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**Datasheet for the decision
of 29 January 2021**

Case Number: T 0947/19 - 3.2.01

Application Number: 13736600.1

Publication Number: 2871984

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:
ELECTRONIC VAPOUR PROVISION DEVICE

Patent Proprietor:
Nicoventures Trading Limited

Opponent:
JT International S.A.

Headword:

Relevant legal provisions:
RPBA 2020 Art. 15(7), 15(8), 11
EPC Art. 54, 84, 111(1)

Keyword:

Abridged reasons for decision - explicit consent of parties -
agreement with finding of deparment of first instance
Novelty - main request (no) - auxiliary requests 1-3 (no) -
auxiliary request 6 (yes)
Claims - clarity - auxiliary requests 4 and 5 (no)
Remittal - special reasons for remittal

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0947/19 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 29 January 2021

Appellant: Nicoventures Trading Limited
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Respondent: JT International S.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 22 January 2019
revoking European patent No. 2871984 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: S. Mangin
P. Guntz

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (patent proprietor) against the decision of the Opposition Division to revoke the patent in suit (hereinafter "the patent").
- II. The Opposition Division decided that
- (1) the subject-matter of claims 1 and 15 as granted was not novel over D1, D2, D3, D4 and D7
 - (2) the subject-matter of claims 1 and 15 of the first auxiliary request was not novel over D1 and D3
 - (3) the subject-matter of claims 1 and 14 of the second and third auxiliary requests was not novel over D1
 - (4) the subject-matter of claims 1 and 14 of the fourth and fifth auxiliary requests was not clear
 - (5) the subject-matter of claims 1 and 14 of the sixth auxiliary request was not novel over D3.
- III. Oral proceedings were held before the Board on 29 January 2021.
- IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted or that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 6 as submitted with the statement of grounds of appeal.
- The respondent (opponent) requested that the appeal be dismissed.
- V. Claim 1 according to the main request reads as follows:

An electronic vapour provision device (1) comprising a power cell (9), a vaporiser (6) and a liquid store (7), where the vaporiser comprises a heating element (17) and a heating element support (20), wherein the liquid store comprises a porous material, and wherein the heating element support is or forms part of the liquid store.

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the wording "is or" is deleted. Claim 1 thus specifies that "the heating element support forms part of the liquid store.

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that it recites that the porous material is a "porous ceramic material".

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that it recites that the porous material is a "porous ceramic material" and in that the wording "or forms part of" is deleted. Claim 1 thus specifies that the heating element support is the liquid store.

Claim 1 of auxiliary request 4 differs from claim of the auxiliary request 2 in that it adds the feature that the porous ceramic material is "rigid".

Claim 1 of auxiliary request 5 differs from claim of the auxiliary request 3 in that it adds the feature that that the porous ceramic material is "rigid".

Claim 1 of auxiliary request 6 differs from claim 1 of the main request in that it adds the feature "and wherein the porous material comprises smaller pores in

the region next to the heating element and larger pores further from the heating element".

VI. In the present decision, reference is made to the following documents:

D1: EP 2 404 515,

D2: WO2013/083631,

D3: CN101843368,

D3a: English translation of CN101843368

D4: US 2011 /0209717

D7: WO2013/116571

Reasons for the Decision

1. Main and first to fifth auxiliary requests:
Abridged decision under Articles 15(7) and (8) RPBA 2020

The main and auxiliary requests under consideration, although filed with the statement of grounds of appeal are identical to the main and auxiliary requests underlying the decision under appeal.

According to Article 15(7) RPBA 2020, the reasons for the decision, or parts thereof, may, with the explicit consent of the parties, be put in writing in abridged form. In the present case both parties agreed that the decision on the main request and auxiliary requests 1-5 could be put in writing in abridged form, with the exception of the reasoning in respect of the sole additional argument that was brought forward by the appellant during oral proceedings, according to which D3 does not disclose a vaporiser but an atomiser.

It is further noted that, according to Article 15(8)

RPBA 2020, if the Board agrees with the finding of the department which issued the decision under appeal, on one or more issues, and with the reasons given for it in the decision under appeal, the Board may put the reasons for its decision in abridged form in respect of that issue.

- 1.1 As regards the main request, corresponding to the maintenance of the patent as granted, the Board agrees with the findings of the Opposition Division and the reasons given under points 14 to 16.4 of the decision under appeal, to which reference is made and which findings are adopted by the Board, and confirms that the subject-matter of claim 1 is not novel over D1 and D3.

As regards the sole additional argument that was brought forward by the appellant during oral proceedings, according to which D3 does not disclose a vaporiser, as defined in claim 1, but an atomiser, the Board does not agree with the appellant's view. While the term "atomizer" has been used in D3 instead of the term "vaporiser", the same structural elements and the same process takes place in the atomizer of D3 as in the vaporiser of the patent. In D3 as in the patent, liquid is transferred from the reservoir 5 (liquid store 7, 51 in the patent) via the diffusion layer 71 (heating element support 20, 67 in the patent) to the heater 6 (heating element 17, 68) where the liquid is heated and atomized / vaporised. The "atomizer" in D3 enables vaporisation of the liquid from the reservoir just like the vaporiser in claim 1.

- 1.2 The subject-matter of claim 1 of the first auxiliary request is not novel over D1 and D3 and the subject-matter of claim 1 of the second and third auxiliary requests is not novel over D1.

During oral proceedings both parties relied on their written submissions. The Board sees no reason to change its opinion and thus refers to points 3 and 4 of the notification under Article 15(1) RPBA 2020, confirming the decision of the Opposition Division (sections 17 to 19) on these requests.

- 1.3 As regards the fourth and fifth auxiliary requests, the Board agrees with the findings of the Opposition Division under point 20 of the decision under appeal, to which reference is made and which findings are adopted by the Board, and confirms that the introduction of the term "rigid" in claim 1 introduces a lack of clarity, contrary to the requirements of Article 84 EPC.

2. The subject-matter of claim 1 of auxiliary request 6 is novel over D3.

Claim 1 recites that the liquid store comprises a porous material, and that the porous material comprises smaller pores in the region next to the heating element and larger pores further from the heating element. The Board agrees with the appellant that the term "the porous material" refers to the term "a porous material" and that therefore the claim literally requires that both said smaller pores and larger pores are present in a single porous material, i.e. in a same substance which varies only in that it has smaller pores in the region next to the heating element and larger pores further from the heating element. This literal reading

of the claim is moreover supported by paragraph [0014] of the description of the patent in suit referring to a particular embodiment in which the porous material may have a gradient of pore sizes.

Turning now to D3, this document discloses an electronic vapour provision device in which liquid is stored in a reservoir 5, and in a diffusion layer 71. The latter, as pointed out by the Opposition Division (point 16.4 of the contested decision), supports the heater. D3a, which is, undisputedly, a correct English translation of D3, discloses in paragraph [0017], that the reservoir 5 is made of a sponge or a sheet-like felt fibre or the like and has a relatively high liquid storage property but relative weak diffusion performance. Furthermore, paragraph [0017] discloses that the diffusion layer 71 placed between the reservoir 5 and the heater 6 is a nonwoven fabric or a similar fine fibre material. Such material generally has relatively fine fibre pores having a high adsorption and diffusion performance although lower liquid storage capacity.

Hence, while the Board considers that D3 discloses smaller pores in the diffusion layer, placed in the region of the heating element, and larger pores in the reservoir placed further from the heating element, there is no disclosure in D3 of the porous material of the reservoir and the diffusion layer being the same. On the contrary, paragraph [0017] of D3 discloses the use of a sponge or a sheet-like felt for the reservoir and a nonwoven fabric for the diffusion layer 71.

The respondent is of the opinion that both the reservoir 5 and the diffusion layer 71 together can be considered "a porous material", wherein the porous

material comprises smaller pores in the region next to the heating element and larger pores further from the heating element.

The Board does not agree with the interpretation of the respondent. As explained above, the Board judges that claim 1 requires that the smaller and the larger pores must be present in the same porous material whilst D3 discloses that different pore sizes are the result of different materials used for the reservoir and for the diffusion layer.

3. The case is remitted to the Opposition Division for further prosecution.
- 3.1 The Board notes that the Opposition Division has not decided on inventive step or addressed this issue for any of the appellant's requests and that, according to Article 12(2) RPBA 2020, the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner. Nor did the parties in their written submissions in appeal proceedings specifically address inventive step. The Board also notes that the appellant requested remittal of the case to the Opposition Division for further prosecution and that the respondent objected thereto and submitted that they were prepared, in the interest of enhancing overall efficiency, to formulate their inventive step attacks ad hoc and based on the documents that had been discussed in extenso. The Board points to the principle that in a fair procedure parties should not be confronted with issues which they cannot legitimately be expected to deal with without proper preparation. In the present circumstances and applying this underlying principle the Board is of the opinion that a fair discussion of inventive step would not have been

possible at the oral proceedings.

Against this background, after considering all the relevant circumstances of the case at hand, the Board comes to the conclusion that in the present case there are special reasons within the meaning of Article 11, first sentence, RPBA 2020 that apply, and that it is appropriate to remit the present case to the Opposition Division for further prosecution and examination of the requirements of inventive step, in accordance with Article 111(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.

The Registrar:

The Chairman:



D. Magliano

G. Pricolo

Decision electronically authenticated