

Netherlands

“Bunch O Balloons”

**Decision of the Supreme Court of the Netherlands (Hoge Raad)
1 March 2024 – Case No. 22/04766; ECLI:NL:HR:2024:293**

*Tinnus Enterprises LLC and Zuru Inc. v. [defendant]
B.V.*

**European Patent Convention (EPC), Art. 69; Protocol
on the Interpretation of Art. 69 EPC**

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Keywords Water balloon filler · Equivalence · Two-step approach · Patent grant file · Priority · Scope of protection · Lack of inventive step · Inventive concept perspective · Person skilled in the art · Limitation

1. **The purpose of identifying the inventive concept that underlies the wording of the claims is to avoid an interpretation based solely on the literal meaning of the words, which may as a result be unnecessarily broad or too narrow to reasonably protect the patent holder. The description and drawings are an important source in that context.**
2. **When a patent is being interpreted, what prevails is the perspective of the average person skilled in the art, with his/her knowledge of the prior art. When seeking the balance that, pursuant to Art. 1 of the Protocol on the Interpretation of Art. 69 EPC, must be found between protecting patent holders’ interests and ensuring legal certainty for those who rely on the patent, the courts may, when the question arises as to whether wording included in a claim should be construed as limiting the scope of protection, attribute importance to how the average person skilled in the art would answer the question whether there were good grounds for the limitation. This may involve consideration of the grant file (the part accessible to third parties).**

3. **Article 2 of the Protocol on the Interpretation of Art. 69 EPC requires due account to be taken of equivalents when determining the scope of protection of a patent, leaving room for both interpretation approaches (one or two-step approach) on how to define “due”, as both aim to find the required middle ground between protecting the patent holder’s interests and ensuring legal certainty for third parties.**
4. **To assess what the average person skilled in the art might deduce from a limitation introduced during the grant phase, the facts must be evaluated using the criteria set out above.**

2 Starting Points and Facts

2.1 For the purposes of the appeal, the following can be assumed:

(i) Tinnus is the holder of European patent EP 3 005 948 B1 (hereinafter “EP 948” or “the patent”). It granted Zuru a licence to use EP 948 in a product for filling water balloons with the brand name “Bunch O Balloons”.

(ii) EP 948, entitled “Apparatus, system and method for filling containers with fluids”, was granted on 17 October 2018 on the basis of an application filed on 10 March 2015. EP 948 claims the priority of patents US 201461937083P with a priority date of 7 February 2014, US 201461942193P with a priority date of 20 February 2014, and US 201414492487A with a priority date of 22 September 2014. EP 948 has been validated in a large number of European countries, including the Netherlands.

(iii) EP 948 contains 11 (product and process) claims. Claim 1 reads, in the uncontested Dutch translation: [English translation given immediately below in square brackets]

[...]

[1. An apparatus comprising:

a housing (12) comprising an opening at a first end (A) and a plurality of holes (26) at a second end (B); and

a plurality of hollow tubes (16), each hollow tube (16) attached to a respective hole of said plurality of holes (26), wherein all of the hollow tubes of the apparatus extend from said shared housing to respective tube ends, with the tube ends presenting a plurality of adjacent inflatable containers (18),

wherein each tube end is removably joined to a respective one of said inflatable containers in a sealed manner by an elastic ring (20) disposed around a neck of the inflatable container, and wherein the tubes facilitate the simultaneous filling of the inflatable containers with a liquid, said elastic rings being configured to each slide with the corresponding inflatable container when each inflatable container is detached from the corresponding hollow tube and, upon removal of the inflatable container from the corresponding tube, to constrict the neck of the inflatable container, sealing it with the liquid inside.”]

(i) EP 948 includes the following figures:

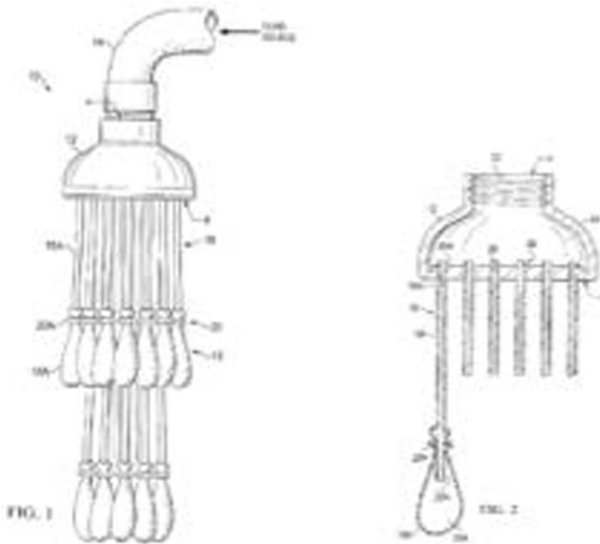




Figure 9A



Figure 9B



Figure 9C

(v) [The defendant] is an international trading company concerned with the import and export of non-food consumer goods, including toys.

(vi) On 7 April 2017, at Zuru’s request, customs in Rotterdam detained a container from China intended for [the defendant], which contained 99,731 water balloon fillers that looked like this:



(vii) In opposition proceedings, the patent was maintained in amended form.

2.2 In the main proceedings in this case, Tinnus et al. seek a ruling that [the defendant] has infringed or is infringing EP 948, or is facilitating or has facilitated such infringement, as well as an injunction prohibiting [the defendant] from infringing the Dutch part of EP 948 and from acting unlawfully against Tinnus et al. It also seeks an award of damages and various ancillary measures.

2.3 By way of a counterclaim, [the defendant] seeks a ruling that its water balloon fillers do not fall within the scope of protection of EP 948, that the Dutch part of EP 948 be declared null and void, and a prohibition be imposed on unwarranted harassment [e.g. demand letters]. It also seeks an award of damages and various ancillary measures.

2.4 Insofar as relevant for the present appeal, the district court¹ revoked the Dutch part of EP 948 for lack of inventive step, and dismissed the parties' remaining claims.

2.5 The court of appeal² set aside the district court's judgment insofar as it had (i) revoked the Dutch part of EP 948, and (ii) dismissed the claims for an order for damages against Tinnus et al. The court of appeal upheld the claim to revoke the Dutch part of EP 948 regarding claim 6 and dismissed the remainder, ordering Tinnus et al. to pay damages. With this in mind, insofar as relevant, it stated the following:

6.1 The Court will hereinafter, following the example of the parties, use the following numbering to indicate the various features of claim 1 of EP 948:

1.1 An apparatus comprising a housing (12)

1.2 comprising an opening at a first end (A) and a plurality of holes (26) at a second end (B); and

1.3 a plurality of hollow tubes (16), wherein each hollow tube (16) is attached to a respective hole of said plurality of holes (26),

1.4 wherein all of the hollow tubes of the apparatus extend from said housing to respective tube ends at where the tube ends present a plurality of adjacent inflatable containers (18),

1.5 wherein each tube end is removably joined to a respective one of said inflatable containers in a sealed manner by an elastic ring (20) disposed around a neck of the inflatable container,

1.6 and wherein the tubes facilitate the simultaneous filling of the inflatable containers with a liquid,

1.7 said elastic rings being configured to each slide (10)³ with the corresponding inflatable container when each inflatable container is detached from the corresponding hollow tube and, upon removal of the inflatable container from the corresponding tube, to constrict the neck of the inflatable container, sealing it with the liquid inside.

¹ District Court of The Hague, 9 December 2020, ECLI:NL:RBDHA:2020:12493.

² Court of Appeal of The Hague, 20 September 2022, ECLI:NL:GHDHA:2022:1802.

³ Translator's note: Brackets have been added around the number 10, as these are assumed to be inadvertently missing.

(...)

6.4 When applying Art. 69 of the European Patent Convention (EPC) and the Protocol on the Interpretation of Art.69 EPC (hereinafter: Protocol), the Court will employ the two-step approach developed in case-law.

6.4.1. The first step of that approach is sometimes referred to as assessing “literal infringement”. In that step, a patent claim undergoes interpretation to determine whether a third party’s product or process corresponds to all the features of the patent claim. Such interpretation does not refer to the extreme mentioned in Art. 1 of the Protocol, whereby the extent of the protection conferred by a European patent is defined strictly by the literal meaning of the wording used in the claim, but rather to an interpretation of the patent claims in the light of, *inter alia*, the description and drawings from the perspective of the average person skilled in the art, with his/her knowledge of the prior art (Art. 69(1) EPC and the middle section of Art. 1 of the Protocol). This first step alone does not take into account the possibility that elements of the [third party’s] product or process may be equivalent to features of the patent claims in accordance with Art. 2 of the Protocol.

6.4.2. If the patent claim cannot be interpreted in such a way that all of its features are “literally” reflected in the product or process, a second step is taken to determine whether the element that differs from a feature included in the claim is equivalent to that feature and whether the product or process therefore should still be considered to fall within the scope of protection of the patent. This second step deals with the question whether the average person skilled in the art would consider the claims, read in the light of the description and drawings, to leave room for equivalents. Here, consideration must be given to, on the one hand, fair protection for the patent holder and, on the other hand, a reasonable degree of legal certainty for third parties.

(...)

6.6 The Court agrees with [the defendant] that its water balloon filler does not “literally” correspond to the features mentioned under 1.2 and 1.3. The housing of the [defendant’s] water balloon filler does not comprise an opening at a first end and a plurality of holes at a second end, as required by feature 1.2. (...) As there is no plurality of holes, the tubes are also not attached to a plurality of holes, as required by feature 1.3.

(...)

6.9 In the Court’s opinion, the claim of equivalence cannot succeed either. As this Court held in the *Pemetrexed* judgment [Court footnote: Court of Appeal of The Hague of 27 October 2020, ECLI:NL:GHDHA:2020:2052 (*Eli Lilly v. Fresenius Kabi*)], one of the requirements for a claim of equivalence to succeed is that a reasonable degree of legal certainty for third parties be ensured. That requirement has not been met in this case.

6.10 The fact that the patent claims used wording that does not literally include equivalents is an important factor when assessing legal certainty. Given that Art. 69 EPC presupposes that the extent of protection conferred by a European patent is determined by the claims, third parties may generally rely on the wording of the claims, interpreted in the light of the description and

drawings; any ambiguity created by the wording of the claims generally works to the detriment of the patent holder.

6.11 Moreover, in this case, according to the average person skilled in the art, there is a good reason for limiting the scope of protection to apparatus with the feature that the housing comprises a plurality of holes at a second end (feature 1.2). During the grant procedure, Tinnus initially removed this feature from claim 1, only to subsequently reinstate it in response to an objection on novelty from the Examining Division of the European Patent Office (EPO). The average person skilled in the art can in principle infer from that course of events that the intention was to exclude devices without feature 1.2 from the scope of claim 1 of EP 948.

6.12 The fact that feature 1.2 was introduced in response to an objection on novelty was explained by [the defendant], using a description of the grant history. Its statement, which was not challenged, argued that Tinnus had filed amended claims on 17 November 2017, claiming that the housing had multiple holes at a second end, and that this limitation was a response to the Examination Report of 2 October 2017 (submitted as exhibit 42). In this Report, the EPO's Examining Division had ruled that claim 1, as filed at the time, was not novel. It would have been incumbent on Tinnus et al. to explain why a third party should nonetheless not be able to rely on feature 1.2 being an essential element of the claimed invention. Tinnus et al. did not do so.

6.13 The Court can pass over the argument of Tinnus et al. that the limitation involving the attachment of the tubes to the respective holes was not added on the basis of an objection on novelty. That argument concerns the feature that each hollow tube is attached to a respective hole of said plurality of holes (feature 1.3) rather than the feature that the housing comprises an opening at a first end and a plurality of holes at a second end (feature 1.2). However, feature 1.3 too was part of claim 1 of the patent application and was initially removed during the grant procedure. The fact that, after the introduction of feature 1.2, claim 1 was further limited by also reinstating feature 1.3, and that the subsequent addition of feature 1.3 was connected with an objection to additional subject-matter within the meaning of Art. 123(2) EPC, does not change the conclusions that the average person skilled in the art can draw from the introduction of feature 1.2.

(...).

3 Assessment of the Grounds of Appeal in the Main Action

3.1.1 Part II of the grounds of appeal is directed against paras. 6.4–6.4.2 of the contested judgment, in which the court of appeal interprets a patent using what is known as the two-step approach. This Part objects that, *inter alia*, the two-step approach conflicts with the Supreme Court's guiding principles, as well as with Art. 69(1) of the European Patent Convention (hereinafter: EPC) and Art. 2 of the Protocol on the Interpretation of Art. 69 EPC (hereinafter the "Protocol").⁴ Part II

⁴ Convention on the Grant of European Patents, Munich, 5 October 1973, and its Protocol on the Interpretation of Art. 69 of the Convention, *Treaty series* 1975, 108 and 2013, 127.

further argues that the result of the two-step approach is that no, or too little, significance is attached to the inventive concept perspective.

3.1.2 The scope of protection of a European patent is governed by Art. 69 EPC and its Protocol, interpreted in accordance with the criteria of Arts. 31 and 32 of the Vienna Convention.⁵ Article 69(1) EPC provides that the extent of protection conferred by a patent is determined by the claims contained in the patent specification, with the description and drawings serving to interpret those claims. Articles 1 and 2 of the Protocol read as follows:

Article 1 – General principles

Article 69 should not be interpreted as meaning that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Nor should it be taken to mean that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

Article 2 – Equivalents

For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is equivalent to an element specified in the claims.

3.1.3 In accordance with this norm for interpreting the Protocol, the Supreme Court referred to the wording used in its earlier judgments, “that which is essential to the invention for which protection is claimed” and “the inventive concept underlying the wording of the claims”, as perspectives, as opposed to the literal wording of the claims (the “extremes” in the words of the Protocol). The purpose of identifying the inventive concept that underlies the wording of the claims is to avoid an interpretation based solely on the literal meaning of the words, which may as a result be unnecessarily broad or too narrow to reasonably protect the patent holder. The description and drawings are an important source in that context. When a patent is being interpreted, what prevails is the perspective of the average person skilled in the art, with his/her knowledge of the prior art. When seeking the balance that, pursuant to Art. 1 of the Protocol, must be found between protecting patent holders’ interests and ensuring legal certainty for those who rely on the patent, the courts may, when the question arises as to whether wording included in a claim should be construed as limiting the scope of protection, attribute importance to how the average person skilled in the art would answer the question whether there were good

⁵ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *Treaty series* 1972, 51, and 1985, 79.

grounds for the limitation. This may involve consideration of the grant file (the part accessible to third parties).⁶

3.1.4 Article 2 of the Protocol requires due account to be taken of equivalents when determining the scope of protection of a patent, but does not define “due”. In practice, there are essentially the following two approaches.

3.1.5 In the first approach, the patent is interpreted in one step, and equivalents are directly considered when seeking the middle ground referred to in Art. 1 of the Protocol.

3.1.6 The second approach involves two steps. In the first step, an interpretation of the relevant patent claim is used to determine whether a third party’s product or process corresponds to all the features of the patent claim. Although also described in case-law as a “literal” interpretation, the patent claim is considered in the light of, *inter alia*, the description and drawings from the perspective of the average person skilled in the art, with his/her knowledge of the prior art. This first step considers all relevant perspectives, except for the possible equivalence of elements of the product or process to features of the patent claim as referred to in Art. 2 of the Protocol. If the patent claim cannot be interpreted to mean that all of its features are reflected in the product or process, then – if the patent holder’s argument so warrants – a second step examines whether the element that deviates from a feature included in the claim is equivalent to that feature and whether it is therefore still appropriate to include the product or process within the patent’s scope of protection.⁷ Such a two-step approach is currently used by the Dutch, as well as by the English, French and German courts in their decision-making (see the Advocate General’s Opinion at 3.15).

3.1.7 The Protocol, like the Supreme Court case-law based on it (see 3.1.3 above), leaves room for both approaches. After all, the aim of both is to find the required middle ground between protecting the patent holder’s interests and ensuring legal certainty for third parties. Thus, the inventive concept perspective also has ample opportunity to come into its own in the two-step approach (cf. the Advocate General’s opinion at 3.28 and 3.38).

3.1.8 In view of the foregoing (3.1.2–3.1.7 above), the complaint set out in 3.1.1 above fails.

3.2.1 Parts VII and VIII of the grounds of appeal are directed against the Court of Appeal’s finding in paras. 6.11–6.13 that, according to the average person skilled in the art, there were good grounds for limiting the scope of protection to devices in which the housing comprised a plurality of holes at a second end (feature 1.2), because Tinnus had first removed this feature from claim 1 during the grant procedure, only to reintroduce it in response to an objection on novelty from the

⁶ See, *inter alia*, Supreme Court, 8 June 2018, ECLI:NL:HR:2018:854 (*Resolution v. AstraZeneca*), paras 3.4.2 and 3.4.3, with references to earlier case-law.

⁷ Cf. the Court of Appeal of The Hague, 27 October 2020, ECLI:NL:GHDHA:2020:2052 (*Eli Lilly v. Fresenius; Pemetrexed*), paras 4.3.1 and 4.6–4.11.

EPO’s Examining Division. Parts VII and VIII complain, *inter alia*, that this finding is incorrect or incomprehensible, because the reinstatement of feature 1.2 was intended to restore the claimed priority and was not about a substantive objection on novelty.

3.2.2 Those parts of the grounds of appeal incorrectly interpret the law insofar as they are based on the argument that when a feature is included in order to claim priority, and there is an objection on the grounds of novelty that does not involve priority (what Tinnus et al. refer to as a “formal” objection on novelty), the average person skilled in the art can never infer from this that the claim thus limited leaves no room for equivalents that do not “literally” correspond to the included feature. To assess what the average person skilled in the art might deduce from a limitation introduced during the grant phase, the facts must be evaluated using the criteria set out therefor in 3.1.2–3.1.3 above. The court of appeal did apply those criteria. Furthermore, in the light of the relevant section of the grant file and the parties’ debate on this point, the court of appeal’s finding is not incomprehensible.

[...]

4 Decision

The Supreme Court:

– dismisses the main appeal;

[...]

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