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**Datasheet for the decision
of 14 September 2017**

Case Number: T 1998/15 - 3.2.03

Application Number: 09701716.4

Publication Number: 2140072

IPC: E03F5/04

Language of the proceedings: EN

Title of invention:
DRAIN WITH ADJUSTING FRAME

Patent Proprietor:
Easy Sanitary Solutions B.V.

Opponents:
Group Nivelles NV
Kessel AG

Headword:

Relevant legal provisions:
EPC Art. 100(a), 54, 56, 114(2)
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Auxiliary requests 1, 3, 5, 6, 7 - admitted (yes)
Auxiliary requests 4, 8 - admitted (no)
Novelty - main request (no) auxiliary requests 1, 5, 6 (no)
Inventive step - auxiliary request 3 (no)
Clarity - auxiliary request 7 (no)
Remittal to the department of first instance - (no)

Decisions cited:

T 0217/10

Catchword:



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Case Number: T 1998/15 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 14 September 2017

Appellant: Easy Sanitary Solutions B.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 August 2015
revoking European patent No. 2140072 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Ashley
Members: V. Bouyssy
 M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. European patent No. 2 140 072 (in the following: "the patent") relates to a drain.
- II. The patent as a whole was opposed by opponents 1 and 2 on the grounds of unallowable amendment before grant (Article 100(c) EPC), insufficient disclosure (Article 100(b) EPC), lack of novelty and lack of inventive step (Article 100(a) EPC).
- III. The opposition division decided to revoke the patent for lack of novelty.
- IV. This decision has been appealed by the patent proprietor (in the following, "appellant").
- V. Oral proceedings before the Board were held on 14 September 2017.
- VI. Requests

The appellant requested that the decision under appeal be set aside and the patent be maintained as granted (main request), alternatively on the basis of one of the sets of claims of auxiliary requests 1, 3, 5, 6 and 7 submitted with the grounds of appeal and auxiliary requests 4 and 8 filed during the oral proceedings.

Opponents 1 and 2 (in the following, "respondent 1" and "respondent 2") requested that the appeal be dismissed.

VII. Claims of the appellant's requests

(a) Main request

Independent product claim 1 as granted reads as follows (the feature numbering is introduced by the Board for ease of reference):

- a) Drain (1;15;30;40;55), comprising:
 - b) a container (2;31;41;57) with a bottom surface (8;16) and an upright edge (9;17;42;58) along the periphery of the bottom surface (8;16);
 - c) a discharge opening (3;33) arranged in the bottom surface (8) of the container (2;31;41;57);
 - d) an adjusting frame (4;22;34;48;60) placed on the container (2;31;41;57) and having adjusting means (6;23;36;49;61) for adjusting the height of the top side (7) of the adjusting frame (4;22;34;48;60);
- characterized in that
- e) the adjusting frame (4;22;34;48;60) fits within the upright edge (9;17),
 - f) that the adjusting frame (4;22;34;48;60) is manufactured from strip material and
 - g) that the adjusting frame (4;22;34;48;60) surrounds the inflow opening of the drain (1;15;30;40;55).

(b) Auxiliary request 1

Claim 1 differs from claim 1 of the main request in that the reference signs have been deleted and in that it comprises the additional limitation that the drain is "for installation in a tiled floor".

(c) Auxiliary request 3

Claim 1 differs from claim 1 of auxiliary request 1 in that it comprises the additional limitation that "the adjusting means rest on the bottom surface of the container".

(d) Auxiliary request 4

Claim 1 differs from claim 1 of auxiliary request 3 by the additional feature that "the inner dimensions of the upright edge are also the outer dimensions of the adjusting frame".

(e) Auxiliary request 5

Claim 1 differs from claim 1 of the main request in that it is directed to a "drain installation in a tiled floor", instead of a drain, and that it comprises the additional limitations

- that the drain installation comprises "a plurality of tiles" and
- that the adjusting frame is "adjusted such that the top side of the adjusting frame lies flush with the top surface of the tiles".

(f) Auxiliary request 6

Claim 1 differs from claim 1 of the main request in that it is directed to a "method of installing a drain in a tiled floor", instead of a drain, and that the method comprises the step of "setting the adjusting frame such that the top side of the adjusting frame lies flush with the top surface of the tiles".

(g) Auxiliary request 7

Claim 1 differs from claim 1 of the main request in that it is directed to the "use of flat metal strip material in the manufacture of a drain" instead of drain and that it comprises the additional limitations

- that the container is "rectangular" and
- that the adjusting frame is "manufactured by bending the strip material to a rectangular shape such that the adjusting frame lies against the upright edge of the container".

(h) Auxiliary request 8

Claim 1 differs from claim 1 of auxiliary request 4 by the additional feature that the drain further comprises "a grating placed on the adjusting frame".

VIII. Cited evidence

In the statement setting out the grounds of appeal, and in the replies to it, the parties relied among others on the following documents which were filed in the opposition proceedings and are cited in the decision under appeal:

- D1: DE 20 2006 014 745 U1
- D2: JP 2002-294853 A and its English translation (E3)
- D4: EP 1 818 464 A1

In its letter dated 27 July 2017, the appellant relied on to the following documents which were filed in the opposition proceedings and are cited in the decision under appeal:

- E5: "Installation guide - Easy Drain® Compact TAF 30",
ESS, 1 page
- E6: "Installation advice - Easy Drain® Compact TAF",
ESS, 24 pages
- E7: "Installation instructions - i-Drain™", Group
Nivelles, 6 pages
- E8: "Anleitung für Einbau, Bedienung und Wartung -
Duschrinne Linearis", Kessel AG, 02/2015, 44 pages
- E9: Copy of an e-mail headed "FW: handleiding 2005"
from Mr. J. Keizers to Mr. B. 't Jong,
including installation advice for Easy Drain®,
6 July 2015, 2 pages
- E10: Copy of an e-mail headed "FW: Betr: easy drain"
from Mr. J. Keizers to Mr. B. 't Jong,
including photos of installation of Easy Drain®,
6 July 2015, 9 pages
- E11: "Designobjekte für Ablaufstellen in bodengleichen
Duschen - Ceraline", Dallmer GmbH + Co. KG,
pages 25 to 28

With letter dated 12 September 2017, the appellant
filed the following documents:

- E12: Product information on "i-rain® linear drain,
retrieved from the Internet
<http://www.i-drain.be/nl/content/idrain/linear-drain>
on 12 September 2017, 3 pages
- E13: Product information on "Camargue Duschrinne"
retrieved from the Internet
<https://www.bauhaus.info/duschrinnen/camargue-duschrinne-/p/20388810>
on 12 September 2017,
5 pages
- E14: "PROLINE - PROCHANNELs-line -
Produktdatenblatt 542", Proline Systems GmbH,
Ausgabe_2016_08, 11 pages
- E15: Product information on "Slimline Channel Drain",

retrieved from the Internet
<http://7mcalpineplumbing.com/sites/default/files/uploads/installation-instructions/L-CD-O-XMM-ENGLISH.pdf>, 2 pages

- E16: Product information on "SANIDRAIN - Douchelijngoot", 1 page
- E17: Polycaro, Nr 56, December 2016, front page and pages 46 and to 48
- E18: "Carrodrain - Classic/Technical specifications", www.carrodrain.com, 6 pages
- E20: Written statement by Mr J. Keizers, 12 September 2017

IX. The arguments of the parties, insofar as relevant for the present decision, can be summarised as follows:

(a) Main request - Novelty

Appellant's case:

The opposition division erred in deciding that D2 anticipates the subject-matter of claim 1, because D2 fails to disclose the features of the claim that the adjusting frame is "placed on the container" (feature (d)) and "manufactured from strip material" (feature (f)). In the context of the patent, the term "placed on" implies that the adjusting frame is simply dropped in the container and not fixed to it (see paragraph 2 and figures 2, 3 and 5 of the patent specification). This feature is not disclosed in D2 since the height adjusting means 21 of the adjusting frame 3 are securely bolted through the bottom surface of the container (see figure 3). Even though D2 teaches that the adjusting frame can be made from rolled steel material (see paragraph 18 in translation E3), this does not anticipate feature (f).

Respondent's case:

The term "placed on" used in feature (d) of claim 1 simply means that the adjusting frame is positioned on the container. It does not exclude that the frame is fixed to the container thereafter. In figure 3 of D2, the adjusting frame 3 is placed on the container 1, whereby the adjusting bolts 21 are fastened to the frame and to the bottom surface 13 of the container by means of fastening nuts 22, 24 and 27.

As ruled by the opposition division, feature (f) is a "product-by-process" feature which cannot distinguish the claimed adjusting frame from that disclosed in D2, which is manufactured from rolled steel material (paragraph 18 in E3).

(b) Auxiliary requests 1, 3 and 5 to 7 - Admissibility

Respondents' case:

Auxiliary requests 1, 3 and 5 to 7 of the appellant, filed for the first time with the grounds of appeal, should not be admitted into the proceedings, pursuant to Article 12(4) RPBA, because they could already have been filed in the opposition proceedings. In addition, these requests should not be considered because they have not been substantiated in the statement of grounds of appeal but only shortly before the oral proceedings before the Board (see T 217/10).

Appellant's case:

The amendments according to auxiliary requests 1, 3 and 5 to 7 are a legitimate and normal reaction to the

decision to revoke the patent. They are a genuine attempt to overcome the objection of lack of novelty over D2 which was held to be prejudicial only at the oral proceedings before the opposition division, following an initially positive opinion by the opposition division in the annex to the summons. The amendments limit the claims to the nitty-gritty details of the invention and do not introduce a departure from the flow of the proceedings so far. An extensive substantiation of the auxiliary requests has been provided with the grounds of appeal.

(c) Remittal of the case

The appellant requested that the case be remitted to the opposition division prior to a discussion of novelty or inventive step over D4.

(d) Auxiliary request 1 - Novelty

Appellant's case:

D4 fails to disclose features (e) and (f) of claim 1. Feature (e) must be read in the light of the description and drawings of the patent (see paragraph 5 and figure 2). It means that the entirety of the frame fits within the upright edge of the container. The use of strip material as required by feature (f) inevitably leads to an adjusting frame having vertical sides and no flange and thus to a frame which fits entirely within the upper edge of the container. It is apparent that the adjusting frame 3 as illustrated in D4 has been manufactured by punching and bending sheet metal. This does not anticipate feature (f). D4 explicitly requires the adjusting means to be placed between the flange 3.1 of the frame 3 and the flange 2.3 of the

container 2, outside of its upper edge. This clearly excludes the use of a strip material and excludes the possibility that the frame can fit within the upper edge.

Respondents' case:

The subject-matter of claim 1 is anticipated by the shower drain disclosed in D4. Feature (f) cannot distinguish the adjusting frame as claimed from that disclosed in D4, which is manufactured by stamping sheet metal. Feature (e) can be understood to mean that the frame fits at least partially within the upright edge of the container. D4 discloses that adjusting frame 3 fits at least partially within the upright edge of container 2 (see figures 3 and 4 and paragraph 40).

(e) Auxiliary request 3 - Inventive step

Appellant's case:

In addition to features (e) and (f) of claim 1, D4 fails to disclose the added feature that the adjusting means "rest on the bottom surface of the container".

These three features inevitably result in that the adjusting frame has vertical walls and no flange (see figure 2 and paragraph 5 of the patent specification) and provides many advantages in terms of manufacture, installation and freedom of design. The frame has a more compact design and a more aesthetic appearance than that disclosed in D4. In addition, the frame having no flange, there is no longer a problem of water seepage under the flange and of flexing of the flange under vertical loads in use. Most importantly, the drain as claimed allows installation of the container

and completion of the tiled floor prior to location of the adjusting frame. Indeed, the tiles can be positioned to correspond with the upright edge of the container, and the frame, complete with adjusting means, can be easily inserted thereafter.

For the skilled person starting from D4 it would require an inventive step to arrive at the drain of claim 1. D1 could not lead him to the claimed solution because D1 fails to disclose features (f) and (g) of the claim. Moreover, the claimed invention enjoys wide commercial success, as evidenced by documents E5 to E18 and E20, and this is a secondary indication of inventive step.

Respondents' case:

The subject-matter of claim 1 differs from the drain disclosed in D4 only by the feature that the adjusting means "rest on the bottom surface of the container".

Contrary to the appellant's view, this feature does not imply that the frame has vertical walls and no flange, but rather that the drain is more compact than that disclosed in D4. Thus, the objective problem to be solved is how to obtain a more compact floor drain.

For a skilled person attempting to solve this problem, the distinguishing feature is an obvious solution. D1 discloses, in figures 1 to 6, a shower drain which anticipates features (a) to (g) of claim 1. It comprises a container (4) and an adjusting frame (8, 12) with height adjusting means in the form of bolts (13) screwed in nuts (14), wherein the bolts rest on the bottom surface of the container (paragraph 22 and figures 2 and 5 of D1). It is apparent that this

arrangement renders the adjusting frame as slim as possible. In light of this it would be straightforward for the skilled person to arrange the adjusting means of D4 between the frame and the bottom surface of the container in order to make the drain more compact. In so doing he would arrive at the feature distinguishing claim 1 from D4.

In conclusion, the subject-matter of claim 1 lacks an inventive step in light of D4 and D1.

(f) Auxiliary requests 5 and 6 - Novelty

The respondents contended that the subject-matter of claim 1 of auxiliary requests 5 and 6 is anticipated by the shower drain installation and the method of installing a drain as disclosed in D4.

(g) Auxiliary request 7 - Clarity

Respondent 2 submitted that the amendment contravenes the requirements of Article 84 EPC because it is not clear from the language of the claim whether it relates to the whole manufacturing process of the drain, or only to a step of using flat metal strip material within the manufacturing process.

(h) Auxiliary requests 4 and 8 - Admissibility

Appellant's case:

The amendments of auxiliary requests 4 and 8 relate to the introduction of limiting features in claim 1 of auxiliary request 3, with the aim of overcoming the objection that the subject-matter of this claim lacks an inventive step in light of D4 and D1.

Starting from D4, the objective technical problem can be defined as how to obtain a more compact floor drain.

The claimed solution to this problem as defined in claim 1 of auxiliary requests 4 and 8 is not rendered obvious by the teaching of D1.

In fact, D1 teaches away from the claimed solution according to auxiliary request 8. In figures 1 to 4 of D1, the height-adjustable part 8 has the double function of an adjusting frame and a grating. If the skilled person were to combine the teachings of D4 and D1, he would inevitably replace the adjusting frame 3 and the grating 4 as disclosed in D4 by a single height-adjustable part as disclosed in D1, which fits entirely in the container and is supported by adjusting means which rest on the bottom surface of the container. After doing so, he would not obtain a drain comprising an adjusting frame as well as a grating, as required in the claim.

D4 already teaches that the grating 4 can be provided with adjusting means and placed directly on the container, without using an adjusting frame (see figure 7 and paragraph 58).

Respondents' case:

Auxiliary requests 4 and 8 should not be admitted into the proceedings because they were filed at a very late stage and are not clearly allowable. In fact, the amendments raise new objections not yet discussed and claim 1 of auxiliary requests 4 and 8 does not overcome the objection of lack of inventive step set out with regard to claim 1 of auxiliary request 3.

Reasons for the Decision

1. Main request - Interpretation of claim 1
 - 1.1 Before turning to the question of novelty, it is necessary to construe claim 1.
 - 1.2 The claim requires that the adjusting frame is "placed on the container" (feature (d)), "fits within the upright edge" (feature (e)) and "manufactured from strip material" (feature (f)). The interpretation of these features is disputed by the parties.
 - 1.3 The ordinary meaning of the term "placed on the container" is that the adjusting frame is disposed or positioned on the container. This reading makes technical sense in the context of claim 1. In particular, for the drain to fulfil its functionality, the frame does not have to be loosely placed on the container; it may be fixed in position, contrary to the appellant's view.
 - 1.4 The wording of feature (e) is clear in the context of the claim. It simply means that the adjusting frame fits at least partially within the upright edge of the container. This is technically sound in the context of the claim. In fact, the adjusting frame, complete with height adjusting means, does not have to fit entirely within the upright edge. This reading is in conformity with the teaching of the patent: in figures 2 and 3, the adjusting frame extends beyond the upper edge of the container.
 - 1.5 Feature (f) seeks to define the claimed product by its method of manufacture. On a normal reading, it clearly

requires that the frame has been made from strip-shaped material. The language of feature (f) is clear, albeit broad. For instance, claim 1 covers embodiments wherein the starting product is strip material (e.g. cold rolled steel) that is then cut into the required size and later formed into the frame, e.g. by pressing, stamping and/or joining (e.g. welding).

1.6 Since claim 1 itself imparts a clear and technically sound teaching to the skilled reader, there is no reason for consulting the description and the drawings of the patent to give the disputed features a narrower meaning. In particular, even though it is stated in paragraph 5 of the patent specification that "the inner dimensions of the upright edge are also the outer dimensions of the adjusting frame", this statement cannot be relied on to read into the claim an implicit restrictive feature not suggested by the explicit wording of the claim.

2. Main request - Novelty

2.1 D2 discloses, in the terms of claim 1, a drain for installation in paved road surfaces of bridges or viaducts, comprising:

- a container (basin body 1 in figure 1) with a bottom surface (bottom parts 12 and 13) and an upright edge along the periphery of the bottom surface (rim frame part 11);
- a discharge opening arranged in the bottom surface of the container (drain cylinder 14);
- an adjusting frame (fitting frame body 3) which fits within the upper edge of the container (figure 3), surrounds the inflow opening of the drain and has means (2) for adjusting the height of the top side of the adjusting frame.

- 2.2 The parties dispute whether D2 discloses the features of claim 1 that the adjusting frame is "placed on the container" (feature (d)) and "manufactured from strip material" (feature (f)).
- 2.3 The Board agrees with the respondents that these features cannot distinguish the claimed drain from that disclosed in D2.
- 2.3.1 In D2 (see figure 3), the adjusting frame 3 is placed on the container, whereby the adjusting bolts 21 rest on the bottom surface 3 of the container and are fixed to it by means of fastening nuts 22.
- 2.3.2 It is stated in D2 that the adjusting frame can be made from rolled steel material (see paragraph 18 of translation E3). It is not credible that feature (f) leads inevitably to a discernible difference in the manufactured frame (see point 1.5 above).
- 2.4 Hence, the Board agrees with the opposition division that the subject-matter of claim 1 as granted lacks novelty in light of D2.
3. Auxiliary requests 1, 3 and 5 to 7 - Admissibility
- 3.1 The appellant filed the amended claims of auxiliary requests 1, 3 and 5 to 7 for the first time with the grounds of appeal, although they could arguably have been filed in the opposition proceedings.
- 3.2 Nevertheless, the Board sees no reason to disregard these requests (Article 114(2) EPC and Article 12(4) RPBA). Considering that the purpose of an appeal is to give the losing party a chance to have the decision set

aside, these requests appear to be a reasonable reaction to the decision under appeal. Therefore they could be disregarded only if they amounted to an abuse of procedure, which they do not. Indeed, they do not introduce an entirely fresh case and, in the present case, the Board sees an important circumstance which justifies considering those requests as filed in due time: in the annex to the summons to oral proceedings, the opposition division was positive on the questions of novelty and inventive step. Accordingly the appellant had no objective reason to file these auxiliary requests in advance of the oral proceedings. On the other hand, rejecting such requests on the ground that they could have been filed later during the oral proceedings would restrict the full exercise of the appellant's right to defend its case in appeal, in a way hardly reconcilable with the purpose of an appeal.

3.3 Contrary to the view of respondent 2, the auxiliary requests have been sufficiently substantiated in the grounds of appeal to satisfy the requirements of Article 108, sentence 3, and Rule 99(2) EPC and Article 12(2), sentence 2, RPBA. The circumstances of the present case are thus different from the situation underlying T 217/10, where auxiliary requests were neither substantiated in the grounds of appeal nor self-explanatory.

4. Remittal of the case

4.1 The appealed decision only deals with the objection of lack of novelty in light of D2. The questions of whether or not the claimed invention is novel over D4 and is inventive in light of D4 and D1 have not been addressed.

4.2 However, in the communication annexed to the summons to oral proceedings, the opposition division had expressed its preliminary view of the teachings of D4 and D1 with respect to these issues (see points 6 and 7 of the communication dated 8 December 2014).

4.3 Given the provisional view of the opposition division concerning D4 and D1 and that further evaluation was straightforward and could be dealt with within the framework of the oral proceedings, and taking in consideration the need for procedural economy which, in the present case, was not conflicting with the right to be heard of the parties, the Board considered that it was not appropriate to remit the case but decided instead to deal with it itself (Article 111(1) EPC).

5. Auxiliary request 1 - Novelty

5.1 D4 discloses, in the terms of claim 1, a shower drain for installation in a tiled floor-level shower, comprising:

- a container with a bottom surface and an upright edge along the periphery of the bottom surface ("Rinnenmodul 2" in figure 1);
- a discharge opening arranged in the bottom surface of the container ("Ablauföffnung 2.2"); and
- an adjusting frame ("Rahmen 3") which is placed on the container (figures 3 and 4), surrounds the inflow opening of the drain and has means for adjusting the height of the top side of the frame ("Auflagemittel 9" and paragraph 60).

5.2 The parties dispute whether D4 discloses the features of claim 1 that the adjusting frame "fits within the

upright edge" (feature (e)) and is "manufactured from strip material" (feature (f)).

5.3 The Board agrees with the respondents that these features cannot distinguish the claimed drain from that disclosed in D4.

5.3.1 In D4, the adjusting frame 3 fits at least partially within the upright edge of the container 2 (see figures 3 and 4 and paragraph 40).

5.3.2 The adjusting frame 3 as shown in figures 1 to 4 has been obtained by stamping sheet material. Feature (f) does not define a difference over this frame (see point 1.5 above).

5.4 Hence, the subject-matter of claim 1 as amended lacks novelty in light of D4.

6. Auxiliary request 3 - Inventive step

6.1 The parties agree that the drain for a tiled floor-level shower as disclosed in D4 forms a realistic starting point for the assessment of inventive step. The Board shares this view.

6.2 The drain defined in claim 1 differs from that disclosed in D4 only by the feature that the adjusting means "rest on the bottom surface of the container".

6.3 There is no apparent technical effect achieved by this distinguishing feature. The patent itself is silent about any effect associated with it.

6.4 The parties agree that this difference results in a drain having a more compact design and a more aesthetic

appearance than that of D4. The appellant alleges that the claimed drain achieves further technical effects because the adjusting frame has vertical walls and no flange. However, the wording of the claim does not exclude that the adjusting frame is provided with a flange that extends above the flange of the container, as disclosed in D4. Thus, the alleged effects cannot be used for formulating the objective technical problem.

6.5 In the absence of any evidence on file for a technical effect of the distinguishing feature, the Board concludes that, starting from D4, the objective technical problem to be solved must be formulated in broad and general terms as being how to provide an alternative arrangement for the adjusting means.

6.6 D1 discloses a drain for a tiled floor-level shower (see figures 1 to 5), comprising a container (4), a discharge opening (1) and an adjusting frame (8, 12) with height adjusting means in the form of bolts (13) screwed in connecting pieces (14). As agreed by both parties, this shower drain discloses at least features (a) to (e) of claim 1. In use, the bolts rest on the bottom surface of the container (see figures 2 and 5 and paragraph 22 of D1). Thus, D1 discloses a shower drain similar to that disclosed in D4 and provides a clear indication for the alternative arrangement of the height adjusting means as claimed. In particular, the skilled person would have no practical difficulty in displacing the location of the adjusting means from the flange of the container to the bottom surface of the container as disclosed in D1.

6.7 This finding is not changed by the appellant's argument that the claimed drain is commercially highly successful. In fact, commercial success alone is not

necessarily indicative of inventive step, and can only be of importance as secondary consideration in case of doubt, i.e. when objective evaluation of the prior art teachings does not provide a clear picture. In the present case, however, the objective assessment of inventive step according to the problem-solution approach clearly shows that the claimed product is obvious irrespective of its alleged commercial success. In addition, documents E5 to E18 and E20 as filed by the appellant are not sufficient to establish that the commercial success is due to the technical features of the drain as claimed, rather than resulting from selling techniques, advertising and marketing strategies.

6.8 Therefore, the subject-matter of claim 1 as amended lacks an inventive step in the sense of Article 56 EPC when starting from D4 and taking into consideration the disclosure of D1.

7. Auxiliary requests 5 and 6 - Novelty

7.1 As reasoned under point 5 above, the subject-matter of claim 1 of auxiliary request 1 lacks novelty over the shower drain disclosed in D4. This drain is designed for installation in a tiled floor-level shower, the height of the adjusting frame being adjusted such that its top side lies flush with that of the adjoining tiles (see paragraphs 17, 18, 37 and 39 of D4). Hence, the added features of claim 1 of auxiliary requests 5 and 6 are also disclosed in D4. This has not been contested by the appellant.

7.2 Therefore, the subject-matter of claim 1 as amended is not novel in light of D4.

8. Auxiliary request 7 - Clarity

8.1 Claim 1 as amended is directed to the "use of flat metal strip material in the manufacture of a drain". This wording puts the emphasis on the step of using flat metal strip material, rather than on the complete process of manufacturing the drain containing this step.

8.2 As argued by respondent 2, this wording makes it unclear whether the protection sought is limited to the step of using flat metal strip material per se, or whether the manufacturing process as a whole is to be protected (see e.g. Guidelines for Examination in the EPO, November 2016, F-IV, 4.15). The amendment thus contravenes the clarity requirement of Article 84 EPC.

9. Auxiliary requests 4 and 8 - Admissibility

9.1 Under Article 13(1) RPBA any amendment to a party's submissions after it has filed its statement of grounds of appeal or reply may be admitted and considered at the Board's discretion. Article 13(3) RPBA adds that amendment made after oral proceedings have been arranged are not admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to address without an adjournment of the oral proceedings. In addition, it is established case law that amended claims belatedly filed at such a stage, in particular during oral proceedings, must be clearly allowable in order to be admitted into the proceedings. Hence, it must be immediately apparent to the Board, with little investigative effort on its part, that the amendments made successfully overcome all outstanding objections under the EPC, without giving rise to new ones.

- 9.2 The appellant filed auxiliary request 4 during the oral proceedings before the Board, in reaction to its opinion that the subject-matter of claim 1 of auxiliary request 3 lacks an inventive step in light of D4 and D1.
- 9.3 Claim 1 as amended apparently still lacks an inventive step, for the following reasons.
- 9.3.1 It differs from claim 1 according to auxiliary request 3 by the addition of the feature that "the inner dimensions of the upright edge are also the outer dimensions of the adjusting frame".
- 9.4 As submitted by the appellant, this feature can be understood to mean that, in plan view, the dimensions of the frame substantially match those of the upright edge. This is not disclosed in D4. The subject-matter of claim 1 thus differs from D4 by this feature, in addition to the feature that the adjusting means "rest on the bottom surface of the container" (see point 6.2 above).
- 9.4.1 The parties agree that the technical problem objectively solved by these two distinguishing features can be formulated as how to provide a more compact shower drain. The Board shares this view.
- 9.4.2 D1 discloses a drain for a tiled floor-level shower similar to that known from D4, with height adjusting means resting on the bottom surface of the container (see point 6.6 above). In addition, from the plan view of the drain of D1 (figures 1 and 4), it is apparent that the outer dimensions of the adjusting frame (8, 12) substantially match the inner dimensions of the

upright edge of the container (4). The skilled person would recognise that this frame design has the advantages of compactness and simplicity compared to the frame 3 of D4, and would have no practical difficulty in modifying the frame of D4 accordingly. It therefore seems that the skilled person would arrive at the distinguishing features in an obvious manner.

9.5 Since claim 1 as amended could not immediately be regarded as being clearly allowable, i.e not successful in overcoming the pending objections, the Board exercised its discretion not to admit auxiliary request 4 into the proceedings.

9.6 The appellant filed auxiliary request 8 during the oral proceedings, after the Board had refused to allow auxiliary request 7 for lack of clarity.

9.7 Claim 1 as amended is based on claim 1 of auxiliary request 4 and includes the additional feature from the description and drawings that the drain further comprises "a grating placed on the adjusting frame".

9.8 This feature cannot distinguish the claimed invention from D4 because, as shown in figure 1, the adjusting frame 3 is covered with a grating 4 in use.

9.9 Thus, starting from D4, the subject-matter of claim 1 seems still to lack an inventive step for the reasons set out above with respect to auxiliary request 4.

9.10 The Board is not persuaded by the appellant's argument that D1 teaches away from the claimed solution. The adjusting frame 3 of D4 is covered with a grating 4 while the adjusting frame 8 of D1 is covered with floor tiles, instead of a grating. However, when modifying

the adjusting frame of D4 in the manner disclosed in D1, this would not hinder the skilled person from placing a grating on the modified adjusting frame. In fact, in D4, the grating seems to provide an essential aesthetic effect to the floor-level shower and the skilled person would strive to preserve it where possible and would thus attempt to keep the grating.

9.11 The appellant further argued that figure 7 of D4 would lead the skilled person away from the claimed solution. The Board is also not persuaded by this argument. This drawing shows a grating 4 with integrated height adjusting means 4.3, which is to be used in place of the adjusting frame 3 and the conventional grating 4 as shown in figure 1 of D4. The appellant has not indicated, and the Board cannot find any reason, why the skilled person seeking to improve the compactness of the drain shown in figure 1 of D4 would consider modifying the grating as disclosed in figure 7 of D4 rather than modifying the design of the adjusting frame as disclosed in D1.

9.12 Since claim 1 as amended was not clearly allowable, i.e. not successful in overcoming the pending objections, the Board exercised its discretion not to admit auxiliary request 8 into the proceedings.

10. In conclusion, none of the requests submitted by the appellant is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated