

UNOFFICIAL DOCUMENT FOR INFORMATION PURPOSES ONLY

**DECISION
of the Third Board of Appeal
of 8 March 2017**

In Case R 2113/2015-3

Buck-Chemie GmbH

Hertzstr. 1

DE-71083 Herrenberg

Germany

Applicant / Appellant

represented by MAMMEL & MASER, Tilsiter Str. 3, DE-71065 Sindelfingen,
Germany

versus

Henkel AG & Co. KGaA

Henkelstrasse 67

DE-40589 Düsseldorf

Germany

Proprietor / Respondent

represented by WILDANGER KEHRWALD GRAF V. SCHWERIN & Partners mbB
Rechtsanwälte, Couvenstraße 8, DE-40211 Düsseldorf, Germany

APPEAL relating to Invalidity Proceedings No 9735 C (Community design
No 1663618-0003)

THE THIRD BOARD OF APPEAL

composed of Th. M. Margellos (Chairperson), E. Fink (Rapporteur) and C. Bartos
(Member)

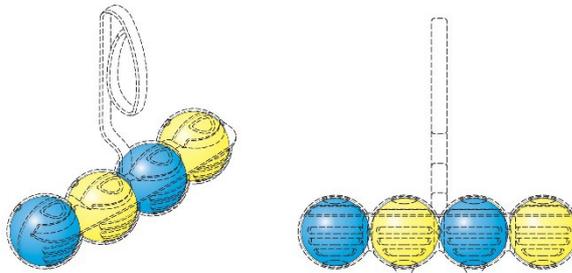
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

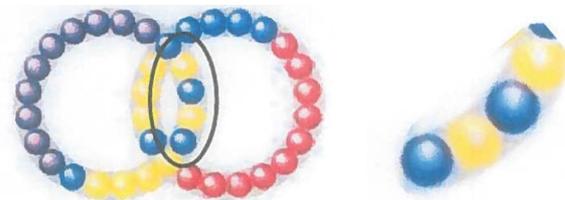
- 1 The respondent ('the proprietor') is the proprietor of registered Community design No 1663618-0003 ('the contested CD') in respect of 'flushing systems for water closets', applied for on 1 February 2010 and represented in the following two views:



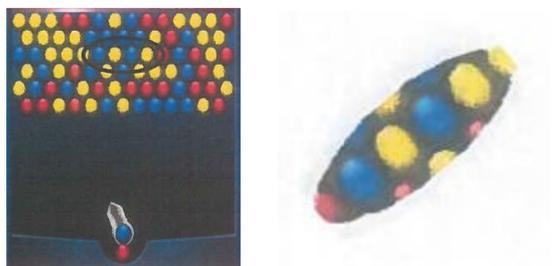
- 2 The appellant ('the applicant') filed an application for a declaration of invalidity of the contested CD. It cited Article 25(1)(b) CDR in conjunction with Article 4(1), Article 5 and Article 6 CDR as ground for invalidity; the contested CD was not novel and lacked individual character.

- 3 The application was based on the following earlier designs:

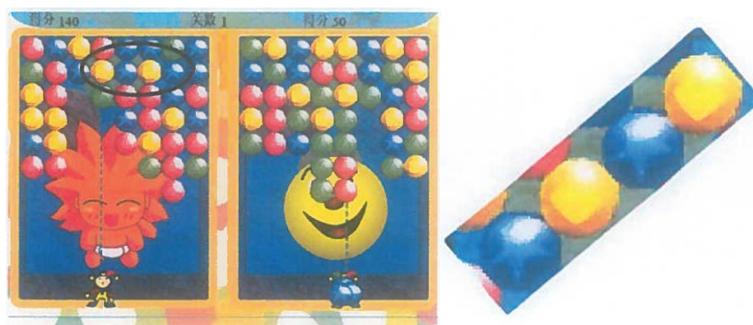
- Screenshot from the internet archive 'Wayback Machine' dated 26 August 2007 with the following image, 'Hungarian rings' (D1):



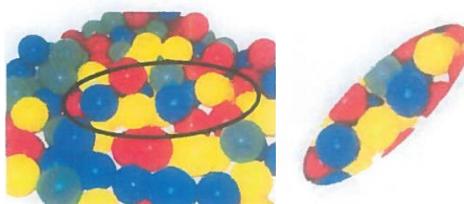
- Screenshot from the internet archive 'Wayback Machine' dated 31 December 2009 with the following images of a computer game (D2):



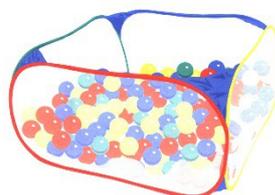
- Screenshot from the internet archive 'Wayback Machine' dated 31 December 2009 with the following images of a computer game (D3):



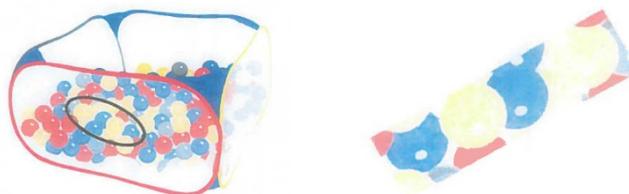
- Screenshot from the internet archive 'Wayback Machine' dated 18 September 2008 with the following images, '100 ball pool balls 6cm ball-pool' (D4):



- Registered CD No 84645-0001 applied for on 6 October 2003 in respect of 'Wild und Laufgitter für Babys', which is obviously a translation error for the English product indication 'game and play pen', with the following view (D5):



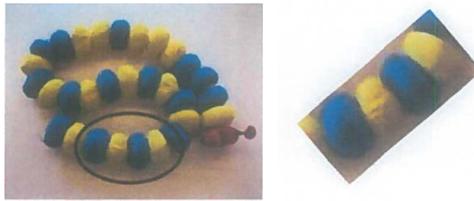
supplemented by the following images:



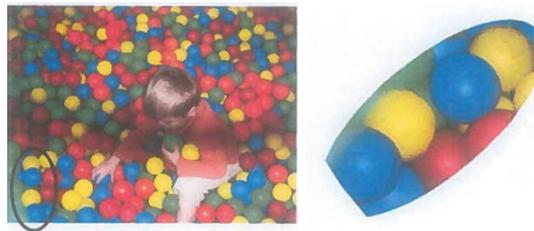
- Registered CD No 955729-0001 applied for on 23 June 2008 in respect of 'multiple activity toys', with five views, including the following (D6):



supplemented by the following views:



- Screenshot from Wikimedia.org dated 23 April 2009 with the following image, 'David playing', dated 11 February 2006 (D7):



- 4 By decision of 21 August 2015 ('the contested decision'), the Invalidity Division rejected the application for a declaration of invalidity and ordered the applicant to bear the costs of the proceedings. The earlier designs claimed did not preclude the contested CD from having novelty and individual character.
- 5 The following reasons were given:
 - The earlier designs were to be deemed as having been disclosed within the meaning of Article 7 CDR.
 - The contested design related to a row of four balls in the arrangement of colours blue-yellow-blue-yellow. The other features were not claimed.
 - The fact that, in computer games or multiple-activity toys, balls that were similar to those of the contested CD were lined up was unable to destroy its novelty. Arbitrarily singling out individual elements from the earlier designs and comparing them with the contested CD was not permissible. In the case of ball pools, the occurrence of particular colour combinations was sheer coincidence.
 - The informed user was familiar with cleaning preparations, in particular also with toilet cleaners. As has been explained by the applicant, the designer's degree of freedom was extensive in the case of cleaning preparations.
 - The examples chosen by the applicant came from remote markets and brought about a different impression among the relevant public familiar with cleaning preparations. Even if the informed user was aware of computer games or ball pools in which balls were lined up, some credit ought to be given to the designer who designed the arrangement of several balls in a row for the first time in relation to the cleaning sector and applied this arrangement in relation to an industrial product.

Grounds of appeal

- 6 With the notice of appeal filed on 19 October 2015 and grounds of appeal submitted on 26 November 2015, the applicant requests that the contested decision be annulled and the contested CD be declared invalid. It also requests that the appeal fee be reimbursed.
- 7 As grounds, the applicant essentially states the following:
- The contested CD lacked novelty. It was the informed user that was relevant for the assessment of novelty and not the question of whether the products were attributable to remote markets. The fact that it was sufficient for a finding of a lack of novelty if parts of the earlier design were the same as the contested CD had already been established by the Board in its decision R 978/2010-3, 'Part of a sanitary napkin'. How the overall impression of the earlier design came about, i.e. whether the arrangement of the balls was random or not, was irrelevant.
 - The informed user of toilet cleaning preparations in toilet baskets was anyone who used toilets, and this person also had knowledge of playpens for babies, ball pools and computer games. Since the arrangement of the balls in a row was similar, as was found by the Invalidity Division, the overall impression was also the same.
 - The appeal fee had to be reimbursed, since the applicant was not given the opportunity to make any comment on the assertion that the designs related to different markets.
- 8 The proprietor requests that the appeal be dismissed.
- 9 It agrees with the contested decision and makes the following additional arguments:
- The extracts taken from the earlier designs and arbitrarily highlighted by the applicant did not show the appearance of a unitary object and thus a design within the meaning of Article 3(a) CDR.
 - These extracts were not disclosed within the meaning of Article 7(1) CDR either.
 - The market for toilet cleaning preparations was remote from the markets for games and playthings.
 - The informed user, who had knowledge of various designs in the field of toilet cleaning preparations, considered the earlier designs to have originated from a remote sector, which resulted in a different overall impression.
- 10 The parties also discussed in detail the question of whether, in relation the product indication of the contested CD, decision R 978/2010-3 was relevant to the present proceedings.

Reasons

- 11 The appeal is unfounded. The designs claimed do not preclude the contested CD from having novelty and individual character.

Individual character

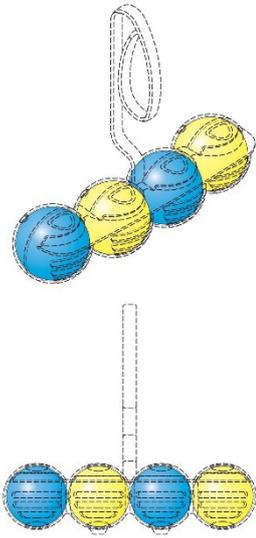
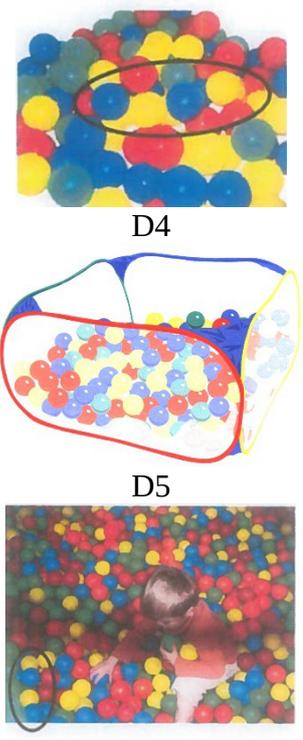
- 12 Pursuant to Article 6(1)(b) CDR, a registered design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any other design which has been made available to the public before the date of filing the application for registration or, if a priority is claimed, before the date of priority. Pursuant to Article 6(2) CDR, in assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.
- 13 Within the meaning of the provision referred to, a design is the appearance of a product or part of it, resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. The term 'product' covers any industrial or handicraft item excluding computer programs, Article 3(a) and (b) CDR.
- 14 The contested design relates to the appearance of a cleaning preparation for toilets in the form of so-called toilet rim blocks. The product indication '(Water) flushing systems for toilets' is obviously incorrect, since this is not 'sanitary equipment' within the meaning of subclass 23-02 of the Locarno Classification, which is encompassed by the generic term 'Apparatus for the distribution of liquids or gases' in Class 23. The incorrect designation of the product is not prejudicial, however, as the product indication is not to be used to determine the subject-matter for which protection is sought, Article 36(6) CDR.

Earlier designs D4, D5 and D7

- 15 The earlier designs relate to ball pools.
- 16 It is the representations submitted with the application for a declaration of invalidity that are relevant for the identification of the earlier designs, specifically in the form in which they had been made available to the public according to the applicant's arguments. These show a ball pool (D5) and balls as a part of such a ball pool (D4, D7). The detailed views claimed by the applicant were not disclosed in this form and are therefore irrelevant, irrespective of the question of whether the submission of screenshots is sufficient as evidence of disclosure within the meaning of Article 7(1) CDR. Moreover, the extracts do not show the appearance of a part of a product. Considered separately, it is not possible to identify the product to which they relate, meaning that the subject-matter for which protection is sought remains completely unclear and the extracts cannot be regarded as a representation of a design within the meaning of Article 3 CDR.
- 17 The assessment of individual character must therefore be based solely on the earlier designs in their entirety.
- 18 According to the definition of the users of the products in question given in the case-law, the informed user is a user who, without being a designer or a technical

expert, knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them (20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 53, 59; 09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 23, 24).

- 19 Since the designs in question relate to different products, an informed user who is familiar with both the features of toilet rim blocks and the different designs in this field, and also with the features of ball pools and balls for pools of this type and the range available on the market in this regard must be used as a basis.
- 20 Pursuant to Article 6(2) CDR, the degree of freedom of the designer in the case of toilet rim blocks is restricted firstly with regard to the material, which is prescribed by the chemical substances used for toilet rim blocks, and secondly with regard to the size and shape, which must be capable of being accommodated in the corresponding holder. The designer is not subject to any restrictions with regard to the colouring and specific design.
- 21 In the case of ball pools, the freedom of design is only restricted to the extent that they must necessarily have a large number of balls in order to evoke the feeling of a 'pool'.
- 22 The assessment of the relevant overall impression must be based on the following designs:

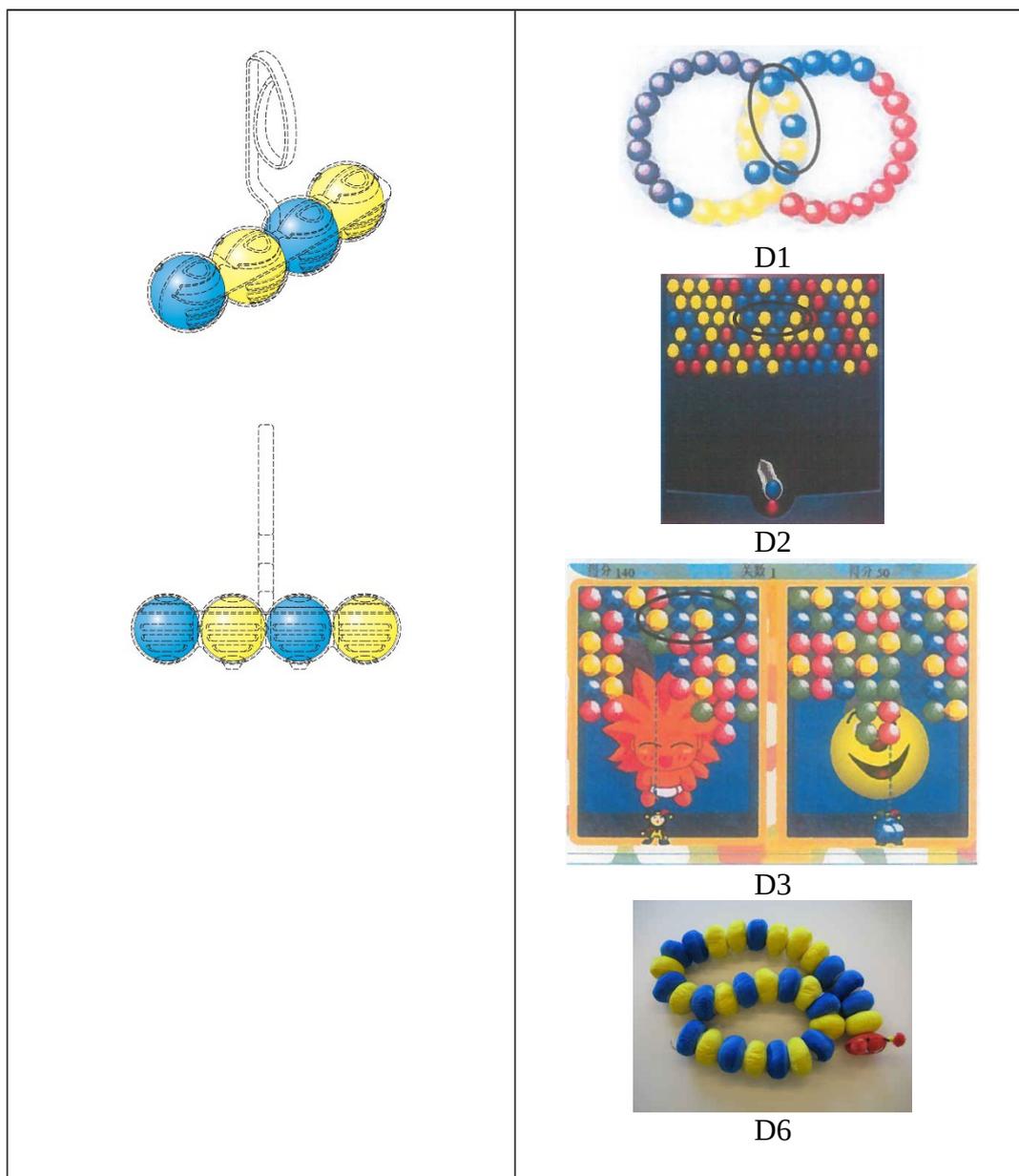
<i>Contested design</i>	<i>Earlier designs</i>
	 <p style="text-align: center;">D4</p> <p style="text-align: center;">D5</p> <p style="text-align: center;">D7</p>

- 23 In the contested CD, the features depicted by means of dashed lines are excluded from protection. It is therefore restricted to the following features:
- Four balls, two in blue and two in yellow;
 - An arrangement of these balls in a row, in alternating colours.
- 24 Designs D4 and D7 differ merely in the scale of the representation and are otherwise identical. The child depicted in D7 is clearly not a part of the product shown. Both designs show an irregular arrangement of coloured balls in red, yellow, blue and green.
- 25 D5 shows the following features:
- A container with a rectangular base area, which is open at the top;
 - Semi-transparent, rectangular side faces with rounded corners, which have coloured edges, specifically two sides in blue, one in yellow and one in red;
 - An irregular arrangement of coloured balls inside the container in the colours red, yellow, blue and green.
- 26 The similarities between the opposing designs are therefore limited to the feature of blue and yellow balls. None of the earlier designs shows the arrangement of four balls in a row in the sequence of colours blue-yellow and none of the other features in the earlier designs is found in the contested CD.
- 27 The applicant's attempt to bring about such similarity by emphasising individual details of the earlier designs is unsuccessful. The informed user knows that the balls in a ball pool become mixed up during use, with specific predetermined arrangements or colour sequences being irrelevant. Contrary to what the applicant is suggesting by way of the markings it has made on the earlier designs, individual instances of these arrangements and colour sequences are therefore not capable of influencing the overall impression given by the earlier designs in a way that could result in correspondence with the contested CD.

Earlier designs D1, D2, D3 and D6

- 28 The earlier designs relate to computer games and toys. It is also true here that the assessment of individual character must be based on the designs in their entirety (paragraph 16).
- 29 Account must therefore be taken of an informed user who is familiar both with the features of toilet rim blocks and the different designs in this field and with the features of computer games and toys and the range available on the market in this regard. An informed user also knows that freedom of design is virtually limitless in the case of computer games and toys.
- 30 The assessment of the relevant overall impression must be based on the following designs:

<i>Contested design</i>	<i>Earlier designs</i>
-------------------------	------------------------



- 31 The contested CD has already been described above (paragraph 23).
- 32 D1 shows two intersecting rings consisting of small balls in purple, blue, red and yellow, in which blue and yellow balls alternate at the interface of the two rings, while several balls of the same colour are also lined up.
- 33 D2 has the following features:
- A black rectangular surface;
 - An indeterminate number of oval balls in yellow, red and blue in the top third of the surface;
 - An arrangement of these balls in a row, the balls being offset from row to row;
 - A dark lower edge with a semi-circular recess in the middle;
 - A switch-like object in red and blue in this recess.

- 34 D3 shows the following features:
- A rectangular, vertically divided blue surface with a yellow frame;
 - An indeterminate number of polyhedral balls in red, blue, yellow and green in the upper half of the surface;
 - An arrangement of these balls in rows;
 - A large orange cartoon figure at the bottom of the left-hand half with a significantly smaller black figure below it;
 - A yellow smiley at the bottom of the right-hand half with a significantly smaller blue figure below it.
- 35 D6 shows a serpentine arrangement of flattened yellow and blue balls in an irregular colour sequence with a red object at the end.
- 36 The contested CD and D1 therefore only share the feature of blue and yellow balls. However, there are differences in relation to the number of balls and the arrangement of the balls, namely four balls in a row on the one hand, and an indeterminate number of balls arranged in two rings on the other hand. The mere correspondence in the spherical shape and blue-yellow colour sequence in the middle of the rings is therefore not sufficient to produce the same overall impression on the informed user.
- 37 In relation to D2 and D3, the correspondence is limited to the arrangement of the balls in a row and the blue-yellow colour sequence, as the round ball shape in the contested CD differs from the oval shape in D2 and the polyhedral shape in D3. There are also further differences in the number of balls and rows, the length of the rows and the additional graphical elements, which are not present in the contested CD, as a result of which a different overall impression is produced.
- 38 In relation to D6, the single feature in common consists of the blue-yellow colour sequence. The flattened shape of the balls, as well as the number of balls and their serpentine arrangement, is different from that in the contested design, which also results in a different overall impression.
- 39 All of the earlier designs therefore produce an overall impression which differs from the contested CD and do not preclude the individual character thereof. The contested CD therefore also differs from the earlier designs in more than only immaterial details; it therefore also possesses the required novelty pursuant to Article 5 CDR.
- 40 Since the earlier designs do not preclude the eligibility for protection of the contested CD, the question of whether the applicant has demonstrated the disclosure thereof within the meaning of Article 7(1) CDR did not require any further discussion either. However, the Board points out that mere screenshots of the Wayback Machine without any supplementary documents as evidence of disclosure are generally not sufficient, since they do not show the context in which the publication was made and therefore also do not permit any statements to be made as to whether they could have become known to the relevant public in the normal course of business.

- 41 The appeal could therefore not be successful.
- 42 Since the appeal is unsuccessful, the requirements of Article 37 CDR are not met and the request that the appeal fee be reimbursed must also be refused.

Costs

- 43 Pursuant to Article 70(1) CDR, the losing party in the proceedings shall bear the costs incurred by the other party. As the losing party, the applicant shall bear the costs incurred by the proprietor in the invalidity and appeal proceedings.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal.**
- 2. Orders the applicant to bear the costs of the invalidity and appeal proceedings.**
- 3. Refuses the request that the appeal fee be reimbursed.**

Signed

Th. M. Margellos

Signed

E. Fink

Signed

C. Bartos

Registrar:

Signed

H. Dijkema

