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**Datasheet for the decision
of 14 April 2021**

Case Number: T 0954/16 - 3.2.07

Application Number: 09712244.4

Publication Number: 2262716

IPC: B67D7/42

Language of the proceedings: EN

Title of invention:
HOOD FOR FUEL NOZZLE

Patent Proprietor:
Nozzad (UK) Limited

Opponent:
Alvern Media GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)
EPC R. 103(3)(a)
RPBA 2020 Art. 13(1), 13(2), 24, 25(1)

Keyword:

Grounds for opposition - added subject-matter (yes)

Amendments - allowable (no)

Reimbursement of appeal fee - withdrawal of appeal

Amendment after summons - exceptional circumstances (no)

Decisions cited:

G 0002/10

Catchword:



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Case Number: T 0954/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 14 April 2021

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 on 22 February
2016 rejecting the opposition filed against
European patent No. 2262716 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	K. Poalas
	S. Watson

Summary of Facts and Submissions

- I. The opponent lodged in due time and in due form an appeal against the decision rejecting its opposition against the European patent No. 2 262 716.
- II. The patent proprietor also filed an appeal (notice of appeal dated 20 April 2016) which it withdrew with its letter dated 7 May 2020. As a consequence, the appeal proceedings were continued with the opponent as the only appealing party and the patent proprietor as the respondent to the opponent's appeal.
- III. All grounds for opposition according to Article 100 EPC were dealt with and decided upon during the opposition proceedings.
- IV. In the impugned decision the opposition division found *inter alia* that the ground for opposition according to Article 100(c) EPC does not hold against the patent as granted and rejected the opposition.
- V. In preparation for oral proceedings scheduled at the request of both parties, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated therein *inter alia* that the ground for opposition according to Article 100(c) EPC seemed to hold against the patent as granted and that the four auxiliary requests filed with letter dated 17 November 2016 seemed to not meet the requirements of Article 123(2) EPC.

- VI. The opponent responded by letter dated 15 July 2020 and the patent proprietor responded by letter dated 12 March 2021 by submitting arguments and by filing auxiliary request 5.
- VII. Oral proceedings before the Board took place on 14 April 2021. At the conclusion of the oral proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes thereof.
- VIII. The lines of arguments of the parties are dealt with in detail in the reasons for the decision.
- IX. The final requests of the parties are the following:

The opponent requested

that the decision under appeal be set aside and that the European patent No. 2 262 716 be revoked.

The patent proprietor requested

that the appeal be dismissed,
i.e. that the patent be maintained as granted (main request),
or in the alternative, when setting aside the decision under appeal,
that the patent be maintained in amended form on the basis of one of the sets of claims filed as auxiliary requests 1 to 4 with letter dated 17 November 2016 and as auxiliary request 5 with letter dated 12 March 2021.

X. Independent claim 1 of the main request (patent as granted) reads as follows (amendments over the combination of originally filed claims 1 and 4 are depicted in bold or struck through):

"A device for fitting over at least a portion of the housing of a fuel delivery nozzle (90), the device having a body (10), and a securing element (30), the body (10) **comprising a pair of channels** in the body (10) **each arranged** for slidably receiving at least a portion of a **said** securing element (30) **such that the securing element (30) has a range of sliding adjustment in the channels** to allow adjustable securement **of the body (10) to the fuel delivery nozzle (90)**".

XI. Claim 1 of auxiliary request 1 reads as follows (amendments over claim 1 of the patent as granted are depicted in bold or struck through):

" A device for fitting over at least a portion of the housing of a **both a first and a second type of** fuel delivery nozzle (90), **the first and second types of fuel delivery nozzles having different physical dimensions and shape**, the device having a body (10), and a securing element (30), the body (10) comprising a pair of channels in the body (10) each arranged for slidably receiving at least a portion of said securing element (30) such that the securing element (30) has a range of sliding adjustment in the channels to allow adjustable securement of the body (10) to the fuel delivery nozzle (90)".

XII. Claim 1 of auxiliary request 2 reads as follows (amendments over claim 1 of the patent as granted are depicted in bold):

"A device for fitting over at least a portion of the housing of a fuel delivery nozzle (90), the device having a body (10), and a securing element (30), the body (10) comprising a pair of channels in the body (10) each arranged for slidably receiving at least a portion of said securing element (30) such that the securing element (30) has a range of sliding adjustment in the channels to allow adjustable securement of the body (10) to the fuel delivery nozzle (90); **wherein the body (10) includes a display surface (40) and each channel (35) is disposed with respect to the body (10) in a direction oblique to the display surface (40).**

XIII. Claim 1 of auxiliary request 3 reads as follows (amendments over claim 1 of the patent as granted are depicted in bold or struck through):

"A device for fitting over at least a portion of the housing of a fuel delivery nozzle (90), the device having a body (10), and a ~~securing element~~ **U-shaped clip** (30), the body (10) comprising a pair of channels in the body (10) each arranged for slidably receiving at least a portion of said ~~securing element~~ **U-shaped clip** (30) such that the ~~securing element~~ **U-shaped clip** (30) has a range of sliding adjustment in the channels to allow adjustable securement of the body (10) to the fuel delivery nozzle (90)"

XIV. Claim 1 of auxiliary request 4 reads as follows (amendments over claim 1 of the patent as granted are depicted in bold):

"A device for fitting over at least a portion of the housing of a fuel delivery nozzle (90), the device having a body (10), and a securing element (30), the

body (10) comprising a pair of channels in the body (10) each arranged for slidably receiving at least a portion of said securing element (30) such that the securing element (30) has a range of sliding adjustment in the channels to allow adjustable securement of the body (10) to the fuel delivery nozzle (90);

wherein the securing element (30) is secured to the body (10) at a position which is substantially central between front (16) and rear (17) end walls of the body (10)".

XV. Claim 1 of auxiliary request 5 reads as follows (amendments over claim 1 of the patent as granted are depicted in bold or struck through):

"A device for fitting over at least a portion of the housing of a fuel delivery nozzle (90), the device having a body (10), and a securing element (30) **comprising a U-shaped clip comprising a central portion for engaging against a nozzle housing (92) of the nozzle (90) and end arms (33)**, the body (10) comprising a pair of channels in the body (10) each arranged for slideably receiving **the end arms of the** ~~at least a portion of said securing element U-shaped clip~~ (30) **in the channels** such that the ~~securing element U-shaped clip~~ (30) has a range of sliding adjustment in the channels to allow adjustable securement of the body (10) to the fuel delivery nozzle (90); **wherein the body (10) includes a display surface (40) and each channel (35) is disposed with respect to the body (10) in a direction oblique to the display surface (40).**"

Reasons for the Decision

1. *Reimbursement of the patent proprietor's appeal fee*

1.1 As stated under point II above, the patent proprietor withdrew its appeal filed by notice of appeal dated 20 April 2016 with its letter dated 7 May 2020. As a consequence, the appeal fee paid by the patent proprietor is to be reimbursed at 50% in accordance with Rule 103(3)(a) EPC.

2. *Claim 1 of the main request - unallowable amendments, Article 100(c) EPC*

2.1 In the impugned decision the opposition division found *inter alia* that the ground for opposition according to Article 100(c) EPC does not hold against the patent as granted and rejected the opposition. The opposition division's findings (see points 2.3.1 and 2.3.2 of the grounds of the impugned decision), and the corresponding patent proprietor's arguments can be summarised as follows:

Basis for the introduction of the feature "the securing element has a range of sliding adjustment in the channels" ("**feature a**") into claim 1 of the patent as granted can be found, in particular, in originally filed claim 1, which states "*a channel in the body for slideably receiving at least a portion of a securing element to allow adjustable securement*".

From originally filed page 6, lines 1 to 18, the skilled person would recognise that the range of adjustment is "allowed" by the sliding of the securing element 30. Feature a is exactly representative of this arrangement. The skilled person would also recognise

from page 6, lines 11 to 12, that it is the channel that allows the range of sliding adjustment. The skilled person would be able to directly and unambiguously derive that the securing element has a "range of sliding adjustment in the channels", as required by feature a.

Moreover, the skilled person would unambiguously recognise that the provision of the range of adjustment is provided for by the ability of the securing element to slide in the channel. This assertion is supported by the general overall disclosure of the originally filed application for providing a device that can encompass attachment of both "standard" and "vapour recovery" types of fuel delivery nozzle to the hood, as stated on page 6, lines 7 and 8. In view of this the skilled person would recognise that the range of adjustments must be achieved by the pair of channels in the body arranged for slideably receiving at least a portion of the securing element. The skilled person would have no issue in deriving this from the application as filed because the overall disclosure as a whole unambiguously discloses that the technical effect of achieving a range of adjustments is achieved by the pair of channels in the body being arranged for slideably receiving at least a portion of the securing element.

Furthermore, according to originally filed page 4, lines 5 to 7, the clip is the same as the securing element.

- 2.2 Neither the reasoning of the opposition division nor the patent proprietor's line of argument convince the Board. The Board rather follows the corresponding arguments of the opponent as follows.

2.3 It is common ground that there is no literal basis in the originally filed description or claims for feature a. On the other hand, literal support for amendments in a patent application is not required under Articles 100(c) and 123(2) EPC, insofar as the amended or added features reflect the technical information that the skilled person reading the original disclosure would have derived from its content, considered in its entirety. Therefore, in order to avoid an overly formalistic approach in which more emphasis is given to the literal content of the original application rather than the technical information that it conveys, the Board assesses the technical information that the skilled person reading the parts of the originally filed application referred to by the patent proprietor and in the impugned decision would have derived therefrom, see Case Law of the Boards of Appeal, 9th edition 2019, II.E.1.3 and G 2/10, OJ 2012, 376.

2.4 In originally filed claim 1 it is claimed that the device has "**a channel in the body for slideably receiving at least a portion of a securing element to allow adjustable securement**" (emphasis added by the Board).

Accordingly, the skilled person derives from originally filed claim 1 that it is the **channel** and its capability for slideably receiving at least a portion of a securing element which **allows an adjustable securement**.

2.5 In lines 10 to 18 of the originally filed page 6 it is stated that "**the obliqueness of the channel (35) in which the clip (30) is slideable, relative to the pipe of the fuel delivery nozzle, allows the range of adjustment of the clip (30) to be greater than if a clip adjustable in a substantially normal direction to**

*the pipe of the fuel delivery nozzle was employed. The **increase in adjustment range** is achieved without necessitating an increase in the thickness of the body (10) relative to the display surface (40) area. The thickness or height of the body (10) is thereby able to be minimised while still **allowing a relatively wide range of adjustment of the clip (30)**" (emphasis added by the Board).*

Accordingly, the skilled person derives from the above-mentioned passage that it is the obliqueness of the **channel** which allows **the range of adjustment of the clip** to be greater than another specific range of adjustment of the clip.

- 2.6 In lines 15 to 23 of the originally filed page 4 it is stated that "**[t]he channels (35) in the hood (10) are parallel to each other and oblique** relative to the general direction of the upper surface (40) of the hood (10), and thereby **the length of the channels** able to be accommodated in the hood **is increased** relative to that which would be achievable if the channels (35) were aligned in a normal direction to the general direction of the upper surface (40). Thereby **the range of adjustment of the clip (30) is extended** such that it is suitable for encompassing attachment of both 'standard' and 'vapour recovery' types of fuel delivery nozzle to the hood (10)" (emphasis added by the Board).

Accordingly, the skilled person derives from the above-mentioned passage that it is the parallelism and the obliqueness of the **channels** which allows the **range of adjustment of the clip** to be extended such that it is suitable for encompassing attachment of both "standard" and "vapour recovery" types of fuel delivery nozzle to

the hood.

- 2.7 Furthermore, lines 5 to 7, on page 4 of the originally filed application refer to the specific embodiment of figure 5, said specific embodiment having securing means in the form of a "generally U-shaped, rigid clip (30)" (see the expression "in this embodiment" in said lines).

The Board, following the corresponding arguments of the opponent under point 5 of its statement setting out the grounds of appeal, cannot see how the above-mentioned passage of the originally filed application can provide any basis for the opposition division's conclusion under point 2.3.1 of the impugned decision, that the skilled person would deduce that "*a clip is an equivalent of the "securing element"*", i.e. that the securing element claimed in claim 1 is to be understood by the person skilled in the art as being identical with the "generally U-shaped, rigid clip" depicted in figure 5, as argued by the patent proprietor.

- 2.8 Further, the Board cannot see which part of "the general knowledge of the skilled person at the time of priority" is referred to under point 2.3.2 of the impugned decision which gives support to the opposition division's consideration that the feature that "the securing element has a range of sliding adjustment in the channels" is "fully supported by the originally filed application". Because the claimed securing element cannot be considered as being equivalent to the "generally U-shaped, rigid clip" depicted in figure 5, the opposition division's considerations presented under points 2.3.2 and 2.3.4 of the grounds of the impugned decision and the corresponding arguments of the patent proprietor cannot be considered convincing

by the Board.

- 2.9 In claim 1 of the patent as granted it is claimed that "the securing element has a range of sliding adjustment in the channels" ("**feature a**").

Accordingly, it is claimed that it is the securing element itself which has a range of sliding adjustment in the channels.

- 2.10 The Board is convinced, see points 2.4 to 2.6 above, that the technical information disclosed in the parts of the originally filed application referred to by the patent proprietor and in the impugned decision, said parts concerning the relation between the **channel** and an **adjustable securement** (originally filed claim 1) and between the **channels** and a **range of adjustment of the U-shaped, rigid clip** (originally filed page 4, lines 15 to 23 and originally filed page 6, lines 1 to 18), do not provide the skilled person with unambiguous information that it is the **securing element** itself (not the channel) which has **a range of sliding adjustment in the channels**, as now claimed in claim 1 of the patent as granted.

- 2.11 The Board therefore follows the argument of the opponent that feature a introduced into claim 1 of the patent as granted cannot be considered as being directly and unambiguously derivable for the person skilled in the art from the application as originally filed. The ground for opposition according to Article 100(c) EPC holds thus against the patent as granted.

3. *Claims 1 of auxiliary requests 1, 2 and 4 - unallowable amendments, Article 123(2) EPC*

3.1 Due to the fact that the above-mentioned feature a is further present in claims 1 of the auxiliary requests 1, 2 and 4 and that the further additional features of claims 1 of said auxiliary requests are not correlated to feature a, the Board's conclusion under point 2 above concerning the unallowable amendment in view of the introduction of feature a into claim 1 of the patent as granted is also directly applicable to claims 1 of said auxiliary requests.

3.2 Accordingly, claims 1 of the auxiliary requests 1, 2 and 4 do not meet the requirements of Article 123(2) EPC.

4. *Claim 1 of auxiliary request 3 - unallowable amendments, Article 123(2) EPC*

4.1 In claim 1 of auxiliary request 3 the feature at stake reads: "the U-shaped clip has a range of sliding adjustment in the channels" ("**feature a'**")

4.2 It is common ground that there is no literal basis in the originally filed description or claims for feature a'. As stated under points 2.4 to 2.6 above the skilled person derives

- from originally filed claim 1 that it is the **channel** and its capability for slideably receiving at least a portion of a securing element which **allows** an **adjustable securement**;

- from lines 10 to 18 of the originally filed page 6 that it is the obliqueness of the **channel** which allows **the range of adjustment of the clip** to be greater than another specific range of adjustment of the clip; and

- from lines 15 to 23 of the originally filed page 4 that it is the parallelism and the obliqueness of the **channels** which allows the **range of adjustment of the clip** to be extended such that it is suitable for encompassing attachment of both "standard" and "vapour recovery" types of fuel delivery nozzle to the hood.

- 4.3 The Board, in analogy with point 2.10 above, is convinced that the technical information disclosed in the parts of the originally filed application referred to by the patent proprietor and in the impugned decision, said parts concerning the relation between the **channel** and an **adjustable securement** (originally filed claim 1) and between the **channels** and a **range of adjustment of the U-shaped, rigid clip** (originally filed page 4, lines 15 to 23 and originally filed page 6, lines 1 to 18), does not provide the skilled person with unambiguous information that it is the **U-shaped clip** itself (not the channel) which has a **range of sliding adjustment in the channels**, as now claimed in claim 1 of auxiliary request 3.
- 4.4 Therefore, claim 1 of auxiliary request 3 does not meet the requirements of Article 123(2) EPC.
5. *Auxiliary request 5 - admittance into the proceedings, Article 13(2) RPBA 2020 in conjunction with Articles 24 and 25(1) RPBA 2020*
- 5.1 The patent proprietor filed a new auxiliary request 5 with its submissions dated 12 March 2021, i.e. after the summons to oral proceedings which had been notified after the entry into force of the revised version of the Rules of Procedure. The patent proprietor argued that said request should be admitted as it was filed in reaction to the preliminary opinion of the Board dated

26 March 2020. In particular the opinion implied, for the first time, that not only the U-shaped clip, as argued by the opponent in the grounds of appeal, but also the obliqueness of the channels was/were necessary to overcome the objection under Article 100(c) EPC. The patent proprietor argued that this indication in the preliminary opinion constituted exceptional circumstances as required by Article 13(2) RPBA 2020. The proprietor being confronted with several objections raised by the opponent avoided filing several combinations of requests earlier on in the appeal proceedings to avoid a large number of requests, respecting thereby the procedural economy. Auxiliary request 5 overcame *prima facie* the issues raised by the Board in the preliminary opinion and did not give rise to new objections, since claim 1 of said request is a combination of claims 1 of auxiliary requests 2 and 3 together with originally filed claim 5.

- 5.2 The Board is not persuaded by these arguments. As argued by the opponent, the patent proprietor submitted the new auxiliary request in order to overcome an objection (unallowable amendment of claim 1) that had already been raised by the opponent during the whole opposition-appeal proceedings, including the statement setting out the grounds of appeal. Not only that, but the U-shaped clip and also the obliqueness of the channels have been referred to by the opponent (see the statement setting out the grounds of appeal, point 5, and also the minutes of the oral proceedings before the opposition division, point 5).

Accordingly, the opponent's objection based on Articles 100(c) and 123(2) EPC in connection with the absence of the U-shaped clip and the obliqueness of the channels have been known to the patent proprietor well

in advance. In its preliminary opinion the Board merely agreed with the arguments of the opponent and its preliminary opinion does not go beyond the framework of the previous objection, which is defined by the underlying claim deficiency.

- 5.3 The patent proprietor therefore could and should have formulated auxiliary request 5 in reply to the opponent's objections in a timely manner, before the Board had given its preliminary opinion. Against this background, the procedural economy aspect argued by the patent proprietor becomes irrelevant.
- 5.4 The Board has come therefore to the conclusion, that no exceptional circumstances are present and auxiliary request 5 is not to be admitted into the proceedings (Article 13(2) RPBA 2020).
- 5.5 For the shake of completeness the Board notes that it is further convinced by the opponent's argument that in view of the fact that in the originally filed application the U-shaped clip was defined as being a specific form of the securing element, the introduction of the feature "the securing element **comprising** a U-shaped clip" into claim 1 of auxiliary request 5, said feature leaving open whether the securing element discloses further structural elements and not only the U-shaped clip, gives rise to new objections based on Article 123(2) EPC.

Accordingly, even if auxiliary request 5 were to be taken into account under Article 13(2) RPBA 2020, it would not have been admitted into the appeal proceedings using the criteria of Article 13(1) RPBA 2020.

6. In **conclusion**, the Board finds that neither the patent as granted nor any of auxiliary requests 1 to 4 are allowable due to added subject-matter, that auxiliary request 5 is not to be admitted into the proceedings pursuant to Article 13(2) RPBA 2020 and that the patent is therefore to be revoked.

Order

For these reasons it is decided that:

- 1. The decision under appeal is set aside.**
- 2. The patent is revoked.**
- 3. The appeal fee paid by the patent proprietor is reimbursed at 50%.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated