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**Datasheet for the decision
of 8 May 2018**

Case Number: T 1602/14 - 3.2.07

Application Number: 01270485.4

Publication Number: 1347936

IPC: B67D1/08

Language of the proceedings: EN

Title of invention:

TAPPING ROD

Patent Proprietor:

Heineken Supply Chain B.V.

Opponent:

MICRO MATIC A/S

Headword:

Relevant legal provisions:

EPC Art. 56, 113(1)

RPBA Art. 12(2), 12(4), 13, 15(3)

Keyword:

Admissibility of appeal - (yes)

Oral proceedings - non-attendance of appellant/patent proprietor

Appealed decision - sufficiently reasoned (yes) - substantial procedural violation (no)

Inventive step - (no)

Decisions cited:

T 1704/06, T 1941/10

Catchword:



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Case Number: T 1602/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 8 May 2018

Appellant 2: Heineken Supply Chain B.V.
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Appellant 1: MICRO MATIC A/S
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
26 May 2014 concerning maintenance of the
European Patent No. 1347936 in amended form.

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
K. Poalas

Summary of Facts and Submissions

I. The opponent (appellant 1) and the patent proprietor (appellant 2) lodged appeals in the prescribed form and within the prescribed time limits against the interlocutory decision of the opposition division maintaining European patent EP 1 347 936 in amended form.

II. The present decision is based on the following documents, mentioned, between others, in the notice of opposition:

D1: WO 00/03944;

D2: US3822716;

D3: WO 98/27003;

D4: WO 91/02694;

D5: W095/23112;

D6: WO 93/17954;

D7: GB2117840;

D8: JP56065850U;

D9: W095/11191

D10a-g: documents related to an allegation of prior use;

D11: EP 0 294 095 A1;

D12: DE 298 20 465 U1.

The present decision also refers to the following document submitted by the appellant 2 with its statement setting out the grounds of appeal:

P1: Hauser, Gerhard: Hygienic design and cleaning of system for draught beer, pages 1-8, Monograph 32 Sanitary Engineering & HACCP, Session III Hygienic Design, pt. 16, European Brewery Convention.

- III. Appellant 1 requested that the decision under appeal be set aside and that the patent be revoked.
- IV. Appellant 2 requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or, alternatively, that the patent be maintained in amended form on the basis of one of the two sets of claims being filed as first and second auxiliary request with letter of 29 September 2014.
- V. In its communication pursuant to Article 15(1) RPBA annexed to the summons for oral proceedings set for 8 May 2018 the Board gave its provisional opinion concerning the allowability of the main request and of the first and second auxiliary requests.
- VI. With its submission dated 3 May 2018 appellant 2 informed the Board that they would not be attending the oral proceedings. Appellant 2 made no observations on the content of the Board's communication.
- VII. Oral proceedings before the Board took place as scheduled in the absence of appellant 2 in accordance with Article 15(3) RPBA and Rule 115(2) EPC.
- For the course of the oral proceedings, in particular for the matters discussed with appellant 1 as the only attending party, reference is made to the minutes of the oral proceedings.
- VIII. The wording of the independent claim 1 of the **main request** is as follows:

"A tapping rod (2) with a beverage valve (16) and a collar (24), while in or on the collar (24) a connecting device (26, 126, 226, 326) is fitted, which connecting device (26, 126, 226, 326) comprises a pressure body (30, 130, 230, 330) for opening the beverage valve (16), wherein:

- the pressure body (30, 130, 230, 330) comprises or defines at least one first beverage channel (50, 150, 250, 350) for bringing, with the beverage valve (16) in open position, the inner space of a keg, in particular a riser (10) of the tapping rod (2), into fluid communication with a beverage dispensing line (5, 65, 105, 205);

- the pressure body (30) comprises or defines at least one gas channel (48, 148, 248, 348),

characterized in that the tapping rod (2) further comprises a gas valve (14) cooperating with said beverage valve (16), said pressure body (30) fitted for opening said gas valve (14), wherein said gas channel (48, 148, 248, 348) is designed for bringing, with the gas valve (14) in open position, the inner space of the keg into fluid communication with a gas supply line."

The wording of the independent claim 1 of the **first auxiliary request** is as follows (the features added with respect to claim 1 of the main request are in bold, emphasis added by the Board):

"An assembly of a tapping head (34) and a keg comprising a tapping rod (2) with a beverage valve (16) and a collar (24), while in or on the collar (24) a connecting device (26, 126, 226, 326) is fitted, which

connecting device (26, 126, 226, 326) comprises a pressure body (30, 130, 230, 330) for opening the beverage valve (16), wherein:

- the pressure body (30, 130, 230, 330) comprises or defines at least one first beverage channel (50, 150, 250, 350) for bringing, with the beverage valve (16) in open position, the inner space of a keg, in particular a riser (10) of the tapping rod (2), into fluid communication with a beverage dispensing line (5, 65, 105, 205);

- the pressure body (30) comprises or defines at least one gas channel (48, 148, 248, 348), ~~characterized in that~~**wherein** the tapping rod (2) further comprises a gas valve (14) cooperating with said beverage valve (16), said pressure body (30) fitted for opening said gas valve (14), wherein said gas channel (48, 148, 248, 348) is designed for bringing, with the gas valve (14) in open position, the inner space of the keg into fluid communication with a gas supply line **and**

- wherein the tapping head (34) comprises a coupling part (35) for coupling same with the collar (24) of the tapping rod (2) or a neck (1) at least partly surrounding this collar (24), while an operating rod is provided for pressing the pressure body (30, 130, 230, 330) down for opening the gas valve (8) and the beverage valve (16), while in or along the operating rod, gas passage openings are provided for passing a gas under pressure through the or each gas channel into the keg, at least when the gas valve is open."

The wording of independent claim 1 of the **second auxiliary request** corresponds to the wording of claim 1 of the first auxiliary request, with the following

features added at the end of its characterising portion:

"wherein during use contact between the beverage and the tapping head is avoided".

IX. Appellant 1 argued, insofar as relevant to the present proceedings, substantially as follows.

Claim 1 of the patent as granted lacked novelty over the content of the disclosure of D1.

D1 was also a suitable starting point to discuss inventive step of the subject-matter of claim 1 as maintained by the opposition division (corresponding to claim 1 of the first auxiliary request presently on file). A skilled person would not need any inventive abilities to combine the assembly of a tapping head and a keg comprising a tapping rod of D1 with one of the tapping heads as disclosed in D9, and thereby arrive at the subject-matter of said claim.

The same objection applied to the subject-matter of claim 1 of the first auxiliary request.

The features added to claim 1 of the second auxiliary request over claim 1 of the first auxiliary request were inevitably present in the combination of the teachings of documents D1 and D9.

As a consequence of that the above objection of lack of inventive step also applied to the subject-matter of claim 1 of the second auxiliary request.

X. Appellant 2 argued, insofar as relevant to the present proceedings, as follows.

Appellant 2 appears to argue that the appeal of appellant 1 was inadmissible for lack of substantiation. In respect of the main request, appellant 1 had merely stated in the statement setting out the grounds of appeal that they agree with the opposition division in respect of the main request. And in respect of the amended version of the patent as maintained by the opposition division, appellant 1 had submitted only a summary argumentation against claim 1.

Apart from that, the appealed decision did not deal with the explicit request not to admit D6, D7, D11 and D12, and was therefore deficient.

D1 was not relevant, as it disclosed a hinged lid of a tapping device which closed over a bag in box-type container. Clearly D1 neither disclosed a keg nor a tapping rod. A tapping rod necessarily included a valve housing, mounting means for mounting the rod inside a keg, and eventually also a riser. The skilled person knew that a tapping rod extended well into the keg and provided the closure for the keg. D1 also failed to disclose cooperating gas and beverage valves, because only two separate elements could interact with each other and therefore cooperate. In D1 there was no such cooperation, but only a simultaneous operation of each valve independently from the other one. Claim 1 of the main request was therefore new over D1, contrary to the decision under appeal.

The subject-matter of independent claim 1 of the first and of the second auxiliary request involved an inventive step substantially because D1 was not a suitable starting point to discuss inventive step, because it did not disclose a keg (but a "bag-in" type

container) and also because it did not disclose a tapping rod. A skilled person would not be able to connect a known tapping head to this container, without extensive modifications. Document P1 constituted a "secondary indication of inventive step".

The Board was requested to give a decision on allowability of each of the independent claims of each request independently. In this context reference was made to T 1941/10. Should the Board have considered such requests unallowable, the proprietor reserved the right to verbatim file auxiliary requests based on all combinations and permutations of the independent claims in the file.

Reasons for the Decision

1. Right to be heard

Although the appellant 2 did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 8th edition 2016, sections III.B.2.7.3 and IV.E.4.2.6.d)).

2. Admissibility of the appeal of appellant 1

The objections of appellant 2 to the admissibility of the appeal of appellant 1 are not convincing. This has

already been brought to the parties' attention in the Board's preliminary opinion in respect of which appellant 2 chose not to comment on.

Appellant 1 was not adversely effected by the decision of the opposition division not to maintain the patent as granted, whereby this party was clearly grieved by the decision to maintain the patent in amended form.

Thus, appellant 1 could rightly limit their own appeal to arguing why the opposition division was considered wrong in maintaining the patent in amended form. The appeal of appellant 1, therefore, is admissible, because this party provided arguments against the assessment, at the basis of the appealed decision, that the subject-matter of claims 1 and 29 as maintained by the opposition division (second auxiliary request in opposition) involves an inventive step (see pages 9 and 10 of the statement setting out the grounds of appeal, referring to page 21, lines 30 - 34 of D1).

The Board also notes that an eventual lack of cogency of the arguments of appellant 1, as allegedly identified and brought forward by appellant 2, might only lead to an unsuccessful outcome of the appeal of appellant 1, but does not of itself render it inadmissible.

The Board also does not see how an allegedly insufficient substantiation in the statement setting out the grounds of appeals of appellant 1 may result in a lack of compliance with the requirements of "Article 13 RPBA" thereof, because this Article refers to amendments to a party's case made **after** it has filed its grounds of appeal.

3. Allegations of procedural deficiency

As far as appellant 2 alleged procedural deficiencies of the opposition proceedings leading to the appealed decision, those allegations are not convincing.

As already mentioned in the Board's preliminary opinion to which appellant 2 did not respond, it is to be noted that even if appellant 2 was right that the opposition division had failed to deal with a procedural request, namely not to admit late filed documents D11 and D12, this did not constitute a deficiency and therefore a procedural violation, because the appealed decision (see in particular the assessment of lack of patentability of the patent as granted) was not based on these documents.

Concerning the further allegation that the appealed decision was deficient in that it did not deal with the explicit request not to admit documents D6 and D7, which were mentioned in the appealed decision, the Board, after having reconsidered the parties' respective submissions, maintains its preliminary opinion in the absence of any convincing argument submitted by appellant 2 why the Board should have been wrong in this respect. D6 and D7 were mentioned in the notice of opposition. The lack of a discussion on admissibility of D6 and D7 does not therefore constitute a procedural violation. Where the appealed decision (see in particular the assessment of inventive step of the subject-matter of claim 1 of the second auxiliary request) dealt with D6 and D7, the opposition division discussed and took a decision on the admissibility of a new line of argument based on these available documents (points 15.2.2 and 15.2.3 of the appealed decision).

4. Main request (the patent as granted)

4.1 D1 - Novelty of claim 1

In its communication pursuant to Article 15(1) RPBA, annexed to the summons for oral proceedings, the Board gave its provisional negative opinion concerning novelty of the subject-matter of claim 1 of the main request over the content of the disclosure of document D1. The above-mentioned preliminary finding of the Board has neither been commented on nor has it been contested by appellant 2. Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issues - does not see any ground to deviate from its above-mentioned negative finding for the following reasons.

4.1.1 Appellant 2 argued that D1 neither discloses a keg nor a tapping rod.

The Board disagrees. A keg (2) is clearly disclosed in figure 1 of this document, showing a barrel shaped container. An elongated device enabling beverage present in a container to be led out thereof, which therefore corresponds to a tapping rod, is also clearly shown in the figures. This device includes a valve housing (see the enlarged portion at the bottom of figure 1) and mounting means (the collar 22) for mounting the rod inside a keg. This device also extends into the keg and provides a closure thereof.

Contrary to the opinion of appellant 2 the Board is not convinced that a tapping rod necessarily has to include a riser and notes that this party did not provide any evidence supporting this view.

4.1.2 D1 therefore discloses (see figures 4 and 5) a tapping rod (page 11, lines 1-31) with a beverage valve (20) and a collar (22, 34), while in or on the collar a connecting device (100) is fitted (page 15, lines 6-12), which connecting device (100) comprises a pressure body (100, 102, 110) for opening the beverage valve (page 16, lines 10-13).

D1 also discloses that the pressure body comprises or defines at least one first beverage channel (120) for bringing, with the beverage valve in open position, the inner space of a keg (1, 2) into fluid communication with a beverage dispensing line (116, fig. 5).

As in D1 an air channel (76) is opened by the downward movement of the coupling means (100) pressing down the valve body (20), and is closed by the upward movement of the coupling means under the influence of a spring means (45) and returning the valve body into its first position (see page 17, lines 5-20 and figures 4, 5), D1 also discloses a gas valve operated by the pressure element.

4.1.3 Appellant 2 argued that D1 failed to disclose cooperating gas and beverage valves, because only two separate elements could interact with each other and therefore cooperate. In D1 there was no such cooperation, but only a simultaneous operation of each valve independently from the other one.

The Board disagrees. When the valve body (20) is in the first position (shown in figure 4) both the gas channel and the beverage openings are closed and when the valve body is in the second position (shown in figure 5) both the gas channel and the beverage openings are open. The

upper end of the valve body (20) forms with the valve seat at the housing (18, 22) a gas valve and the lower end of the valve body forms with the seal face at the collar (62) a beverage valve. Both valves have thus a common valve body and cannot function independently, as it is not possible to open or close one valve independently from the other valve.

D1 therefore also discloses that the pressure body (100, 102, 110) comprises or defines at least one gas channel (within the circumferential wall 102 of the pressure body 100; see figure 4), the tapping rod further comprises a gas valve (upper part of valve 20) cooperating with said beverage valve (page 17, lines 5-24; see figures 4,5), said pressure body fitted for opening said gas valve (page 17, lines 5-24; fig. 5), wherein said gas channel is designed for bringing with the gas valve in open position, the inner space of the keg (1, 2) into fluid communication with a gas supply line (see figure 5; page 17, lines 5-11).

- 4.1.4 The Board therefore concurs with the lack of novelty assessment contained at point 13.1.1 of the reasons of the appealed decision.

For this reason the main request cannot be allowed.

5. First auxiliary request - Inventive step of claim 1

In its communication pursuant to Article 15(1) RPBA, the Board issued a provisional analysis on inventive step of claim 1 of the first auxiliary request over the combination of the teachings of documents D1, taken as the closest prior art, and D9. The above-mentioned preliminary analysis has neither been commented on nor has it been contested by the appellant 2.

The Board, having heard the arguments of appellant 1 during oral proceedings and having once again taken into consideration all the relevant aspects concerning said issues, comes to the conclusion that the subject-matter of claim 1 of the first auxiliary request does not involve inventive step for the following reasons.

5.1 D1 as a starting point

Appellant 2 argued that D1 could not be considered as closest prior art because it did not disclose a keg (but a bag in type container) and also did not disclose a tapping rod.

The Board disagrees. As discussed above in relation to novelty of claim 1 of the main request, the Board is of the opinion that D1 does disclose a keg and a tapping rod. D1 relates to the same technical field of the patent in suit, and is therefore a suitable starting point to discuss inventive step.

5.2 Differences

D1, however, does not only disclose a keg comprising a tapping rod (see figure 1) but also an assembly of a tapping head (referred to a "tapping device") and this keg (see D1, page 21, lines 30-34).

D1 fails to disclose that the tapping head comprises a coupling part for coupling the same with the collar of the tapping rod or a neck at least partly surrounding this collar, while an operating rod is provided for pressing the pressure body down for opening the gas valve and the beverage valve, while in or along the operating rod, gas passage openings are provided for

passing a gas under pressure through the or each gas channel into the keg, at least when the gas valve is open.

5.3 Effect - problem to be solved

These features (coupling part, operating rod) make the extraction of the beverage from the keg by operation of a tapping head connected to the keg possible.

The problem solved by these features may therefore be regarded as how to realize a tapping head capable of actuating the valves of the tapping rod and at the same time providing pressure gas to extract the beverage from the keg shown in D1 (see paragraph [29] of the patent in suit and point 15.2.1 of the appealed decision).

5.4 Discussion of inventive step

5.4.1 Appellant 1 argued that as D1 contained a teaching according to which the "assembly of a tapping head and a keg comprising a tapping rod" disclosed therein could be straightforwardly connected to any known tapping devices, a skilled person would not need any inventive abilities to combine the assembly of a tapping head and a keg comprising a tapping rod of D1 with the tapping head as disclosed in D9 and thereby arrive at the subject-matter of this claim.

The Board agrees. D9 can be seen as disclosing a tapping head (1) assembled on the tapping rod (2) of a keg, with a coupling part (6) for coupling same with the collar of the tapping rod, an operating rod (16) suitable for pressing the pressure body of D1 down for opening the gas valve and the beverage valve and a gas

channel and having a gas passage for passing a gas under pressure into the keg at least when the gas valve is open.

D9 therefore discloses all the distinguishing features listed under point 5.2 above.

- 5.4.2 The opposition division acknowledged the presence of inventive step with the argument that a skilled person attempting to use the tapping head of D9 with the tapping rod of D1 would have to carry out extensive constructional changes of both these elements in order to couple the tapping head with the collar of the tapping rod with a gas-tight connection between the tapping head known from D9 and the tapping rod known from D1.

The skilled person wishing to couple the tapping head known from D9 with the collar of the tapping rod known from D1 would therefore have to provide corresponding coupling parts.

The Board concedes that neither the collar (see figure 5 of D1) nor the tapping head (see figure 1 of D9) demonstrate suitable coupling means for coupling the tapping head of D9 to the collar of D1 but it notes at the same time that also the tapping head of D9 is coupled with the collar of the tapping rod of D9 with a connection which is also necessarily gas tight, to prevent the pressurized gas supplied through 14 from escaping at the junction.

The Board disagrees with the position of the opposition division and of appellant 2 that the provision of such a gas tight connection would be beyond the capabilities of a skilled person.

This is because, as argued by appellant 1 during oral proceedings, D9 itself clearly shows how the collar of a tapping rod should be formed in order to engage with the coupling part (6) of the tapping head of D9 in a gas tight way.

As brought forward by appellant 1, the skilled person only needs to replicate on the collar 22 of the tapping rod of D1 the protrusions (5) and the undercuts (10) shown in figure 1 of D9 in order to achieve reliable results. In doing that a skilled person would also take account of the fact that the tapping rod of D1 dispenses beverage sideways (see figure 5) through element 5, and therefore foresee a corresponding lateral opening for a beverage channel in the tapping head according to D9.

By doing that he would come to the assembly as claimed in claim 1 of the first auxiliary request.

As a consequence of that, the Board concludes that the subject-matter of claim 1 of the first auxiliary request lacks an inventive step over the combination of the teachings of documents D1 and D9.

5.4.3 As far as appellant 2 referred to document P1 as a secondary indication of inventive step, arguing that it showed how important the problem of hygiene of tapping systems was in the eyes of a skilled person, the Board notes that even if this party argued on the basis of P1 that a skilled person would never have considered D1 for for designing an hygienically improved tapping rod, appellant 1 did not explain which passages of this document would lead to the exclusion of D1 and the reasons therefor.

6. Second auxiliary request

In its communication pursuant to Article 15(1) RPBA, annexed to the summons for oral proceedings, the Board issued a provisional analysis on inventive step of claim 1 of the second auxiliary request over the combination of the teachings of documents D1, taken as the closest prior art, and D9. The above-mentioned preliminary analysis has neither been commented on nor has it been contested by the appellant 2.

The Board, having heard the arguments of appellant 1 during oral proceedings and having once again taken into consideration all the relevant aspects concerning said issues, comes to a negative conclusion on inventive step for the following reasons.

6.1 Additional feature

D1 disclose a tapping rod (see figure 5) having coupling means conveying beverage in a sideways direction.

As D1 however does not disclose how the tapping head to be coupled to said rod is formed, the additional feature of the claimed assembly that "during use contact between the beverage and the tapping head is avoided" is to be considered as being a further distinguishing feature.

6.2 Effect - problem to be solved

This feature achieves the effect (see in particular paragraphs [7] and [41] of the patent in suit) that the

tapping head is not contaminated by the beverage and does not need to be cleaned.

The problem to be solved, therefore, is how to (see paragraph [5] of the patent in suit) avoid cleaning of the tapping head, as it is a time consuming and environmentally unfriendly task.

6.2.1 Discussion of inventive step

As discussed above in relation to claim 1 of the first auxiliary request (see point 5.4.2 above) the skilled person would, when trying to mutually adapt the tapping head of D9 and the keg of D1 for mutual use not only replicate on the the collar 22 of the tapping rod of D1 the protrusions and the undercuts shown in figure 1 of D9 but also take account of the fact that the tapping rod of D1 dispenses beverage sideways (see figure 5) through element 5, and therefore foresee a corresponding lateral opening for letting the beverage channel of D1 out of the tapping head according to D9.

By doing that he would inevitably realize an assembly in which, during use, contact between the beverage and the tapping head is avoided, without the exercise of an inventive activity.

As a consequence of that the Board concludes that the subject-matter of claim 1 of the second auxiliary request also lacks an inventive step over the combination of the teachings of documents D1 and D9.

7. Further requests of appellant 2

7.1 The above mentioned lack of inventive step over the combination of the teachings of documents D1 and D9 is

the basis for taking the present decision, revoking the patent in suit.

Hence, there is no need to discuss the request of appellant 2 not to admit other documents (D2 to D8, D10a to D10g, D11 and D12) mentioned by appellant 1 during opposition proceedings.

7.2 Appellant 2 referred to T 1941/10 and requested that the independent claims of the first and second auxiliary requests should be considered by the Board independently from each other since they "intended" to submit new requests in which these are combined with each other in the respective allowable version.

Appellant 2 is right that in case T 1941/10 the Board in a different composition treated the individual independent claims of appealing party's requests (see point 3 of the Reasons). However, the deciding Board in the same paragraph explicitly mentioned that it is an established principle of proceedings before the Boards of appeal that a request can be dismissed as a whole if one of the independent claims is not allowable.

Applying this principle, the Board is convinced that none of the requests of appellant 2 presently on file is allowable because of the above discussed objections.

The Board also notes that in case T 1941/10 the deciding Board exercised its discretion in how it dealt with a similar request by deviating from the above principle for reasons of procedural economy (see point 3. of the Reasons) which however do not apply to the present case.

Order

For these reasons it is decided that:

1. The appeal of the patent proprietor is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated