judgment

THE HAGUE COURT OF APPEAL

Civil-Law Section

Case number : 200.192.921/01
District Court case number : C/09/504274 / KG ZA 16-100

judgment of 22 August 2017

in the case of

1. Ruby Decor B.V.,
having its registered office in Broek op Langedijk (Municipality of Langedijk),
2. Aparto B.V.,
having its registered office in Broek op Langedijk (Municipality of Langedijk),
appellants in the principal appeal,
respondents in the cross-appeal,
hereinafter referred to as Ruby Decor,
attorney: *mr.* Th.C.J.A. van Engelen, practising in Utrecht,

v.

Basic Holdings ULC,
having its registered office in Dublin (Ireland),
respondent in the principal appeal,
appellant in the cross-appeal,
hereinafter referred to as Basic Holdings,
attorney: *mr.* A. Tsoutsanis, practising in Amsterdam.

The proceedings

By writ of 25 May 2016, Ruby Decor appealed a judgment rendered between the parties by the preliminary relief judge of The Hague District Court on 4 May 2016. Ruby Decor advanced seven grounds of appeal by statement of appeal (the 'Statement of Appeal'). By defence on appeal, also statement of appeal in the cross-appeal including exhibits (the 'Defence on Appeal'), Basic Holdings challenged the grounds of appeal and also lodged a cross-appeal, formulating one ground of appeal to that end. Ruby Decor responded to this by defence on appeal in the cross-appeal including one exhibit (the 'Defence on Appeal in the Cross-Appeal'). Subsequently, Basic Holdings also submitted the document regarding 'claim 3', in response to the defence on appeal in the cross-appeal, also entering exhibits into evidence (the 'Document').

The parties then had their cases argued on 9 February 2017: Ruby Decor by the aforementioned *mr.* Van Engelen, assisted by patent attorney *ir.* A.H.K. Tan, and Basic Holdings by the aforementioned *mr.* Tsoutsanis, assisted by patent attorney *ir.* J.A.M. Grootscholten, both of them on the basis of written arguments they had submitted (the 'Written Arguments on Appeal'). Finally, the parties requested judgment.

2. Facts

2.1. Basic Holdings is part of the internationally operating Glen Dimplex Group, which engages in the development and production of decorative fireplaces.

2.2. Basic Holdings is the proprietor of European Patent EP 2 029 941 B1 (hereinafter: 'EP 941' or the 'Patent') for an '*Artificial Fireplace*'. EP 941 is valid for countries including the Netherlands, Germany, France, the UK and Ireland. EP 941 was granted on 3 October 2012 pursuant to an application to that end of 13 March 2007, invoking priority based on patent applications GB 0605001 of 13 March 2006 and GB 0623434 of 24 November 2006.

2.3. EP 941 has 17 claims, the first of which is an independent claim. The dependent claims are all dependent on claim 1. The original English text of claim 1 of EP 941 reads as follows:

1. A simulated fire effect apparatus (10) (450) (322) comprising:
an apertured bed (12) (232);
a container (30) (452) (452') (652) (752) adapted to contain a body of liquid (32), the container providing a head space (496) (6528) above the liquid;
an ultrasonic transducer (34) (34') (462) (458) device having a transducing surface operatively in liquid contacting relation with the body of liquid (32) and operable to produce a vapour in said head space (496) (652B); and
means for providing a current of air directed upwardly from the apertured bed (12) (232) ***characterised in that*** *the container (30) (452) (452') (652) (752) includes a vapour outlet port (482) ((482'), and* ***in that***
the apparatus (10) (450) (322) further comprises means (26) for providing a flow of air along a path extending into the head space (496) (652B) and out of the vapour outlet port (482) (482'), wherein the outlet port (482) (482') is so disposed that the air flow path exits the container (30) (452) (452') (652) (752) below the aperture bed (12) (232).

2.4. In the unchallenged Dutch translation, claim 1 reads as follows:

1. Inrichting voor de simulatie van een haardvuureffect (10) (450) (322) omvattende: een van openingen voorzien bed (12) (232);
een houder (30) (452) (452') (652) (752) ingericht om een vloeistofhoeveelheid (32) te bevatten, waarbij de houder een kopruimte (496) (652B) boven de vloeistof verschaft; een ultrasonische omvormerinrichting (34) (34') (462) (458) met een omvormend oppervlak dat werkzaam in vloeistofcontacterend verband met de vloeistofhoeveelheid (32) staat en bruikbaar is om een damp in de genoemde kopruimte (496) (652B) voort te brengen; en middelen voor het verschaffen van een luchtstroom, die vanaf het van openingen voorziene bed (12) (232) naar boven is gericht,
met het kenmerk*, dat de houder (30) (452) (452') (652) (752) een dampuitlaatpoort (482) (482') omvat en dat de inrichting (10) (450) (322) voorts middelen (26) omvat voor het verschaffen van een luchtstroom langs een weg, die zich naar binnen in de kopruimte (496) (652B) en uit de dampuitlaatpoort (482) (482') uitstrekt, waarbij de uitlaatpoort (482) (482') dusdanig is aangebracht, dat de luchtstromingsweg de houder (30) (452) (452') (652) (752) beneden het van openingen voorziene bed (12) (232) verlaat.*

2.5. The description of EP 941 includes – to the extent relevant here – the following passages:

[0001] *The present disclosure relates to simulated fires and in particular to apparatus for simulating the burning of solid fuel such as coal or logs. The apparatus may desirably, but not essentially include a heat source configured for space heating of a room. More especially, the*

disclosure relates to apparatus and methods for simulating flames produced by burning solid fuel and/or for simulating smoke as produced when burning solid fuel.

BACKGROUND

[0002] *Many apparatus for simulating the burning of solid fuel are known in the art. Examples can be seen in WO 02/099338 and W097/4139 among many others.*
Typically prior art fire simulating apparatus include a simulated fuel arrangement which may be as simple as a plastic moulding shaped and coloured to resemble coals or logs resting on an ember bed. More complex arrangements include a separate ember bed, which may also be a shaped and coloured plastic moulding, and discrete pieces of simulated fuel which rest on the ember bed. Other arrangements provide simulated fuel pieces resting in a simulated grate. Commonly, the simulated fuel arrangement is illuminated from below by light of varying intensity thereby to attempt to simulate the glowing nature of a burning fire.

[0003] *WO 03/063664 teaches a simulated fire which includes a plurality of fuel pieces resting on a lattice work support. Below the fuel pieces there is provided a water container which includes an ultrasonic transducer. The transducer is operative to provide clouds of water vapour. A fan heater is mounted above the simulated fuel and acts to draw the water vapour through gaps between the fuel pieces. The water vapour emerging through the fuel bed is intended to resemble smoke. The water vapour is heated by the fan heater, thereby losing any resemblance to smoke and is expelled from the apparatus. The fuel bed is illuminated from below by a light source which is preferably located in the water container. The light source may be coloured red or orange.*

BRIEF SUMMARY OF THE DISCLOSURE

[0004] *The present disclosure seeks to provide improved simulations of flames and smoke, and to provide improved methods and apparatus for producing simulated smoke. The disclosure further seeks to provide improved apparatus for simulating a real fire, which, in particular, seeks to provide and* [probably meant to read: '*an*' – Court of Appeal] *improved flame and/or smoke simulating effect."*

(…)

[0018] *The term "apertured bed" in this specification is intended to mean and/or include a body, mass or assembly having gaps or apertures through which vapour produced by vapour generating means (such as an ultrasonic transducer) may pass in particular when entrained in a rising current of air. The apertured bed may, for example, be a fuel bed (in particular, a simulated fuel bed) which comprises a plurality of discrete bodies arranged together to form a larger general mass, such as simulated coals or logs, real coals or logs, pebbles, small rocks or glass or resin or plastic pieces, the vapour being able to pass and around and between the individual bodies. When a plurality of smaller bodies is used, it may be appropriate to support them on a frame which also allows the passage of the vapour produced vapour generating means.*

[0019] *In alternative arrangements, the apertured bed may be in the form of one or more larger bodies each of which has one or more apertures which allow the passage of vapour. For example the apertured bed may comprise a single block of material having a plurality of passages extending from its under surface to its upper surface.*

(…)

DETAILED DESCRIPTION

[0022] *Referring now to the drawings and in particular to Figure 1, in general terms the apparatus 10 of the present disclosure comprises in one embodiment a fuel bed indicated generically at 12, a vapour generator indicated generally at 14, at least one light source 16 and light modifying means 18, 20. Preferably the vapour is water vapour. A preferred liquid is water. Unless the context requires otherwise, references to water and water vapour herein include*

references to other suitable liquids and their respective vapours. A vapour guide 22 is provided to constrain the water vapour produced by the generator 14 to desired flow path. The apparatus 10 may comprise one or more water vapour generators 14. In use, the water vapour generator 14 produces water vapour within a substantially closed housing 24. A fan 26 provides a flow of air into the container 24 which entrains the water vapour. The water vapour exits the housing 24 through a suitable aperture, outlet or orifice 28. The water vapour is carried in the flow of air generated by fan 26 through the vapour guide 22 and ultimately through the fuel bed 12. The water vapour is carried above the fuel bed by the air flow to give the impression of smoke. Light source 16 illuminates the fuel bed 12 to give the impression of burning fuel. Filters 20 are provided to give the light appropriate colour. Filters may colour the light only locally, or over a wider area. Light modifying means 18 can take various forms but will generally interrupt the light from the light source to give perceived variations in the intensity of the light, to resemble the changes in intensity of burning which occur in a real fire.
(...)
[0104] *A further embodiment of an apparatus according to the disclosure is illustrated in Figures 59, 60 and 61. With particular reference to Figures 59 and 60, it is noted that the principles of operation of this embodiment are substantially the same as those of the embodiments illustrated in Figures 56 to 58. The embodiment of Figures 35 59 and 60 includes a liquid container 652 and a vapour distributing component 684 which are conveniently formed as a single component. Vapour distributing component 684 is connected to the container 652 by means of a conduit (or at least one conduit) 700 which extends upwardly and behind the fuel bed 232 and is separated from the container 652 by a partition wall 702. Thus the container 652 is also arranged behind the fuel bed, with the (or each) ultrasonic transducer 658 thereby positioned not lower than (and preferably above) the lower-most parts of the fuel bed 232. A motor driven fan 692 is positioned at a suitable location to provide a supply of air into the container 652. In the embodiment illustrated in Figure 59, the fan 692 is mounted at one end of the container 652, but other locations are possible. The container is also connected to a suitable liquid reservoir via a suitable valve assembly (not specifically illustrated) which acts to maintain an at least approximately constant volume of liquid in the container 652. The reservoir may, for example be connected to the container 652 at sump portion 652A.*

2.6. EP 941 also includes Figures 1, 56, 59 and 60 of embodiments of the invention, presented below:

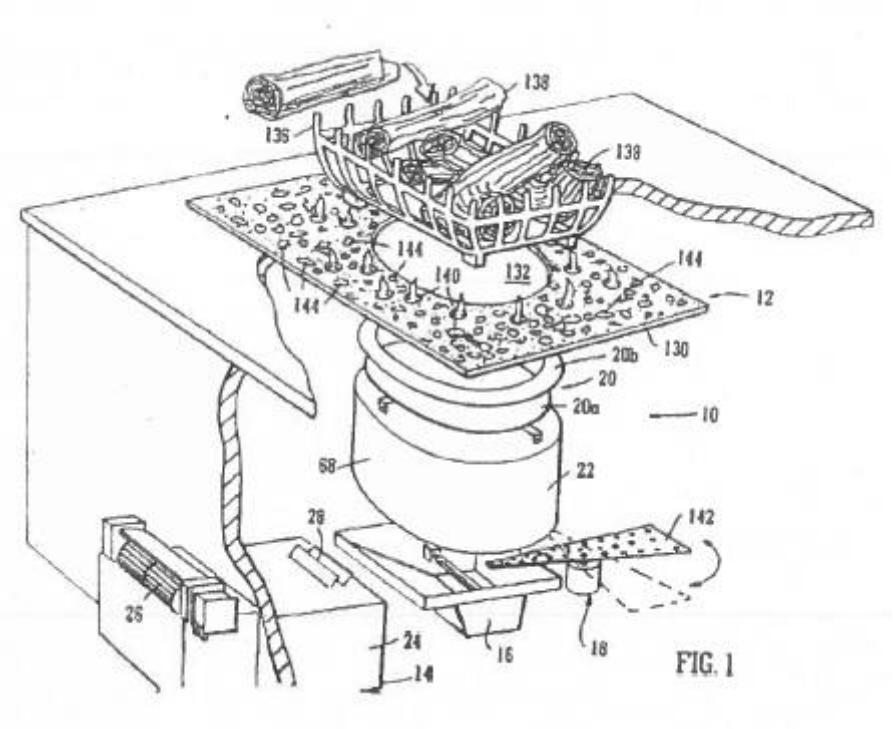
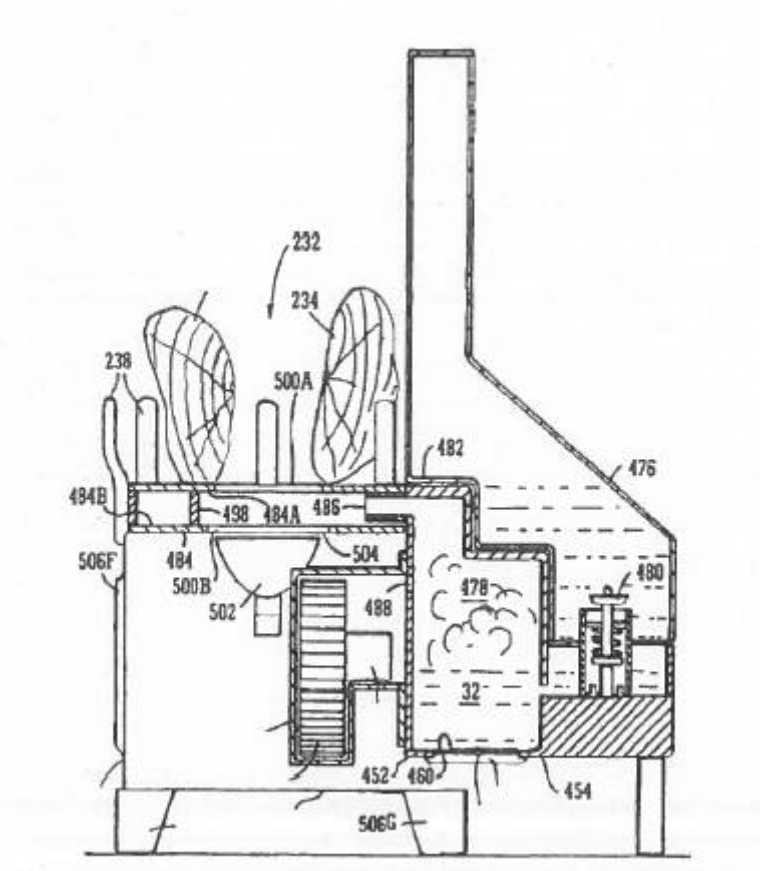


FIG. 1



Figuur 56

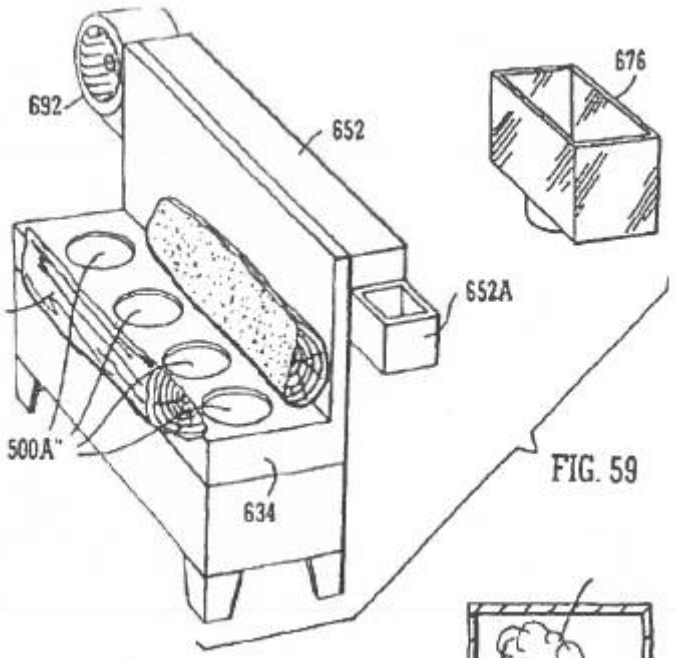
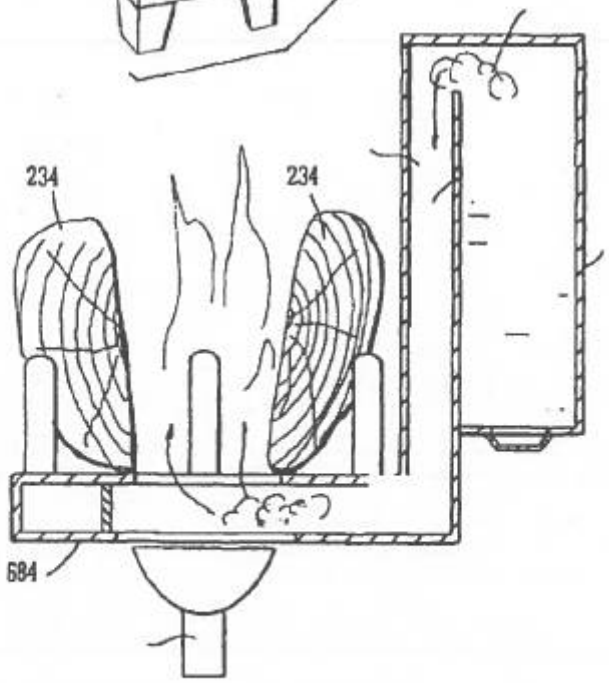


FIG. 59



Figuur 60

2.7. For EP 941, international patent application PCT/GB03/00142, published as WO 03/063664 A1 for a '*smoke effect apparatus*' (hereinafter: WO 664), is part of the prior art. The description of WO 664 includes – to the extent relevant here – the following paragraphs:

Fig. 1 is a perspective view of an embodiment of heating apparatus in accordance with the present invention; and Fig. 2 is a cross-sectional side elevation of the heating apparatus of Fig. 1. Referring to the Figures, a heating apparatus comprises a metal casing 10 having a planar base wall 12, a planar rear wall 14 extending perpendicularly at the rear edge of the base, two planar side walls 16, 18 extending perpendicularly to the base and tapering towards each other at the rear of the base, a planar upper wall 20 extending parallel to the base wall and a front wall 22 having a rectangular aperture 24 provided therein.
Positioned on the base wall 12 of the casing is an ultrasonic water vapour generator 26. The generator comprises an open-topped rectangular container 28 having a planar base wall 30, two parallel upstanding side walls (not visible in the Figures) and parallel upstanding front and

rear walls 32, 34. A conventional ultrasonic transducer 36 sits on the base wall 30 of the container 28 and is supplied with electric power from a cable 38 which passes sealingly through the rear wall 34 of the container 28. The cable 38 is connected to the transducer 36 via a cut-out unit 40 (illustrated schematically) which cuts off the electrical supply to the transducer 36 if the water level falls below a predetermined level. The cable 38 also supplies electrical power to a waterproof lamp unit 42 which preferably has a coloured lens (e.g. orange or red).
A series of intersecting thin parallel rods 44, 46 extend over the open top of the container between the front and rear walls 32, 34 and between the side walls of the container 28, forming a latticework 47 which supports a plurality of simulated coals 48 which are stacked in a manner which simulates a bed of real coals. A metal shroud 50 is also secured to the undersurface of the rods 44, 46 immediately above the ultrasonic transducer 36, to deflect the water vapour emerging from the vicinity of the transducer, as will be explained.
As shown in Fig. 2, a conventional electric fan heater 52 is located towards the upper end of the casing 10. The fan heater 52 is located within an inner fan chamber 54 defined by a planar inner upper wall 56 parallel to the outer upper wall 20 and a planar inner lower wall 58 parallel to, and spaced apart from the wall 56 and is supplied with power from a low-voltage transformer 59 located outside the chamber 54. The fan chamber 54 communicates with the main part of the interior of the casing 10 via a rectangular aperture 60 at the rear of the inner lower wall 58 and communicates with the exterior via a louvred rectangular outlet 62 at the upper end of the front wall 22 of the casing 10.
In use, water 64 is poured into the container 38 of the ultrasonic water vapour generator and the simulated coals 48 are arranged on the latticework 47 to simulate a bed of fuel as illustrated. The electrical power is then switched on, which activates the ultrasonic transducer 36, the lamp unit 42 and the fan heater 52. Activation of the ultrasonic transducer 36 within the water induces the formation and rapid cavitation of bubbles within the water in a known manner, which results in the formation of clouds of water vapour 66 having the appearance of white smoke. The clouds of water vapour pass upwardly and are deflected by the shroud 50 on the undersurface of the latticework 47, whereafter they pass around and between the simulated coals 48 located above. The clouds of water vapour 66 are drawn upwardly by the air current induced by the fan heater 52 and are discharged through the louvred outlet 62 in the front wall of the casing. The clouds of water vapour 66 are guided towards the fan chamber by a planar inner rear wall 68, extending parallel to the rear wall 14 of the casing 10, and an inclined flap 70 extending downwardly and forwardly from the undersurface of the inner lower wall 58 of the fan chamber 54 and forming a cowling. As the clouds of water vapour 66 pass around and between the simulated coals 48 they give the appearance of smoke rising from a fuel bed. The effect is enhanced by the illumination from the lamp unit 42, which flickers and varies as the light passes through the clouds of water vapour and gives the impression of a glowing fuel bed. The illumination effect is particularly effective if the light emerging from the lamp unit 42 is orange, red, yellow or a combination of these colours.
The clouds of water vapour are drawn upwardly by the fan heater 52, in the manner of a real fire, and are eventually discharged via the louvred outlet 62. By the time the water vapour has reached the outlet 62, it will normally have absorbed sufficient energy for it not to have the appearance of smoke and will be completely transparent. If the fan heater is used in a heating mode (as opposed to just in a fan mode for producing a current of air) the water vapour will definitely lose its smokelike appearance before it is discharged as the clouds of water vapour will have passed through, and been heated by, the fan heater.

2.8. WO 664 includes Figures 1 and 2 presented below.

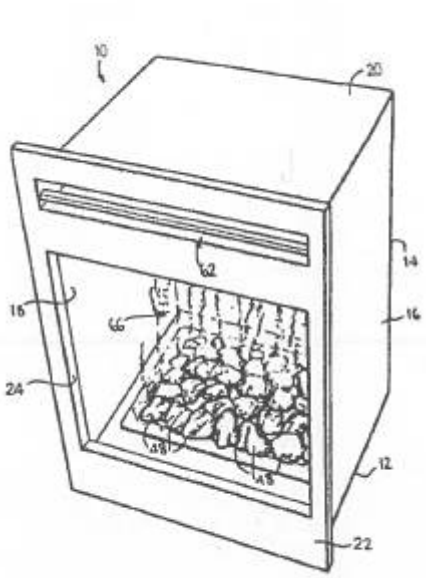


FIG.1.

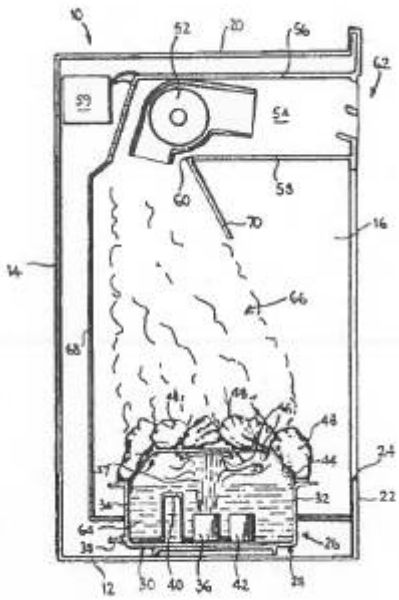


FIG.2.

2.9. In the *Communication pursuant to Article 94(3) EPC* dated 17 June 2009, the Examiner informed Basic Holdings that it did not consider the proposed claim 1 of the Patent to be novel in light of WO 664 (D1) because:

> *1. According to all the features of independent claim 1 document D1 discloses (the references in parentheses applying to this document) a simulated fire effect apparatus comprising:*
> - *an apertured bed 48;*
> - *a container 28 adapted to contain a body of liquid, the container providing a head space above the liquid and including vapour outlet ports (free spaces in the upper region of latticework 47);*
> - *an ultrasonic transducer device 36 having a transducing surface operatively in liquid contacting relation with the body of liquid and operable to produce a vapour in said head space;*
> - *means 52 for providing a flow of air along a path extending into the head space and out of the vapour outlet port, wherein the outlet port is so disposed that the air flow path exits the container below the apertured bed 48, and means for providing a current of air directed upwardly from the apertured bed.*

Further, the Examiner noted:

> *It is noted that in document 01 the relevant components (fan 52, baffle 70, ...) involved in defining the path of the air flow are defined in such a way that the vapour is sucked by the fan. This means implicitly that fresh air enters the head space namely from the side of the vapour generator. Hence, the path of air flow extends from the outside of the vapour generator through the head space of the vapour generator and through the vapour outlet ports (free spaces in the upper region of latticework 47) to the fan 52.*

2.10. In its response to this of 12 April 2010, Basic Holdings stated:

The Examiner indicates that the free spaces in the upper region of lattice work 47 of D1 equate to the outlet ports of claim 1. The applicant submits that the free spaces are just that – free spaces. The term outlet port requires some sort of definite physical construction which constitutes the ports. The free spaces in the lattice work 47 of 01 clearly lack any construction which constitutes a port. Furthermore, the claim as written states:

> "a container adapted to contain a body of liquid, the container providing a head space above the liquid and including a vapour outlet port".

Claim 1 therefore requires that the outlet port is a part of the container. Such a construction is not at all apparent from D1 where the container is clearly an open vessel surmounted by the lattice 47. Note page 5 line 13 of D1 "The generator comprises an open-topped rectangular container 28 ...". The container of D1 does not include any outlet port.

The Examiner further suggests that D1 teaches means for providing an air flow along a path extending into the head space and out of the vapour outlet port, wherein the outlet port is so disposed that the air flow path exits the container below the aperture bed. The applicant submits that such means are lacking in D1. The Examiner's argument concerning the effect of the fan on the headspace is noted, but the applicant does not agree. The primary function of fan heater 52 is to draw cold air from the exterior of apparatus 10 of D1 (note that the apparatus is open to its environment through aperture 24 in wall 22 – page 5, lines 10 and 11) into the interior space and through the fan heater 50 before expelling the heated air through outlet 62. In other words, fan heater 52 provides a flow of air along a path from the exterior of the apparatus through aperture 24 into the interior space and out through outlet 62. The flow air into the apparatus is from the exterior, nat from the container. Further, in view of the open latticework construction 47 it is clear that the container is entirely open to the interior space of the apparatus. It follows that the interior of the container must necessarily be at the same pressure as the interior of the container which would suggest that there is negligible air flow from above the liquid in the container into the interior of the apparatus of D1. Vapour leaves the head space and passes through the fuel bed simply because the volume occupied by the vapour is greater than the volume of that part of the body of water from which the vapour is generated. Having passed through the fuel bed the vapour joins an upward flow of air generated by fan 52 and is carried upwardly to the fan 52, but there is no teaching or indication which may be derived from D1 that the fan 52 generates a tangible flow of air through the head space above the container. The applicant, therefore, does not accept that D1 teaches that fan heater 50 provides "a flow of air along a path extending in to the head space and out of the vapour outlet port".

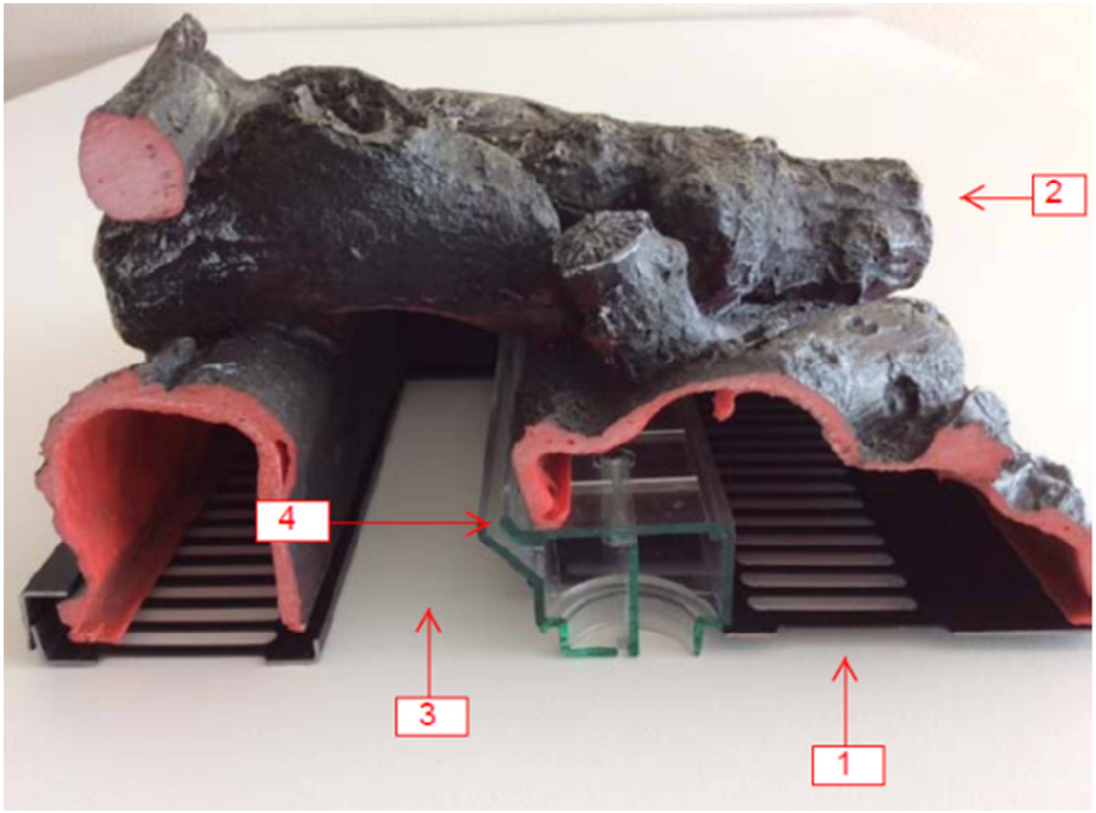
There is an additional requirement of claim 47 to which the examiner may wish to give further consideration, that is, that the outlet port is so disposed that the air flow path exits the container below the apertured bed. If the Examiner regards the latticework 47 as the outlet port then the outlet port in portions adjacent shroud 50 is clearly above the side portions of the apertured bed as illustrated in Figure 2 of D1.

2.11. Ruby Decor is a former customer of the Glen Dimplex Group. In addition, it is a manufacturer of (inter alia) various types of decorative fireplaces. The collaboration ended on 1 September 2015.

2.12. Since 1 November 2015, Ruby Decor has been marketing decorative fireplaces under the name Mystic Fires, with type numbers 1510H, 1530H, 1535H, 1520C and 1540C (hereinafter: the Ruby Fireplaces), through dealers or otherwise. Ruby Decor offers the Ruby Fireplaces in its showrooms in Broek op Langedijk and Nieuwegein as well as on its website in various languages, including Dutch, English, French and German.

2.13. Ruby Decor is (co-)director and (co-)shareholder of Aparto, a company likewise engaged in (inter alia) the trade of decorative fireplaces. Aparto offers the Ruby Fireplaces on its website www.aparto.nl.

2.14. To the extent relevant to these proceedings, the Ruby Fireplaces have the same (technical) characteristics, as may in part be inferred from the photographs below.



2.15. By letter of 25 January 2016, Basic Holdings demanded from Ruby Decor that it cease and desist from all infringement of EP 941, recall and destroy infringing fireplaces, provide a statement of the fireplaces purchased and sold by it and the profit enjoyed by it, and pay damages or surrender the profit it enjoyed. Ruby Decor did not comply with these demands.

2.16. By letter of 1 March 2016, therefore after the summons had been issued, Basic Holdings demanded from Aparto that it cease and desist from infringement of EP 941. Subsequently, Aparto informed Basic Holdings that it was (temporarily) willing to do so. Despite being requested to do so, however, Aparto did not sign a cease-and-desist undertaking.

2.17. Basic Holdings has meanwhile instituted proceedings on the merits against Ruby Decor. Ruby Decor has instituted preliminary relief proceedings concerning enforcement of the judgment subject to this appeal.

3. The dispute at first instance and on appeal

3.1. Briefly summarised, at first instance Basic Holdings sought – based on Ruby Decor's infringement or imminent infringement of EP 941 in all countries where this Patent is valid – an infringement injunction for the Netherlands, Germany, France, Ireland and the UK, while also filing ancillary claims, including a recall and a statement of purchasing and selling details, all this on pain of a penalty subject to non-compliance and with an order for Ruby Decor to pay the costs of the proceedings based on Article 1019h of the Dutch Code of Civil Procedure.

3.2. Disputing its infringement of EP 941, Ruby Decor advanced several invalidity defences. Further, it contested the (urgent) interest in the matters sought. The preliminary relief judge rejected the invalidity defences, along with most defences concerning the matters sought, ruled that

the Ruby Fireplaces fell within the scope of protection of (inter alia) claim 1 of the Patent and largely awarded Basic Holdings' claims.

3.3. With its grounds of appeal, Ruby Decor is opposing the aforementioned findings of the preliminary relief judge. It moves that this Court of Appeal quash the challenged judgment and, adjudicating again, – briefly put – reject Basic Holdings' claims, with an order for Basic Holdings to pay the costs of the proceedings at both instances based on Article 1019h of the Dutch Code of Civil Procedure. With its grounds of appeal, Ruby Decor has presented the debate on the Patent's validity and infringement in its entirety to the Court of Appeal, for which reason these grounds of appeal will be assessed jointly below. Ruby Decor has not directed any grounds of appeal at the preliminary relief judge's opinions that Basic Holdings has an urgent interest in the matters sought and that the Dutch courts are competent to order cross-border interim measures, or at the preliminary relief judge's findings concerning the claims awarded, except for the procedural costs.

3.4. Basic Holdings' ground of the cross-appeal is directed at the preliminary relief judge's failure to render a decision on the validity and infringement of claim 3 of the Patent. Briefly put, it seeks the quashing of the judgment of the court below to the extent that the claims based on claim 3 were rejected or left undecided and the award of the matters sought at first instance based on claim 3 of the Patent, with an order for Ruby Decor to pay the costs of the proceedings based on Article 1019h of the Dutch Code of Civil Procedure.

4. Assessment in the principal appeal and the cross-appeal

4.1. Claim 1 of EP 941 may be broken down into the following subfeatures:

A simulated fire effect apparatus (10) (450) (322) comprising:
A an apertured bed (12) (232);
B a container (30) (452) (452') (652) (752)
B1 adapted to contain a body of liquid (32),
B2 the container providing a head space (496) (652B) above the liquid;
C an ultrasonic transducer (34) (34') (462) (458) device
C1 having a transducing surface operatively in liquid contacting relation with the body of liquid (32) and
C2 operable to produce a vapour in said head space (496) (652B); and
D means for providing a current of air directed upwardly from the apertured bed (12) (232),
characterised in that
E the container (30) (452) (452') (652) (752) includes a vapour outlet port (482) (482') and ***in that***
F1 the apparatus (10) (450) (322) further comprises means (26) for providing a flow of air
F2 along a path extending into the head space (496) (652B) and out of the vapour outlet port (482) (482'),
F3 wherein the outlet port (482) (482') is so disposed that the air flow path exits the container (30) (452) (452') (652) (752) below the apertured bed (12) (232).

Incidentally, the breakdown used by Ruby Decor combines F1 and F2 and refers to them as measure F and refers to measure F3 as G.

Interpretation of claim 1

4.2. On appeal, Ruby Decor took the position that a distinction should be made between the location of the vapour outlet port on the one hand and the location where the air flow path running through that vapour outlet port exits (the exit location) on the other. According to

Ruby Decor, the average person skilled in the art would understand that the feature setting EP 941 apart from the prior art – which feature is therefore essential to the invention – is that the exit location of the air flow path (indicated by point '4' in the photograph included at para. 2.14) is located below the apertured bed (and that the location of the vapour outlet port is irrelevant), so that claim 1 should be interpreted in that sense. In that regard, Ruby Decor relies on Figure 60, in which, according to Ruby Decor, the vapour outlet port is situated at the top of container 652 and is therefore located above the apertured bed, whereas the air flow path *does* exit below the apertured bed. Basic Holdings did not concur with this interpretation of claim 1 'on balance', as asserted by Ruby Decor (Written Arguments on Appeal point '4' 5.2, with reference to various paragraphs in the Defence on Appeal). On the contrary, Basic Holdings in fact disputed it (including in the paragraphs mentioned).

4.3. The Court of Appeal agrees with Basic Holdings that there is no reason to assign a different interpretation to the wording of claim 1, including in particular that the vapour outlet port is part of the container (feature E) and that the vapour outlet port is so disposed that the air flow path exits the container below the apertured bed (feature F3). Contrary to what Ruby Decor argues, the average person skilled in the art will not consider it a distinctive measure compared with the prior art that the exit location of the air flow path is located below the apertured bed, as this measure has already been disclosed in WO 664. As will be held below (para. 4.7), the Court of Appeal believes *prima facie* that the average person skilled in the art, reading claim 1 in the context of the description and the drawings and with due observance of his common general knowledge on the priority date, will realise that the distinctive measures E and F1-F3 from claim 1 set the invention apart from the known prior art and that the combination of these measures, including especially the placement of the vapour outlet port below the apertured bed, ensures that the vapour-carrying air flow is channelled and propelled from the head space to below the apertured bed in such a way as to improve the simulation of smoke and fire, without any necessity to place the water container below the apertured bed.

4.4. Figure 60 does not give the average person skilled in the art cause for an interpretation deviating from the wording of claim 1, as advocated by Ruby Decor. The apparatus pictured in this figure is provided with a vapour distributing component as protected by claim 3 (indicated by '484' in Figure 56 and by '684' in Figure 60). According to that claim, the vapour distributing component receives the vapour from the vapour outlet port. Conduit 700 of the apparatus pictured in Figure 60 ends at the bottom of it in the vapour distributing component horizontally extending below the apertured bed. That is the place where the vapour distributing component receives the vapour and thus where the vapour outlet port is situated. This makes it clear that the vapour outlet port is situated below the apertured bed, in accordance with the literal wording of claim 1.

The inventive step of claim 1

4.5. Ruby Decor takes the position that EP 941 should be deemed to lack inventive step. To that end, it has argued that the description of the Patent does not describe any problem solved by the Patent or how that problem is solved. As a result, it cannot be established that there is an invention, or at least not what technical effect is achieved with the Patent, what the invention is and whether it is based on inventive step. The Court of Appeal rejects that position. The problem solved by an invention and the technical effect achieved do not need to be stated in so many words in a patent description. It is sufficient for the average person skilled in the art, using his common general knowledge, to be able to determine the objective problem solved by the claimed invention and thus the technical effect achieved with the claimed measures when reading the claims in the context of the description and the drawings at the time of the priority date.

4.6. It is not in dispute that the relevant average person skilled in the art is a person skilled in the area of decorative fireplaces and is familiar with (the technology of) smoke and fire simulation, including the use of lighting and of ultrasonic vaporisers to produce water vapour. An ultrasonic transducer device vibrates against the water surface, generating a mist of water drops. This cold mist is described as vapour in EP 941.

4.7. This average person skilled in the art is aware (as was also asserted by Ruby Decor in paragraph 4.5 of the Statement of Appeal) that water vapour is cold and relatively heavy. In the apparatus according to the prior art, such as the one of WO 664, gravity prevents the water vapour from rising sufficiently, so that only a limited smoke and fire effect is achieved. In the Court of Appeal's view, on the priority date of the Patent the average person skilled in the art would understand from the description, especially also paragraphs 1 and 4, and the drawings that the distinctive measures of claim 1 ensure that the vapour-carrying air flow is channelled and propelled from the head space to below the apertured bed, as a result of which the vapour rises further upwards through the apertured bed. The average person skilled in the art will therefore realise that the purpose and technical effect of the measures protected by the Patent is to thus achieve an improved simulation of flames and/or smoke, in the sense that the image of flames and smoke obtained by burning solid fuels such as wood or coal is simulated as realistically as possible. In addition, the average person skilled in the art understands, especially from Figures 39 and 56-60 described in paragraphs 77-80 and 97-105 of the description, that the distinctive measures create more freedom of design as this working principle allows the water container in which the vapour is generated to be placed not just below (as in the prior art apparatus) but also behind or above the apertured bed. This is not diminished by the fact that not all embodiments feature such freedom of design.

4.8. Ruby Decor's position that it is not plausible to the average person skilled in the art that the aforementioned technical effects are actually achieved with the claimed measures should be rejected. That position lacks any substantiation and is apparently based on the presumption, already held to be incorrect above, that it would not be clear to the average person skilled in the art what prior art problems are solved and what technical effects are achieved with the claimed measures. Given the dual effect achieved with the apparatus according to the Patent – improved simulation *and* freedom of design – the Court of Appeal sees no reason, either, to limit the Patent's extent of protection to embodiments where such freedom of design is used by not placing the water container below the apertured bed, as argued by Ruby Decor.

4.9. The parties agree that WO 664 is the closest prior art. EP 941 is distinct from WO 664 because of the measures at E and F1-F3, which jointly provide for channelisation and means to propel the water vapour-carrying air flow from the free head space through the vapour outlet port to below the apertured bed, where the water vapour is released. Ruby Decor's position that the difference measure only consists of having the vapour-carrying air flow exit below the apertured bed rather than in or above it ensues from its incorrect interpretation of claim 1 and is therefore equally incorrect.

4.10. Ruby Decor's position that a container with a head space above it and provided with a vapour outlet port was already known from WO 664 is rejected. It is clear to the average person skilled in the art that the channelisation of the vapour-carrying air flow provided in EP 941 is achieved by it being guided and propelled from the head space to below the apertured bed in a controlled manner. The average person skilled in the art understands from this that the container is a closed space from which the vapour-carrying air is discharged via the vapour outlet port. Given the description from WO 664 – *"The generator comprises an open-topped rectangular container 28"* (p. 15, l. 13) – the average person skilled in the art will understand

that the container disclosed in that document is open at the top. In the apparatus according to WO 664, deflector means are mounted above the water container, below the latticework on which the logs rest (and thus not as part of the container), which deflector means ensure that the water vapour does not go straight up but is diffused. The deflector means do not cover the container and consequently do not confine the vapour inside a closed head space for the purpose of channelling the air flow in the sense of EP 941. Still, Ruby Decor does acknowledge in paragraph 3.3 of the Statement of Appeal that measure E is novel over WO 664 by describing construction measure E – qualified by Ruby Decor as "distinctive" compared with the closest prior art – as "the use of a closed container with a vapour outlet port in it (*instead of an open container from WO 664*)" (emphasis added by the Court of Appeal).

4.11. Ruby Decor's position that a vapour outlet port was already known from WO 664 in the form of apertures in the latticework fails to appreciate that the vapour outlet port in the sense of EP 941 is part of the (closed) container and is placed *below* the apertured bed. To support its position, Ruby Decor referred to the Communication from the Examiner during the prosecution process (see para. 2.9), which qualified the apertures in the latticework (47) of the fire bed disclosed in WO 664 as vapour outlet ports. In its response to the Examiner (see para. 2.10), Basic Holdings rightly pointed out that this was an incorrect position, one reason being that the outlet port according to claim 1 is part of the container whereas the frame placed over the open-topped container to carry the logs is not part of the container for the apparatus known from WO 664. The Examiner evidently realised this, as the Patent was then granted with measure E as distinctive measure. Basic Holdings' alternative position in its response to the Examiner – that, *if* the apertures in the latticework should be regarded as outlet ports, the invention would still be novel, as the vapour outlet ports from WO 664 are not below the apertured bed – cannot be taken as an acknowledgement of the accuracy of the Examiner's position, as suggested by Ruby Decor.

4.12. Ruby Decor's assertion that measures F1/F2 are already disclosed in WO 664 does not hold either. In WO 664, the vapour-carrying air is sucked from the log bed (and the space below it) by a fan mounted above the log bed. With this, measure D ('means for providing a current of air directed upwardly from the apertured bed') has been disclosed. Means for a current of air along a path extending into the head space (located above the liquid in the closed water container) and out of the vapour outlet port (measures F1/F2) are not disclosed in that document. To further substantiate its position, Ruby Decor again referred to the Examiner's Communication here (see para. 2.9). Again, it is of no avail. Basic Holdings also informed the Examiner that, and why, the latter's position was incorrect in respect of the novelty objection raised here (see para. 2.10). The Court of Appeal deems Basic Holdings' position to be correct *prima facie*, and the Examiner evidently also agreed. The Patent was granted with measures F1/F2 as distinctive measures. Here, too, Basic Holdings' alternative position already mentioned above cannot be taken as an acknowledgement of the lack of novelty of measures F1/F2, as put forward by Ruby Decor. Incidentally, Ruby Decor also acknowledges the novelty of measures F1/F2 over WO 664 in paragraph 3.3 of the Statement of Appeal, by describing construction measure F – likewise qualified as "distinctive" compared with the closest prior art – as "the use of that vapour outlet port as an exit for an air flow path entering the head space of the closed container and subsequently exiting that head space via the vapour outlet port (*instead of an unguided air flow from WO 664*)" (emphasis added by the Court of Appeal).

4.13. As found above (para. 4.7), the technical effect achieved with the distinctive measures of claim 1 is that an improved simulation of smoke and/or flames is achieved as the channelling and propelling of the vapour generated ensure that the vapour rises further above the apertured bed, while at the same time more freedom of design is obtained as the water container can be placed not just below the apertured bed but also behind or above it. The Court of Appeal

agrees with Basic Holdings that the objective technical problem solved with the Patent can be formulated as follows: “how can the simulation of smoke and/or fire based on water vapour be improved by moving the vapour further above the apertured bed while also providing more freedom in designing such an electrical fireplace”. The formulation of the problem suggested by Ruby Decor ‘how to achieve a wider and/or better distribution of the vapour-carrying air flow above the fire bed’ is deemed incorrect as the Court of Appeal fails to see – and Ruby Decor did not sufficiently substantiate – how such an effect is achieved with the distinctive measures of claim 1.

4.14. Ruby Decor has taken the position that the priority of GB 001 invoked cannot be claimed as that document does not contain any claims and does not generally disclose the invention. It should be stated first and foremost that it is no requirement for a priority document to include claims. The invention’s clear and unambiguous disclosure in the priority document is sufficient. An explicit description in that document of every aspect of the invention is not necessary for that purpose, as due consideration should also be given to what is implicitly disclosed to the average person skilled in the art reading the priority document in its entirety – including the figures contained therein – and in mutual correlation, considering his common general knowledge on the priority date. As the relevant person skilled in the art, as Ruby Decor argued, is a person skilled in the area of decorative fireplaces and is familiar with the technology used to generate water vapour to simulate smoke, he will understand – in so far as this is not immediately clear based on the figures – that the apparatus includes an apertured bed (according to Ruby Decor ‘specifically for a decorative fireplace’, point '4' 3.3 of the Written Arguments on Appeal), allowing the vapour to go upwards. The lack of the explicit term ‘apertured bed’ therefore does not diminish that measure’s disclosure to the average person skilled in the art as an element of the apparatus. The same is true for the measure that the vapour outlet port is located below the apertured bed. Its importance to the technical effect achieved with the apparatus is clear to the average person skilled in the art, in the same way that this is clear to him when reading EP 941 (as already held above). Ruby Decor’s suggestion that the invention is not generally disclosed in GB 001 – which contains many figures that are (virtually) identical to the figures of the Patent and whose detailed description of the apparatus disclosed therein is highly similar to the one included in the Patent specification – which may be indicative of intermediate generalisation, is disregarded absent any substantiation. This means that the Patent may claim the priority date of 13 March 2006 and that the WO 272 publication, which was disclosed only afterwards, cannot be considered in the assessment of inventive step. Ruby Decor did not challenge the novelty of EP 941.

4.15. In so far as Ruby Decor intended to assert that claim 1 lacks inventive step because the insufficient yield of smoke from the apparatus according to WO 664 can be easily remedied by applying non-inventive measures such as a stronger fan, perhaps in combination with a more powerful vaporiser, that assertion fails. While this may ensure a greater yield of smoke, those measures do not lead to an apparatus according to the Patent which provides not only an improved yield of vapour above the apertured bed but also the aforementioned freedom of design at the same time.

4.16. Why application of the distinctive measures of the Patent would be obvious to the average person skilled in the art on the priority date, starting from WO 664 (apparently only based on his common general knowledge), as asserted by Ruby Decor, has not been substantiated by Ruby Decor after this had been disputed by Basic Holdings, which is why that assertion should be rejected. Nor was any sound substantiation given for the assertion that a combination of WO 664 with a known ‘generic water vaporiser’, with or without the use of a known ultrasonic vapour generator, would be obvious to the average person skilled in the art, after this had been disputed by Basic Holdings. In particular, Ruby Decor failed to substantiate why the

average person skilled in the art would go looking for other ultrasonic transducer devices while the problem he is trying to solve does not relate to the generation of water vapour but to moving it upwards. Further, how that combination could lead to the apparatus according to the Patent – with channelling and propelling of the vapour generated – has not been explained. This is especially true seeing as this water vaporiser would have to end below the apertured bed, according to Ruby Decor (point '4' 5.6.2. of the Statement of Appeal / point '4' 4.4.3. of the Written Arguments on Appeal), and thus the Court of Appeal fails to see how the freedom of design obtained with EP 941, which offers the possibility of placing the water container next to or behind the apertured bed, can be achieved.

4.17. The conclusion is that the Court of Appeal believes *prima facie* that Ruby Decor's invalidity defences are not successful and that there is no serious, non-negligible chance that EP 941 will be declared null and void in proceedings on the merits.

Infringement of claim 1

4.18. The parties disagree on the question whether subfeatures A, E and F3 (referred to as G by Ruby Decor) have been complied with.

4.19. Ruby Decor has argued that its apparatus is not covered by the extent of protection of claim 1 of the Patent because an apertured bed (subfeature A) in the sense of claim 1 should be understood to mean an apertured bed in which the effect of drifting smoke is created by including multiple apertures. That is allegedly not the case in its apparatus, as the simulated smoke would not look any different if the logs were omitted. According to Ruby Decor, the meandering mist in its apparatus is created by the outflow of vapour across the full length of the extended vapour outlet piece in combination with the varying rising heat of the lamps. As the Court of Appeal understands Ruby Decor's position, the apertured bed in its apparatus would still not comply with subfeature A even if it had multiple apertures.

4.20. This position is based on an incorrect interpretation of claim 1 and should be rejected. It is the distinctive features E and F1-F3 that make sure that the technical effects envisaged with the apparatus according to the Patent (including the improved smoke simulation) are achieved, not the prior art measure that vapour-carrying air flows out below an apertured bed provided with multiple apertures. Ruby Decor has not sufficiently substantiated why the average person skilled in the art would infer from the Patent and WO 664 that a smoke effect could *only* be obtained with a fire bed provided with multiple apertures, as asserted by Ruby Decor. In the Court of Appeal's preliminary opinion, neither document gives any cause for such an interpretation. Basic Holdings rightly noted that the descriptions of both WO 664 (p. 8, ll. 9-13) and EP 941 (point '4' 19) expressly mention the option of only one aperture. As a result, the average person skilled in the art understanding that the 'apertured bed' should necessarily have multiple apertures cannot be accepted as correct. The functional interpretation advocated by Ruby Decor is therefore rejected. Ruby's other arguments that are based on the assertion that an apertured bed having only one aperture is not covered by the Patent's extent of protection do not need to be discussed, as the apertured bed of Ruby Decor's apparatus unmistakeably has multiple apertures on account of the logs placed across the slot. It thus matches subfeature A.

4.21. At first instance, Ruby Decor put forward that the element of its apparatus indicated by point '4' in the photograph pictured at 2.14 above should be regarded as the vapour outlet port in the sense of claim 1. On appeal, it has taken the position that point 4 designates the exit location of the air flow path. Since, according to Ruby Decor, that location is decisive for the

question whether claim feature F3 has been complied with, and the exit location in its apparatus does not end below the apertured bed, it is not infringing the Patent, argues Ruby Decor.

4.22. According to Basic Holdings, what Ruby Decor refers to as the ‘exit location’ (point 4 in the aforementioned photograph) is the exit of the vapour distributing component. It follows from claim 3 that it cannot be equated with the vapour outlet port because, according to claim 3, the vapour distributing component receives the vapour from the outlet port. The outlet port therefore precedes, and is located lower than, the end of the vapour outlet port, indicated by point '4', argues Basic Holdings.

4.23. As already found above (para.s 4.3-4.4), the Court of Appeal believes *prima facie* that the interpretation of claim 1 provided by Ruby Decor cannot be accepted as being correct and there is no reason to interpret the claim differently than in accordance with its clear wording. Consequently, it is not relevant where the vapour-carrying air flow exits but whether the vapour outlet port, which is part of the container, is so disposed that the air flow path exits below the apertured bed.

4.24. In these appeal proceedings, Ruby Decor has not specified which element of its apparatus should be regarded as the vapour outlet port, as Ruby Decor believed it to be irrelevant. Ruby Decor did assert, however, that the element regarded by Basic Holdings (at least on appeal) as ‘riser tube’ is not (part of) the vapour distributing component but a conduit in accordance with ‘conduit 700’ from Figure 60. In the Court of Appeal’s preliminary opinion, that position leads to the conclusion that Ruby Decor’s apparatus complies with subfeatures E (‘that the container includes a vapour outlet port’) and F3 (‘wherein the outlet port is so disposed that the air flow path exits the container below the apertured bed’). This is explained as follows.

4.25. What Ruby Decor refers to as ‘the widened outlet opening’ or ‘mist diffuser nozzle’ in its apparatus can only be regarded as the exit of a vapour distributing component, as Basic Holdings also argued, in which respect the Court of Appeal will not render an opinion on whether all features of claim 3 are also complied with (in particular whether it is primarily mounted below the apertured bed). The ‘mist diffuser’ unmistakeably distributes the vapour across a greater surface of the apertured bed, which, as the average person skilled in the art understands from the description, is in any event one of the functions of the vapour distributing component. As already found above (para. 4.4), the average person skilled in the art regards conduit 700 from Figure 60 as an element of the container which, at its end, where the vapour outlet port is situated, connects to the vapour distributing component.

4.26. If the riser tube should indeed be equated with conduit 700 from Figure 60, as Ruby Decor asserts, it follows that the vapour outlet port is situated at the top edge of the riser tube, where the riser tube connects to the vapour distributing component. The top edge of the riser tube is below the lattice, as the Court of Appeal has been able to observe on the basis of a Ruby Fireplace shown by Ruby Decor at the hearing. The schematic drawing entered into evidence by Ruby Decor as Exhibit 33, in which the top of the riser tube is drawn (just) above the lattice, is therefore not in accordance with reality. In Ruby Decor’s apparatus, therefore, the vapour outlet port is situated in any event below the lattice, and consequently also below the apertured bed. Incidentally, in other proceedings (an enforcement dispute concerning the judgment of the court below), Ruby Decor entered a schematic drawing into evidence in which it situated the ‘vapour outlet’ at the bottom of the riser tube, therefore located even further below the lattice. The answer to the question whether the lattice is part of the apertured bed in the sense of claim 1 (as Ruby Decor asserts) or whether the log bed resting on top of it

should be regarded as such (as Basic Holdings argues) does not require an opinion as matters stand now.

4.27. It follows from the foregoing that the Court of Appeal believes *prima facie* that the Ruby Fireplaces comply with all subfeatures of claim 1 of the Patent and therefore infringe the Patent.

Conclusion and costs of the principal appeal

4.28. For the same reasons as those advanced at first instance, Ruby Decor objected to the amount of the procedural costs sought by and awarded to Basic Holdings at first instance. The Court of Appeal finds the preliminary relief judge's opinion on that point acceptable and adopts it, so that this objection is rejected. The conclusion in the principal appeal is that all grounds of appeal put forward fail and that the judgment of the court below should be upheld, including the cross-border claims awarded regarding which the Court of Appeal deems itself competent on the same grounds as held by the preliminary relief judge in para. 4.1 of the challenged judgment. Being the unsuccessful party, Ruby Decor will be ordered to pay Basic Holdings' costs of the proceedings based on 1019h of the Dutch Code of Civil Procedure, in the amount specified by Basic Holdings, i.e. € 90,056.50 plus € 718 for the court registry fee and € 482.50 for disbursements. Ruby Decor only disputed the reasonableness and fairness of this on the ground that this amount exceeds the costs Ruby Decor itself has incurred. This defence is rejected for the same reasons as those mentioned by the preliminary relief judge in para. 4.18 of the challenged judgment, which finding should be considered repeated and inserted here.

Conclusion and costs of the cross-appeal

4.29. As the claims filed by Basic Holdings – including a generally formulated injunction against infringement of EP 941 – are eligible for award simply on the ground of infringement of claim 1 of the Patent, and the judgment is therefore upheld – for which Basic Holdings also moved in the principal appeal – Basic Holdings does not have any interest in an assessment of the validity or infringement of the dependent claims, including claim 3. The claim in the cross-appeal, seeking the quashing of the judgment of the court below 'in so far as it has rejected the claims based on claim 3 or left those claims undecided' and the award of the claims on that ground, will therefore be rejected. No decision needs to be rendered on Ruby Decor's objection to the Document and its request, if admitted, to respond to it, absent any interest in that. Being the unsuccessful party, Basic Holdings will be ordered to pay Ruby Decor's costs of the proceedings in the cross-appeal, specified by it at an amount of € 8,876.21. Contrary to what Basic Holdings asserts, these costs cannot be held to have been needlessly incurred or to be unreasonable and unfair, for which reason they will be awarded.

5. Decision

The Court of Appeal:

- upholds the judgment of the court below;

- orders Ruby Decor to reimburse Basic Holdings' costs of the principal appeal for a total amount of € 91,266;

- rejects the matters sought in the cross-appeal;

- orders Basic Holdings to reimburse Ruby Decor's costs of the cross-appeal in the amount of € 8,876.21;

- declares the cost orders immediately enforceable.

This judgment was rendered by *mr*. R. Kalden, *mr*. M.Y. Bonneur and *mr.* C.J.J.C. van Nispen and pronounced in open court on 22 August 2017 in the presence of the court clerk.

[signature] [signature]