European Patent Convention of 29 November 2000 (see Special Edition No. 1, OJ EPO 2007, 196), as well as Article 1.1 of the transitional provisions as established by the Administrative Council in this respect.
2. According to Article 109(1) EPC 1973 "[i]f the department whose decision is contested considers the appeal to be admissible and well founded, it must rectify its decision".
3. The appeal is admissible.
4. The features "chamber 32", "material piston 114", "knob 128" and "spring 118" are now present in the new claim 1. Their absence in claim 1 subject of the impugned decision was objected to by the Examining Division under Article 123(2) EPC, arguing that the other features, apparently admissibly, taken up in claim 1, were only disclosed in combination with the former, see points 2.4 and 2.5 of the Reasons for the Decision.
5. The appellant has therefore made the amendments which clearly meet the only objection on which the refusal of the application is based and which were clearly indicated as such by the Examining Division.

6. Consequently the appeal is well founded. The Examining Division ought to have established this and rectified its decision pursuant to Article 109(1) EPC 1973. Such practice forms also part of the Guidelines for the Examination in the European Patent Office, E-XI, 7.1(iii), in respect of amendments overcoming the objections of the decision under appeal, making appropriate reference to T 139/87 (OJ EPO 1990, 68).

6.1 Under these circumstances the Board considers that it should remit the application in accordance with Article 111(1) EPC 1973 to the Examining Division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders