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**Datasheet for the decision
of 14 September 2023**

Case Number: T 2386/19 - 3.2.02

Application Number: 13160349.0

Publication Number: 2606870

IPC: A61J1/14, A61J1/20

Language of the proceedings: EN

Title of invention:

Improvements in and relating to liquid dispensing

Patent Proprietor:

Reckitt Benckiser Healthcare (UK) Limited

Opponents:

elm-plastic GmbH

GlaxoSmithKline Consumer Healthcare (UK) IP Limited

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54, 113(1)

RPBA 2020 Art. 13(2)

EPC R. 103(1)(a)

Keyword:

Novelty - public prior use (yes)

Amendment after summons - exceptional circumstances (no)

Substantial procedural violation - violation of the right to
be heard (yes) - reimbursement of appeal fee (yes)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 2386/19 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 14 September 2023

Appellant:
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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 19 July 2019**

rejecting the opposition filed against European patent No. 2606870 pursuant to Article 101(2) EPC.

Composition of the Board:

Chair	M. Alvazzi Delfrate
Members:	A. Martinez Möller
	Y. Podbielski

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Opposition Division rejecting the oppositions against European patent No. 2606870.

II. Oral proceedings before the board took place on 14 September 2023.

The appellant (opponent 1) requested that the decision under appeal be set aside and that the patent be revoked. They also requested that the appeal fee be reimbursed because of a substantial procedural violation during the opposition proceedings.

The respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained as granted (main request), or that the patent be maintained on the basis of the first auxiliary request filed with letter dated 14 June 2023.

The party as of right (opponent 2) requested that the patent be revoked.

III. Claim 1 of the **main request** with feature numbering added in bold reads as follows:

M1 "A liquid dispensing apparatus comprising
M2 a bottle (22),
M3 a bottle neck liner (2) and
M4 a flat-nosed syringe (30) having a plunger (38) and a barrel (32),
M5 the barrel (32) terminating at its distal end (34) in a generally flat face said flat face being

perpendicular to the longitudinal axis of the barrel (32),

M6 the bottle (22) having a bottle neck (24) in which is located the bottle neck liner (2) having a cylindrical body (8) sealingly engaged inside the bottle neck (24) such that liquid cannot flow between the bottle neck liner (2) and the bottle neck (24),

M7 the bottle neck liner (2) comprising a sleeve (4) comprising at its lower end an inward step (18) located within the bottle neck (24),

M8 an aperture (17) being defined inwardly of the inward step (18), wherein

M9 the cylindrical body (8) and the sleeve (4) are connected together with a web of material only at the upper end of the cylindrical body (8) and of the sleeve (4), wherein

M10 the sleeve (4) is formed with a flared portion at its upper end into which the distal end (34) of the syringe barrel (32) passes; wherein

M11 when the syringe barrel (32) is inserted into the sleeve (4) the inward step (18) prevents the syringe barrel (32) from protruding past the step (18) and liquid cannot flow between the sleeve (4) and the barrel (32), but can leave the bottle (22) only via the aperture (17) and thence the syringe, and wherein

M12 the inward step (18) is a substantially annular inward step (18) wherein the sleeve (4) is dimensioned such that when the syringe barrel (32) is inserted into the sleeve (4) the barrel is sealingly received within the sleeve (4) and the inward step (18) limits the movement of the barrel (32)."

IV. Compared with claim 1 of the main request, claim 1 of the **first auxiliary request** further includes the following feature added immediately before the final comma of feature M6:

"with the cylindrical body (8) deformed inwardly providing the sealing fit between the cylindrical body (8) and the bottle neck (24)"

V. The following documents are relevant to this decision:

E2 Bottle interface 6 ml, drawing No. PJ0006-P02-E01

E7 E-mail exchange between Ms Birgit Lonien and Mr Santanu Chowdhury on 1 and 4 February 2002

E8 Alleged attachment to the e-mail E7

E8/2 Alleged attachment to the e-mail E7

LSG1 Minutes of the oral proceedings before the opposition division for European patent No. 1560554, including the minutes of the hearing of the witness Ms Birgit Lonien

VI. The arguments of the appellant and of the party as of right relevant to the present decision can be summarised as follows.

Main request - novelty

The subject-matter of claim 1 was anticipated by a prior use resulting from the delivery of a bottle neck liner as shown in E2 and a flat-nosed syringe to the company Ranbaxy and by document E8 or E8/2 attached to the e-mail E7 sent to that company.

Feature M6 required that liquid cannot flow between the bottle neck liner and the bottle neck. This was justified in the patent specification by the need to withdraw liquid from the inverted bottle using a syringe without having liquid leaking between the bottle neck liner and the bottle neck. The sealing lips provided in the bottle neck liner of the prior use

prevented liquid from flowing between the bottle neck liner and the bottle neck, so that the prior use anticipated feature M6.

The conclusion of the opposition division that feature M6 was not disclosed in the prior use was based on a too narrow interpretation of the feature as implying that no liquid could be present between the bottle neck liner and the bottle neck. Neither the literal meaning of the wording of the claim nor an interpretation of said wording in the light of the description supported said narrow interpretation.

Even if the narrow interpretation were to be applied, in an alternative reasoning the cylindrical body of claim 1 could be regarded as corresponding to the upper part of the neck liner of the prior use, ending at the sealing lips which prevented the presence of liquid, thus also anticipating feature M6.

First auxiliary request - admittance

The first auxiliary request should not be admitted under Article 13(2) RPBA. The interpretation of feature M6 was at the core of the statement of grounds of appeal. There were thus no reasons which could justify such a late request including new features from the description.

Reimbursement of the appeal fee

The opposition division surprisingly announced at the beginning of the discussion on novelty at the oral proceedings that they considered that the prior use did not disclose feature M6, although the disclosure of this feature had not been disputed by the respondent/

patent proprietor. It was not possible for the opponents to find *ad hoc* measurements of a PP28 bottle to prove that feature M6 was disclosed. The appellant/opponent 1 offered a witness to confirm that the inner diameter of a PP28 bottle was ca. 19.4 mm, a dimension which served to establish that the prior use disclosed feature M6. The opposition division rejected the request to hear the witness and concluded that feature M6 was not disclosed. This violation of the appellant's right to be heard eventually led to the rejection of the opposition. The appeal fee was thus to be reimbursed.

VII. The respondent's arguments relevant to the present decision can be summarised as follows.

Main request - novelty

Ms Lonien's comments about E8 and E8/2 at the hearing (LSG1) were made with reservation. If she had doubts, it could not have been shown up to the hilt that E8 was distributed to any 3rd party before the priority date of the patent. Hence, E8 did not belong to the prior art. In any case, E8 did not specify which bottle was being used.

The subject-matter of claim 1 was novel over the prior use, which did not disclose any of features M6 and M9.

With respect to feature M6, the wording "sealingly engaged" had to be construed in the light of the rest of the claim and of paragraph [0014] of the specification, which made it clear that liquid could not flow or leak between the parts. It was also clear that "flow" and "leak" had different meanings. Moreover, the phrase "such that liquid cannot flow

between" clearly meant that there could be no flow of liquid in the space between the bottle neck liner and the bottle neck. Paragraph [0066] of the specification also showed this meaning, which was confirmed by Figures 2 and 6.

This interpretation of feature M6 was also consistent with the main embodiment in the specification, since "sealingly engaged" referred to the cylindrical body and the bottle neck. The taper 10 was not part of the cylindrical body, so that feature M6 was present in the main embodiment even if liquid could flow in the taper region.

Moreover, if one were to follow the appellant's alternative reasoning and consider only the upper part of the neck liner of the prior use as defining the cylindrical body, the lack of definition for the inner part of a PP28 bottle neck meant that some liquid could possibly pass through the lower sealing lips.

First auxiliary request - admittance

The first auxiliary request had been filed as a response to the Board's interpretation of the term "flow between" of feature M6 first raised in the Board's communication under Article 15(1) RPBA. Hence, it could not have been filed earlier.

Reasons for the Decision

1. The contested patent

The administration of liquids from many bottles, such as medicine bottles, normally requires that an accurately prescribed amount is measured. When a syringe is inserted through the bottle neck into the bottle to withdraw liquid, it is often difficult to see the graduations on the syringe body, especially when a bottle having a coloured glass is used. This may prevent a user from withdrawing an accurate amount of liquid from the bottle into the syringe in a single operation.

Moreover, dipping the syringe into the liquid of the bottle coats the outside of the syringe body with medicine. This increases the risk of contamination of the liquid in the bottle by microorganisms from the syringe and the risk of spillages when withdrawing the syringe.

The contested patent addresses these issues with a liquid dispensing apparatus as defined in claim 1 which comprises a bottle, a bottle neck liner and a flat-nosed syringe. An example thereof is shown in Figures 5 and 6 of the contested patent reproduced below. The patent further relates to a method of dispensing liquid from such an apparatus.

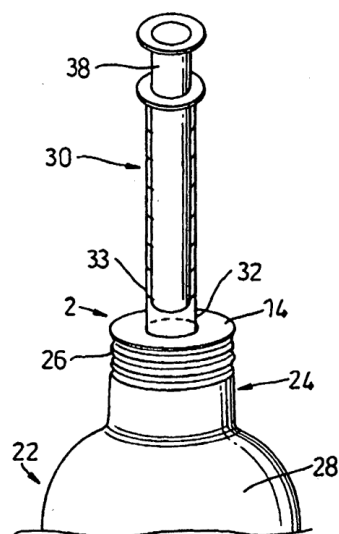


Fig. 5

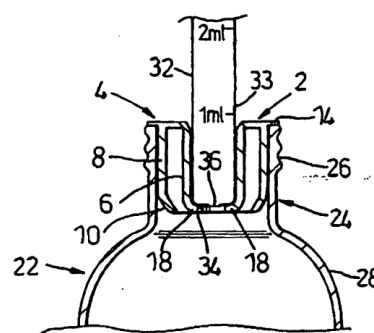


Fig. 6

2. Main request - novelty over a prior use

2.1 Disclosure by the public prior use

2.1.1 It is undisputed that the e-mail E7 (including an attachment) and samples of bottle neck adaptors as shown in document E2 were sent by the company elm-plastic GmbH to the company Ranbaxy in February 2002 without any confidentiality agreement. They constitute a public prior use and belong to the prior art.

2.1.2 Ms Lonien had been heard as a witness in the opposition proceedings relating to the patent resulting from the parent application (see protocol included in document LSG1) and asked among other things about which document had been attached to the e-mail E7. Ms Lonien's credibility has not been disputed.

In the minutes of Ms Lonien's hearing, the doubts referred to by the respondent concern whether it was

document E8 or E8/2 which had been attached to the e-mail E7. However, Ms Lonien expressed no doubt that one of E8 or E8/2 had been attached to E7 as the draft mentioned in it (see page 11, 2nd paragraph of the minutes of Ms Lonien's hearing included in document LSG1). Hence, at least any information disclosed in both E8 and E8/2 (i.e. any information overlapping both documents) belongs to the prior use.

2.1.3 The prior use relates to a bottle with neck PP28 (see e-mail E7) together with a bottle neck adaptor and a dosing pipette (flat-nosed syringe) which is inserted into the adaptor to withdraw liquid from the bottle, as shown by any of E8 or E8/2. It is common ground that the public prior use anticipates features M1 to M5, M7, M8 and M10 to M12 of claim 1 of the contested patent. The respondent's allegation that feature M9 was not disclosed by the prior use was not substantiated. Indeed this feature is clearly shown in the drawing E2. The only remaining issue of dispute is thus whether feature M6 is anticipated by the prior use.

2.2 Feature M6

2.2.1 According to points 25-26 and 30 of the appealed decision, in the prior use liquid could enter the gap between the bottle neck and the cylindrical body of the bottle neck liner. The opposition division concluded therefrom that the prior use did not disclose the part of feature M6 reading "the bottle neck liner having a cylindrical body sealingly engaged inside the bottle neck such that liquid cannot flow between the bottle neck liner and the bottle neck".

2.2.2 The Board holds that this reasoning is based on a too narrow construction of feature M6. The fact that some

liquid could possibly enter the gap between the bottle neck liner and the bottle neck is not decisive, since this is not required by feature M6, which refers to flow between the two elements. This is true both if only the literal meaning of the feature wording is considered and if the context provided by the description is also taken into account.

A "flow" of a liquid between two objects indicates a directional, steady movement along a current between said objects. For example, if the bottle were upside down and there was no sealing engagement, liquid would flow from the inside of the bottle to the outside between the liner and the bottle neck, resulting in leakage and spillage of liquid. Hence, the literal meaning of the wording of feature M6 does not exclude the mere presence of some liquid between the liner and the bottle neck.

Consideration of the purpose of this feature also leads to the same result. The patent specification teaches that the sealing serves to prevent exit of the liquid from the bottle (see the last sentences of each of paragraphs [0059] and [0060] as well as paragraph [0070], lines 24-27 of the patent specification). By contrast, there is no mention of preventing the entry of liquid into the region between the liner and the bottle neck nor its presence in that region. As a matter of fact, in the main embodiment shown in Figures 1-2 and 6 of the patent specification liquid can enter the gap between the bottle neck liner and the bottle neck at the tapered region 10.

- 2.2.3 The respondent's submissions that the wording of feature M6 and the patent specification supported a narrow interpretation cannot convince the Board either.

Even if it could be inferred from the definition of the word "sealingly" in paragraph [0014] that "flow" and "leak" have different meanings, this would not mean that feature M6 has to be interpreted narrowly. The alleged difference in meaning between the two words may, for example, relate to the amount of liquid passing between the two components, with "flow" resulting in a greater spillage than "leak".

Paragraph [0066] uses the words "flow between" without providing any definition. A definition cannot be inferred from the Figures either, even if one were to interpret the specific embodiment of the Figures as not allowing any liquid to enter the space between the liner's cylindrical body and the bottle neck.

While claim 1 refers to the sealing engagement of the "cylindrical body", it also requires that "liquid cannot flow between the bottle neck liner and the bottle neck". As pointed out above, in the main embodiment with the bottle neck liner having a taper 10, liquid can enter the region between the taper 10 and the bottle neck and thus the region between the bottle neck liner and the bottle neck. Applying the narrow interpretation would thus lead to feature M6 not being fulfilled by the main embodiment, so that the main embodiment would not fall under the scope of claim 1.

- 2.2.4 For the reasons above, the Board is not convinced by the narrow interpretation of feature M6 applied by the opposition division and advocated by the respondent and considers that an apparatus anticipates the feature also if it allows entry or presence of liquid between the bottle neck liner and the bottle neck.

- 2.2.5 It is undisputed that the liner of the prior use, when inserted in the bottle neck as shown by any of E8 or E8/2, prevents liquid from exiting the bottle by flowing between the liner and the bottle neck when the bottle is inverted (see any of E8 and E8/2 showing the bottle inverted for withdrawing liquid). The cylindrical body of the liner sealingly engages with the bottle neck preventing flow between the liner and the bottle neck.
- 2.2.6 It follows that the disputed feature M6 is disclosed by the prior use. Hence, the subject-matter of claim 1 is not new, so that Article 100(a) EPC in view of Article 54 EPC prejudices maintenance of the patent as granted.
3. Auxiliary request 1 - admittance
- 3.1 Auxiliary request 1 constitutes an amendment to the respondent's appeal case after notification of a summons to oral proceedings. Under Article 13(2) RPBA, this request must, in principle, not be taken into account unless there are exceptional circumstances justified with cogent reasons by the respondent.
- 3.2 The interpretation of feature M6 and in particular the distinction between flow of liquid and the mere presence of liquid was a central issue in the appellant's statement of grounds of appeal (see pages 12 to 14) and in the respondent's reply (see section "Novelty" on pages 1 and 2). Point 4.2 of the Board's communication under Article 15(1) RPBA dealt with the interpretation of feature M6. It indicated that the Board shared the appellant's view on the interpretation of feature M6 and that this interpretation was

supported by the plain meaning of the word "flow" used to define the feature. Discussion of the meaning of the words used to define a feature is part of the normal discussion when there are disputes about the feature's interpretation.

3.3 There are thus no exceptional circumstances within the meaning of Article 13(2) RPBA. The Board thus decided not to admit the first auxiliary request into the proceedings.

4. Reimbursement of the appeal fee

4.1 At the first-instance oral proceedings, the opposition division of its own motion cast doubts for the first time on whether or not feature M6 was disclosed by the prior use. The appellant/opponent reacted to that by requesting to hear a witness to corroborate an alleged fact, namely that a "PP28 bottle neck could have a diameter of 19,4mm" (see point 4.1 of the minutes of the oral proceedings before the opposition division), or that it had indeed such a diameter, according to the correction of the minutes requested by the appellant/opponent and rejected by the opposition division. This alleged fact was relevant to establish which sealing was achieved in the prior use between the bottle neck liner and the PP28 bottle neck and thus to assess if the prior use anticipated feature M6.

4.2 The opposition division did not grant the request for the hearing of a witness even though it had been made at the first available opportunity and the opposition division considered the outcome of the hearing to be relevant to the outcome of the case (see appealed decision, point 29).

4.3 Hence, the refusal to hear the witness violated the appellant/opponent's right to be heard under Article 113(1) EPC and might have affected the outcome of the appealed decision. It follows that reimbursement of the appeal fee is equitable by reason of a substantial procedural violation (Rule 103(1) (a) EPC).

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 is reimbursed.

The Registrar:

The Chair:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated