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**Datasheet for the decision
of 8 June 2015**

Case Number: T 0703/12 - 3.2.04

Application Number: 07819451.1

Publication Number: 2081475

IPC: A47J27/21, B01D35/143

Language of the proceedings: EN

Title of invention:
JUG FOR FILTERING LIQUIDS

Patent Proprietor:
Laica S.p.A.

Opponent:
BWT Austria GmbH

Headword:

Relevant legal provisions:

EPC Art. 56, 54(2)
RPBA Art. 13(3)

Keyword:

Evidence - public prior use (not proven)
Inventive step - (yes)

Decisions cited:

T 2010/08

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0703/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 8 June 2015

Appellant:
(Opponent)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 24 January 2012
rejecting the opposition filed against European
patent No. 2081475 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
T. Bokor

Summary of Facts and Submissions

- I. By its written decision dated 24 January 2012 the opposition division rejected the opposition against the patent No. EP 2081475. On 26 March 2012 the appellant (opponent) filed an appeal against the decision and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 22 May 2012.
- II. Opposition was filed against the patent as a whole and based *inter alia* on Article 100(a) EPC (lack of inventive step).

The opposition division held that the grounds for opposition mentioned in Article 100(a) EPC did not prejudice the maintenance of the granted patent having regard to the following prior art, among others:

D1 DE 10 2004 014 646 B3;

Alleged prior use of a water filter jug supported by:

D2: a statutory declaration (Eidesstattliche
Versicherung) made by Mr Stefan Bender;

D2a: DE 10 2006 006 230 B3 (inventor Stefan Bender);

D2b: Photographs of packaging for an "Anna" water
filter jug;

D2c: Photographs of a water filter jug.

- III. In the course of the appeal proceedings the respondent submitted *inter alia* the following evidence:
- D3 : certified copy of OHIM certificates of
registration Nr. 006435317 and Nr. 002396281, for
the "Anna by BWT" trade mark.

IV. Oral proceeding before the Board were duly held on 8 June 2015.

V. The appellant requests that the decision under appeal be set aside and that the patent be revoked in its entirety.

The respondent (proprietor) requests that the appeal be dismissed.

VI. Claim 1 as granted reads as follows:

" A jug (1) for filtering liquids, comprising:
- a lid (3),
- an aperture (4) provided through said lid (3) for the filling of the jug (1),
- a blocking mechanism (5) mounted on the lid (3) at the aperture (4) and displaceable between a first position, in which it closes said aperture, and a second, open position,
- actuating means associated with said blocking mechanism (5) for urging it into said first position and such as to allow its passage into the second position under the action of the flow of liquid admitted into the jug (1) through the aperture (4), characterized in that it comprises, on said lid (3), a counting device (11) for counting the cycles of opening and/or closure of said blocking means (5) resulting from the admission of liquid into said jug (1)."

VII. The appellant mainly argued as follows:

The subject matter of granted claim 1 lacks an inventive step starting from D1 combined with a water filter jug that was prior used, as set out in D2. In particular D2 proves the prior use of a jug comprising a lid with an opening protected by a sliding cover, a

magnet on the cover operating a reed switch and a counter connected to the reed switch for counting openings of the sliding cover.

As described in D2, visitors to the Ambiente trade fair were explained the exact functioning of the filter-change indicator, this means they were told that the jug had a reed-switch, magnet and counter arrangement for counting opening actions of the sliding cover. The same jug is the subject of post published D2a. At the fair the jug must also have been available for inspection, fair visitors could then see the magnet and would realise that it operated a reed switch to count openings of the sliding cover. The magnet can be seen on recent photos of a similar jug having the same indicator. Details of the jug can also be seen in photographs of packaging supplied with prior sold jugs. In addition named companies received samples of the jug. Both the latter prior uses are also described in D2.

The prior uses detailed in D2 are proven beyond any reasonable doubt, however if any evidentiary gaps exist in D2 these should be filled by hearing its author, Stefan Bender, as a witness. This offer was implicitly made in the statement of grounds of appeal because it referred to the appellant's submissions in opposition, which contain the same offer.

VIII. The respondent mainly argued as follows:

None of the alleged prior uses in D2 have been proven beyond any reasonable doubt. Therefore the appellant's inventive step argument must fail. In particular, at the Ambiente trade fair, explaining to visitors the exact functioning of the filter-change indicator might

only have involved explaining in detail how a user was to be informed of the necessity to change the filter, without mentioning that the jug had a counter for counting opening actions of a sliding cover. D2 does not prove that a working example of a jug was available to inspect at a fair. Even if it was, D2 says nothing about how it was displayed and whether or not visitors were permitted to examine it. In any case, visual inspection would not have revealed the existence of a counter since it is hidden from view.

No supporting evidence has been provided to prove the prior use by sale or sending of samples. To prove this beyond any reasonable doubt invoices and delivery documentation should have been provided.

Offering a witness for the first time in appeal proceedings at the oral proceedings could only be dealt with by adjournment of the proceedings to which the respondent does not agree.

Reasons for the Decision

1. Admissibility of the appeal

During the oral proceedings before the Board, the respondent withdrew their objection to the admissibility of the appeal. Nor indeed is any deficiency apparent to the Board that might warrant the rejection of the appeal as inadmissible under Rule 101 EPC. Therefore the Board concludes that the appeal is admissible.

2. Background

The patent relates to a jug for filtering liquids, in accordance with its title. Such jugs typically have a filter cartridge which must be changed after a certain number of filtering cycles, see patent specification paragraph [0003]. The jug is said to have the advantage that the number of filtering cycles are counted automatically by introducing water into the jug, see patent specification paragraph [0029]. To this end the lid of the jug has *inter alia* a filling aperture and a counting device for counting opening/closing of an aperture blocking means, see claim 1.

3. Prior use: issue of proof
 - 3.1 In appeal the appellant only contests the decision's finding that the subject matter of claim 1 as granted involves an inventive step in the light of prior art document D1 combined with the alleged prior uses (see grounds of appeal, page 3, second to fourth complete paragraphs).
 - 3.2 The question of inventive step therefore depends, *inter alia*, on whether or not the alleged prior uses are proven to the necessary standard of proof.
 - 3.3 According to established jurisprudence of the Boards, in cases of alleged prior use where all evidence in support of the alleged public prior use lies within the power and knowledge of the opponent, while the patentee has barely any or no access to it at all, it is incumbent upon the opponent to prove the alleged prior use to the standard of proof "beyond any reasonable doubt", see Case Law of the Boards of Appeal, 7th edition, 2013 (CLBA), III.G.4.3.2, and the decisions cited therein. In particular to establish a prior use to this standard, the questions "what was disclosed",

"when", "where" and "under which circumstances" must be answered, see for example T 2010/08.

3.4 In the present case the appellant alleges the prior public disclosure, by use, of a jug that is described in the statutory declaration D2 as having a lid with an opening closed by a sliding cover, whereby the sliding cover is provided with a magnet which interacts with a reed switch of an electronic circuit to count opening operations of the sliding cover (2nd and 3rd paragraphs of D2).

3.5 D2 further states that the water filter jug was presented at the Ambiente trade fair, Frankfurt, from 10-14 February 2006 (i.e. prior to the patent's claimed priority date of 15 November 2006); delivered to customers shortly after 21 September 2006; and that product samples were sent to companies BHL in Leeds, UK and Gurriss, Mannheim, Germany before 21 September 2006.

3.5.1 It is common ground that all the evidence in support of the alleged public prior uses lies within the power and knowledge of the appellant. Thus, as is evident from the packaging, see photographs D2b, the jug of the alleged prior use is marketed under the registered trade mark "Anna by BWT" owned by BWT Wassertechnik GmbH, see D3, a subsidiary of the BWT Group of which the opponent-appellant BWT Austria AG is also a subsidiary. Consequently the higher standard of proof, that is beyond any reasonable doubt, must be applied.

3.6 Starting first with the Ambiente trade fair, it is not disputed that the company "Anna" attended the Frankfurt Ambiente fair, 10-14 February 2006 (D2, fifth paragraph). Thus the Board considers the "where" and

"when" questions vis-à-vis the first alleged prior use to be answered. However, the respondent contests that the "what" and the "circumstances" of the prior use are proven beyond any reasonable doubt.

- 3.6.1 The appellant has argued that, according to D2 (page 1 third and fifth paragraphs), a jug as described in D2a, including the features of a "Wechselanzeige", (i.e. a change indicator) namely a reed switch, magnet and electronics to count opening operations, was disclosed to visitors at Ambiente. In particular the appellant considered this proven by the statement "Interessierten Kunden wurde dabei die genaue Funktion der Wechselanzeige erläutert", i.e. interested clients were given an explanation about the exact functioning of the change indicator.

It is common ground that the change indicator is an indicator for displaying when the user should change the filter cartridge. However, assuming for the sake of argument that the jug alleged to have been presented at the fair was as described D2a, in the Board's opinion, the above statement could mean different things.

On the one hand it could mean that visitors were given a detailed explanation as to how the indicator on the jug's lid informs a user when to change the filter cartridge. This might for example have entailed explaining that filter usage was displayed on a percentage-scale LCD display, that the display is revealed by operating the sliding cover and that the indicator is reset by removing the lid (see D2a, paragraphs [0019], [0024], [0032] and [0022]).

On the other hand, the above statement could indeed mean that visitors were informed that the change

indicator included a reed switch in the lid interacting with a magnet on the sliding cover to count the number of times the cover was opened, as the appellant has argued (see D2, third paragraph and D2a, paragraphs [0011] and [0059]).

Without calling into question the credibility of the above statement in D2, any number of other possible oral disclosures, which might or might not involve informing visitors about counting openings of the sliding cover could, in the Board's view, be described as an exact explanation of the change indicator's function. Thus, on the basis of statements in D2, the presence of a counter counting the number of times the lid was opened or closed need not have been explained to interested visitors, even though it is possible or even probable that it was. An alternative explanation may have been given, and thus a different reasonable interpretation of the facts exists. This raises reasonable doubts as to *what* was disclosed to the public at the Ambiente trade fair, in particular concerning the claimed feature of the counter.

- 3.6.2 Nor is the Board convinced that by seeing the jug exhibited at Ambiente, a visitor would have been able to fill in any gaps between what might have been orally disclosed and what is alleged to have been disclosed by prior use. In particular, the post-published photos D2c of a jug, said to have the same change indicator as the one exhibited (D2 last paragraph), show only the jug as it might have been presented to a visitor. Leaving aside the poor quality of the photographs, it is questionable whether a magnet can be identified as such, nor are the inner workings of the change indicator immediately apparent to the observer. In particular, nothing on the outside indicates that lid

openings or closings are counted, or points toward the presence of a reed switch or other sensor for counting opening operations. These features are also not apparent from the photograph of the underside of the lid. Even if a visitor had been allowed to closely inspect the jug, on the basis of the photographs it appears that he would not have been able to ascertain the above features. In this regard D2a suggests that the electronics and reed switch appear to be encapsulated in plastic (see also D2a, paragraph [0018]) and are therefore hidden from view. The Board also notes that D2 may indicate that the change indicator's function was explained to visitors, it does however not state whether or not they were free to handle the jug. To the extent that the exact circumstances of the alleged prior use might have shed light on what was disclosed to the public they are thus unclear.

- 3.6.3 In view of the above, the Board is neither convinced that *what* was disclosed at the Ambiente fair nor the *circumstances* of the alleged disclosure have been proven beyond any reasonable doubt.
- 3.7 Moving on to the alleged delivery to customers shortly after 21 September 2006 (D2, page 1, last paragraph), no customer name, exact date or location has been given for this prior use. Thus where, when or by whom the alleged prior use should have occurred has not been stated by the appellant, let alone proven to the required standard beyond any reasonable doubt as might have been possible by supplying evidence such as invoices. Insofar as the photographs of packaging, which are of very poor quality, might have revealed detail of *what* was alleged to have been sold, they could in any case never fill in the gaps in the chain

of evidence as to where, when and by whom the alleged prior use took place. Therefore, in the Boards view, the prior use by sale alleged in D2 is also not proven beyond any reasonable doubt.

- 3.8 Finally, the exact details relating to the alleged prior use by delivery of product samples (*Muster*) to two companies prior to 21 September 2006 (D2, page 2, first paragraph) are unclear and incomplete. No documentary evidence is provided which might have established the specific date and the particular circumstances of the delivery. For example, whether or not the recipient companies were free to dispose of the samples as they wished or whether they were under some obligation of secrecy is not mentioned in D2. Therefore, the Board considers that again without questioning the credibility of the statutory declaration as regards the delivery of product samples, it nevertheless does not establish to the required degree of certainty, namely beyond any reasonable doubt that the named companies received samples, *what* was received and *when*, nor the exact *circumstances*.
- 3.9 In view of the above, the Board finds that none of the alleged prior uses set out in D2 are proven to the necessary standard of proof, that is beyond any reasonable doubt.
- 3.10 During oral proceedings before the Board, the appellant offered Mr Bender as a witness in order to prove the alleged prior uses detailed in D2.
- 3.10.1 In accordance with Article 12(2) RPBA, the appellant's statement of grounds of appeal should contain their complete case, *inter alia* it should specify expressly all the evidence relied on. In accordance with Article

13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion and further this discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Moreover, in accordance with Article 13(3) RPBA, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings.

In the present case, the appellant was aware from the impugned decision (see point 3.2.1) that it was questionable whether the alleged prior use was proven beyond any reasonable doubt. Indeed the appellant addressed this point in his notice of appeal, stating that, in his opinion, the prior use was sufficiently proven (page 4, first complete paragraph). Therefore the Board considers that there is no justification, such as a new development in the appeal proceedings, for waiting until the oral proceedings to request Mr Bender be heard as a witness. Furthermore, consistent with established jurisprudence, the generic reference to the appellant's submissions in opposition in the penultimate sentence of the notice of appeal cannot be interpreted as *expressly* specifying the offer of Mr Bender as a witness, see CLBA IV.E.2.6.4.

Accordingly, the witness offer made for the first time during the oral proceedings constitutes an amendment to the appellant's case in accordance with Article 13(1) RPBA and, in the Board's opinion, one that is not justified by developments in proceedings.

3.10.2 Without prejudice to the question as to whether or not the opposition division was correct in refusing the offer of Mr Bender as a witness (decision point 3.2.1), repeating this offer for the first time in appeal proceedings at the very last stage and in the absence of the witness concerned, could only have been dealt with by an adjournment of the oral proceedings. Therefore, in accordance with Article 13(3) RPBA, the Board exercised its discretion not to hear Mr. Bender.

4. With the finding that the alleged public prior uses, as set out in D2, have not been established to the necessary degree of certainty, the appellant's sole objection to claim 1 due to lack of inventive step, based on D1 in combination with the prior uses set out in D2 must fail. No further arguments or evidence have been presented as to why the feature of the counter counting lid opening and/or closing cycles, not disclosed in D1, might be obvious, nor is this immediately apparent to the Board from any of the submissions in appeal. Therefore, the appellant has failed to convince the Board that the subject matter of claim 1 as granted lacks an inventive step within the meaning of Article 56 EPC. It follows from the above that the appeal must fail.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated