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**Datasheet for the decision  
of 6 July 2022**

**Case Number:** T 3143/19 - 3.2.04

**Application Number:** 15820303.4

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**IPC:** A01G27/04, A01G9/02, A01G9/04,  
A01G31/00

**Language of the proceedings:** EN

**Title of invention:**  
PLANT POT HAVING DRAIN OPENING

**Applicant:**  
Van Den Ende, Peter Hubertus Elisabeth

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56  
RPBA 2020 Art. 13(1), 13(2)

**Keyword:**  
Inventive step - main request (no)  
Amendment to appeal case - justification by party (no) -  
suitability of amendment to resolve issues raised (no)

**Decisions cited:**

**Catchword:**



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Case Number: T 3143/19 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 6 July 2022**

**Appellant:** Van Den Ende, Peter Hubertus Elisabeth  
(Applicant) De Heugden 95  
6411 DN Heerlen (NL)

**Representative:** Verhees, Godefridus Josephus Maria  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 23 July 2019  
refusing European patent application No.  
15820303.4 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** S. Oechsner de Coninck  
**Members:** C. Kujat  
T. Bokor

## **Summary of Facts and Submissions**

- I. The appellant (applicant) lodged an appeal against the decision of the Examining Division refusing European patent application No. 15820303.4 pursuant to Article 97(2) EPC.
  
- II. The examining division came to the conclusion that the subject-matter of claim 1 lacked an inventive step and thus did not meet the requirements of Articles 52 and 56 EPC having regard to the state of the art as disclosed in documents:  
  
D1: US 4 160 342  
D2: WO 2014/018834 A2
  
- III. Together with his grounds for appeal, the appellant requested cancellation of the decision under appeal and grant of a patent on the basis of an amended main request, alternatively on the basis of an auxiliary request to be filed in accordance with a proposed amendment. The auxiliary requests itself was not filed with the grounds of appeal. Reimbursement of the appeal fee by reason of a procedural violation was also requested.
  
- IV. In a communication in preparation for oral proceedings the Board gave its provisional opinion, regarding the requirements of Article 56 EPC, added subject-matter and indicated its intention not to admit the auxiliary request.
  
- V. In a letter of 22 June 2022 the appellant filed a new main request as well as an auxiliary request.

- VI. Oral proceedings were held on 6 July 2022 in the form of a videoconference.
- VII. The appellant requested at the end of the oral proceedings that the decision under appeal be set aside, and a patent be granted on the basis of an "amended main request" (claims 1-14) or an "additional auxiliary request" filed during the oral proceedings or an "auxiliary request" (claims 1-14), with the "amended main request" and the "auxiliary request" both having been filed on 22 June 2022. Reimbursement of the appeal fee by reason of a procedural violation was also requested.
- VIII. Claim 1 of the relevant requests reads as follows:

*Main request (filed on 22 June 2022 under the title of "amended main request" ):*

"A plant pot comprising a bounding wall (2) forming an open-top pot and including a bottom (5) that bounds the under side of the pot as well as a side wall (3), the bottom forming the complete part of the bounding wall that is present between the side wall, the bounding wall having at least a single opening and a filled first space (7) which is located within the bounding wall, as well as a second space (11) filled with a substrate (12), where the second space is partly bounded by a bounding wall portion (2A, 2B) of the bounding wall, wherein the opening is located in said bounding wall portion (2A, 2B) and forms a drainage opening (13) for draining a surplus of nutrient water and/or water that cannot be 10 absorbed by the gel during use, characterized in that the first space (7) is filled with a hydrating gel (10) intended to receive roots from a plant growing into the gel and the

substrate (12) in the second space (11) is a substrate different from gel."

*"Additional auxiliary request" filed during the oral proceedings before the Board:*

"A plant pot comprising a bounding wall (2) forming an open-top pot and including a bottom (5) that bounds the under side of the pot as well as a side wall (3), the bottom forming the complete part of the bounding wall that is present between the side wall, the bounding wall having at least a single opening and a filled first space (7) which is located within the bounding wall, as well as a second space (11) filled with a substrate (12), where the second space is partly bounded by a bounding wall portion (2A, 2B) of the bounding wall, wherein the opening is located in the bottom (5) of said bounding wall portion (2A, 2B) and forms a drainage opening (13) for draining a surplus of nutrient water and/or water that cannot be absorbed by the gel during use, characterized in that the first space (7) is filled with a hydrating gel (10) intended to receive roots from a plant growing into the gel and the substrate (12) in the second space (11) is a substrate different from gel and the first space (7) is partly bounded by a further bounding wall portion (2D, 2E) of the bounding wall (2) and at least a single aeration opening (14) is located in this further bounding wall portion."

*"Auxiliary request" filed on 22 June 2022 under this title*

"A plant pot comprising a bounding wall (2) forming an open-top pot and including a bottom (5) that bounds the under side of the pot as well as a side wall (3), the

bottom forming the complete part of the bounding wall that is present between the side wall, the bounding wall having at least a single opening and a filled first space (7) which is located within the bounding wall, as well as a second space (11) filled with a substrate (12), where the second space is partly bounded by a bounding wall portion (2A, 2B) of the bounding wall, wherein the opening is located in said bounding wall portion (2A, 2B) and forms a drainage opening (13) for draining a surplus of nutrient water and/or water that cannot be absorbed by the gel during use, characterized in that the first space (7) is filled with a hydrating gel (10) intended to receive roots from a plant growing into the gel and the substrate (12) in the second space (11) is a substrate different from gel and is located above and beside the first space (7) and a part of the second space (11) is bound by a bounding wall portion formed by a top (2A) of the side wall (3) and an outer ring (2B) of the bottom (5) and 15 the first space (7) is filled with swellable gel grains (9) in swollen state."

### **Reasons for the Decision**

1. The appeal is admissible.
2. Main request - Inventive step
  - 2.1 Claim 1 according to the main request is the same as claim 1 on which the impugned decision is based.
  - 2.2 D1 as starting point discloses a plant pot comprising a bounding wall 12 forming an open-top pot and including a bottom (27) that bounds the underside of the pot as well as a side wall (22; fig 4), a first space 35 which is located within the bounding wall, as well as a

second space 45 filled with a substrate, e.g. soil. A plurality of drainage openings 47 for draining surplus water are also provided (column 3, lines 19-22). The soil in the second space is also different from the particulate material, for example perlite, in the first space 35 (sentence bridging columns 2 to 3).

2.3 The appellant does not dispute that the subject-matter of claim 1 differs from this known plant pot of D1 in that instead of a particulate material: "the first space is filled with a hydrating gel intended to receive roots from a plant growing into the gel".

2.4 Objective technical problem

2.4.1 According to established case law an objective definition of the problem to be solved by the invention should normally start from the problem described in the contested patent, see Case Law of the Boards of Appeal (CLBA), 9th edition, 2019, I.D.4.3.2. In relation with the self cited prior art EP-A-1 139 716, the application exposes the drawback that water may be on the top of the saturated gel layer (page 1, lines 28-30), and formulates the problem of draining excess water which was the main object of the application as filed (page 2, lines 5-9). The fact that gel might be saturated with water in the prior art is merely presented as a disadvantage or undesired effect that is addressed in the present application with additional drainage holes. Contrary to the appellant's argument the application in relation to that self cited prior art does not indicate that the roots are unable to grow into saturated gel, but merely that it is not optimal (page 1, line 32). It is not disputed that D1 also discloses the same type of openings 47 and therefore also solves the problem of draining excess water



(column 3, lines 19-22). As the subjective problem is already solved by D1 in the same way, a less ambitious objective technical problem needs to be formulated.

- 2.4.2 Using the established problem and solution approach, the objective technical problem should be formulated in accordance with the technical effect associated with this particular differing provision of a hydrating gel. Any effect provided by the invention may be used as a basis for reformulating the technical problem, as long as that effect is derivable from the application as filed (CLBA), 9th edition, 2019, I.D.4.4.1. For that reason the problem to improve means to rise water upwardly to wet the soil, suggested by the appellant rather relies on another technical effect explained in D1. It is thus not appropriate as it does not derive from an effect of hydrating gel disclosed in or derivable from the application.
- 2.4.3 The particulate material in the first space 35 of D1 also provides some retention of water, and thus, storing moisture and nutriment for the roots (D1, col 1, lines 35-39). The hydrating gel in the present application also serves to retain moisture and nutriment, be it in a different way. Therefore the objective technical problem can merely be considered as the provision of a suitable alternative to the water and nutriment retention means of D1.
- 2.4.4 In view of the above objective technical problem, that does not require to rise the water from the reservoir, the skilled person does not need any specific incentive to depart from the particulate material in the well 35 of D1 and consider providing another suitable water and nutriment retention in the well.

2.5 Obviousness of the solution

2.5.1 The Board considers the different materials for storing, retaining or otherwise providing water buffer for plants to belong to the common general knowledge of the person skilled in small gardening equipment, as concluded in item 8.1.7 of the impugned decision. Such materials commonly include porous materials such as perlite, sponges or foams, or hydrophilic polymers in any form: gel or particles. It should thus be expected from the skilled person to be able to select any such type of material, that provides suitable water retention capabilities to fill the first space 35 of D1. This assessment is not based on hindsight as there exist only a limited number of water retention materials commonly used in the field of gardening. The Board also agrees with the examining division that at least D2 would in any case provide useful hints to the skilled person to replace the material used in the well 35 of D1 by a water-absorbent polymer 352 as taught by D2 (e.g. page 13, second full paragraph).

2.5.2 The Board is not convinced by the appellant's initial arguments that the skilled person would not solve the problem of drawing water from the reservoir, because D1 discloses an adsorbing material, not an absorbing one. According to the appellant, an absorbing material such as an hydrating gel would be unable to rise water into the substrate from the reservoir underneath, and thus would be contradictory with the sought effect of D1.

2.5.3 The Board first observes that the technical problem to be solved as identified above generally concerns water retention or storage, rather than the more specific task of drawing water from a reservoir to a substrate located above. The skilled person is well aware of the

differences between absorption and adsorption, and their respective advantages or drawbacks. Porous materials retain liquid in their corrugations or voids, whereas an absorbing materials store water in their bulk, no unexpected effect as concerns water retention capability arises from these known different ways of storing moisture.

2.5.4 When considering to replace the particulate material in the well 35 of D1 by an absorbing material, such as swellable gel, the skilled person does not expect the technical drawback submitted by the appellant. On the contrary a similar effect of drawing water from the reservoir to the soil 45 is expected to occur. A swellable gel, which is hydrophilic will absorb moisture through openings 42 provided in the adjacent water reservoir 29. In fully swollen state the upper side of the absorbing polymer exposes the soil in the pot located just above to moisture. The appellant indirectly confirms this behaviour in their latter argument stating that the gel might be saturated with water. This physical behaviour takes place, even if the "rising" effect is considered somewhat less efficient with a polymer than with perlite, and not equivalent as submitted by the appellant. Such similar technical result or effect would therefore not detract the skilled person from providing a hydrating gel from their own technical knowledge of gardening materials or as taught by D2.

2.5.5 The Board is unconvinced by the appellant's further argument that the person skilled in the art would not replace the perlite of D1 by the polymer of D2 because the polymers would be saturated with water and therefore the plant will not grow therein. As observed under item 2.4.1 above the self cited prior art makes

use of polymer gel that may also be saturated with water, the application in its explanation of this prior art however does not contain any indication that roots might be unable to grow through this saturated polymer. There is especially no teaching in the application that the advantages of gel, as explained on page 1, lines 19-20 of the application, namely that gel forms a water buffer and provides protracted water supply to the plant, cannot be achieved by the pot of D1. Furthermore as also exposed in the same item 2.4.1 above, the drainage holes 47 in D1 drain any excess water above the well level, irrespective of whether they would result from saturated particulate material or perlite as in D1 or from another water absorbing material, including polymer particles (e.g. D2 page 9, paragraph 2). Therefore this possible saturation with water would not deter the skilled person from replacing the particulate material of D1 with another one such as polymer gel grains.

- 2.6 The Board thus confirms the examining division's conclusion the the subject-matter of claim 1 of the main request lacks an inventive step.
  
- 3. Admission of the "additional auxiliary request" and the "auxiliary request"
  
- 3.1 The "additional auxiliary request" has been filed during the oral proceedings and thus represents an amendment to the appellant's case sought to be made after notification of a summons to oral proceedings. Pursuant to Article 13(2) RPBA such amendment shall, in principle not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 3.2 The appellant justifies this filing of the additional auxiliary request because they realised that the previous auxiliary request filed with the grounds had an unintended limitation: the outer ring. The newly presented auxiliary request would remedy this problem.
- 3.3 The amendment concerns the incorporation of the features of claim 5 into claim 1. Claim 1 of this request is thus different and broader than claim 1 of the auxiliary request on file. The justification proposed by the appellant that claim 1 of the auxiliary request on file was considered too narrow is not a reason that would justify an exceptional circumstance in favour of an admission of the request. The reason proposed by the appellant rather relate to the adjustment of the scope of protection on the initiative of the appellant applicant, but it is not related to any particular triggering event or fact which the applicant could not have foreseen or expected. The Board is also unable to recognise an exceptional circumstance in the sense of what would arise from surprising or unexpected development during the proceedings. In the present case no new or unexpected argument arose in the debate, nor did the appellant submit one.
- 3.4 In that light, the additional arguments of the appellant submitted during the oral proceedings, namely that the the Board would also be expected to look at the dependent claims, as a direct consequence of the refusal of the main request, need not be addressed. The same applies for the argument that the Examining Division's refusal of the application following a single communication was most unusual and unexpected to the applicant. Apart from that, these arguments are also not convincing. Neither the Board, nor the

Examining Division has any formal duty to foresee and prepare for potential claim combinations based on dependent claims, without any prompting by the applicant, merely because pending independent claims do not appear allowable. As to the refusal after a single communication, the appellant admitted that it was aware of the practice of requesting an oral proceedings as a precaution against such refusals. Otherwise, while the procedure followed might be perceived as formally stricter than usual, such approach of the Examining Division is not lacking legal basis *per se*, and does not constitute a procedural error.

3.5 Therefore the Board decided not to admit the additional auxiliary request pursuant Article 13(2) RPBA.

3.6 The auxiliary request has been filed on 22 June 2022 and is also an amendment of the appellant's case after they filed their grounds of appeal pursuant to Article 13(1) and has furthermore been filed after notification of a summons to oral proceedings pursuant to Article 13(2) RPBA.

3.7 Claim 1 of this request adds the following wording as its last features "...is located above and beside the first space (7) and a part of the second space (11) is bound by a bounding wall portion formed by a top (2A) of the side wall (3) and an outer ring (2B) of the bottom (5) and the first space (7) is filled with swellable gel grains (9) in swollen state."

3.8 Considering the first feature concerning the location of the substrate above and beside the first space the Board has indicated in its communication that the grounds failed to provide reasons why the amendment overcomes the objections raised pursuant to Article

12(6) RPBA. In the letter accompanying the further addition concerning the bounding wall portion formed by a top of the side wall and an outer ring of the bottom and the first space, the appellant also fails to provide reasons why the further amendment overcomes the objections raised in respect of added-matter and the critical question of inventive step.

3.9 The appellant explains that the feature concerning the substrate being above and beside should be interpreted to exclude the configuration shown in figure 1 of the application in suit. For the Board this argument raises new issues of interpretation, with associated questions of support and added subject-matter in addition to the prima facie lack of contribution to an inventive step raised in item 4.2 of the Board's communication. Thus the amendment to claim 1 of the auxiliary request adds complexity and its suitability to address the issues which led to the decision under appeal, in particular inventive step, is questionable.

3.10 Therefore as the auxiliary request is not accompanied by suitable justification and reasons pursuant to Article 12(4) and (6) RPBA, and furthermore as it appears prima facie unsuitable to address all questions at issue, the Board decided to exercise its discretion under Article 13(1) RPBA not to admit the auxiliary request.

4. As no allowable request remains, the Board can but confirm the impugned decision to refuse the application pursuant to Article 97(2) EPC.

5. Reimbursement of the appeal fee

5.1 Rule 103(1) (a) EPC requires as a precondition for the reimbursement of the appeal fee that the appeal is allowed. Since in the present case the appeal is not successful, already for this very reason the appellant's request for the reimbursement of the appeal fee must fail.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed

The Registrar:

The Chairman:



A. Voyé

S.Oechsner de Coninck

Decision electronically authenticated