

DECISION
of the Third Board of Appeal
of 11 May 2016

In Case R 734/2015-3

Koninklijke Auping B.V.

Deventer

The Netherlands

RCD Proprietor / Appellant

represented by Klos Morel Vos & Reeskamp (Partnership), Amsterdam,
The Netherlands

v

Napco Beds B.V.

Bemmel

The Netherlands

Invalidity Applicant / Respondent

represented by Quirijn Meijnen, Amsterdam, The Netherlands

APPEAL relating to Invalidation Proceedings No ICD 9 312 (registered Community design No 2 094 615-0001)

THE THIRD BOARD OF APPEAL

composed of Th. M. Margellos (Chairperson), H. Salmi (Rapporteur) and
E. Fink (Member)

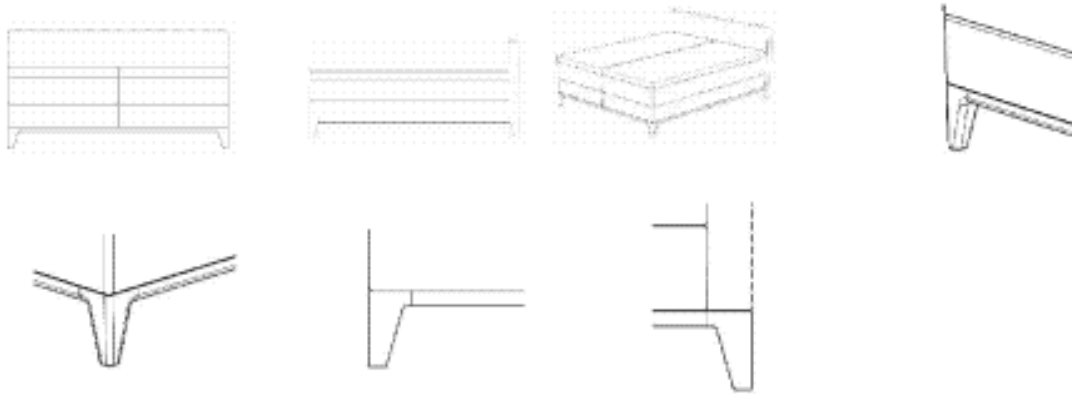
Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 30 August 2012, Koninklijke Auping B.V. (hereinafter 'the RCD proprietor') sought to register the following design (hereinafter 'the contested RCD'):



- 2 The indication of the products reads 'bedsteads, beds, composite beds, beds (part of -)'.
- 3 The design was registered and published in the Community Designs Bulletin No 168/2012 of 30 August 2012.
- 4 On 15 November 2013, Napco Beds B.V. (hereinafter 'the invalidity applicant') filed an application for a declaration of invalidity against the contested RCD. The invalidity applicant requested the invalidation of the RCD based on the grounds according to Article 25(1)(b) and Articles 4 to 9 CDR.
- 5 The invalidity applicant stated that the design lacked novelty and individual character due to the existence of the earlier disclosed designs. On 4 September 2014, the invalidity applicant withdrew its initial claim that the RCD design was solely dictated by its technical function. As evidence it provided, *inter alia*, the design views depicted below (hereinafter 'D1' and 'D2') from a brochure dated 2012. These designs were identified as 'avek model noflik fjild' and as 'avek model noflik stirpe' respectively.



Avek model noflik fjild (D1)



Avek model noflik stirpe (D2)

- 6 The 'Wayback Machine' in www.archive.org shows that the Avek brochure was available as early as 3 July 2012. See, in that respect, the following link

<https://web.archive.org/web/20120703131650/http://www.avek.nl/pdf/noflik.pdf>.
The attached screenshots of the views can be found in this URL.

- 7 The RCD proprietor pointed out that it had not been proven that the prior designs were disclosed and it indicated the differences between the prior designs and the contested RCD. It considered the prior designs clearly different to the contested RCD.
- 8 On 24 February 2015, the Invalidity Division issued a decision (hereinafter 'the contested decision') declaring the contested RCD invalid in accordance with Article 25(1)(b) CDR and ordering the RCD proprietor to bear the costs. The reasoning in the contested decision was, in essence, the following:

Admissibility

- The application complies with the formal requirements prescribed in the CDR and the CDIR, in particular it complies with Article 28 CDIR. The application is therefore admissible.

Disclosure

- The 'Wayback Machine' in www.archive.org showed that the Avek brochure was available from 3 July 2012. D1 and D2 can be seen in <https://web.archive.org/web/20120703131650/http://www.avek.nl/pdf/noflik.pdf>. Thus they have been disclosed.
- For reasons of procedural economy the Invalidity Division has selected among the prior designs claimed the ones it considers justifies sufficiently the application for invalidity on the basis of lack of novelty and individual character.

Novelty

- According to Article 5 CDR, an RCD lacks novelty when an identical design has been made available to the public prior to the filing date of the RCD. Designs are deemed to be identical if their features differ only in immaterial details.
- The design disclosed in views D1 and D2 is not identical to the contested RCD's design. Therefore, the invalidity applicant's submission that the contested RCD lacks novelty is not founded:
- The following differences in the contested RCD are noted:
 - The headboard is directly supported by the bedframe;
 - the legs are part of the bedframe and have a clearly different shape because, seen from one angle, they follow a diagonal line towards the frame;
 - the legs are right below the four corners of the bedframe.
- On the contrary in the prior designs the headboard and frame are separated. The legs and bedframe do not form one unique element, as they do in the contested RCD, but rather two separated elements. The legs are then fixed to the bedframe but not in line with the corners of the bed (frame).

Individual character

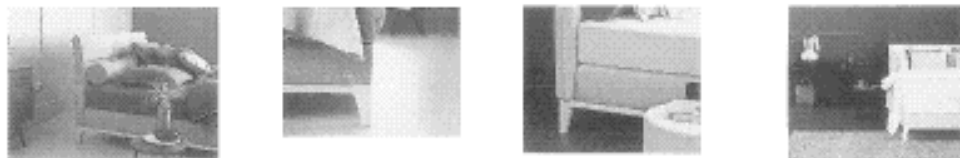
- The informed user is familiar with designs of bedsteads, beds, composite beds, beds (part of -'). The informed user is aware of the designs of products which were available before the date of filing of the contested RCD, and they are aware of the considerably large freedom of the designer of this kind of products.
 - The overall impression given by the prior designs and the contested RCD is the same. This is despite some minor differences that for the informed consumer do not deviate sufficiently from the previous designs even when making a direct comparison. Both the contested RCD and the prior designs have a bedframe, a headboard, and at the corners or close to them four supporting legs. The contested RCD and the prior designs have two thick and one thin rectangular element, on a visible, thin bedframe. The bedframe also has a rectangular shape, following the lines of the elements on it. The contested RCD does not have individual character in light of D1 and D2.
 - The contested RCD is to be declared invalid on the grounds of Article 25(1)(b) CDR in conjunction with Article 6 CDR due to the lack of individual character.
 - There is no need to assess the disclosure of the other claimed prior designs as the contested RCD is declared invalid taking into account the aforementioned designs D1 and D2
- 9 On 13 April 2015, the RCD proprietor filed a notice of appeal against the contested decision. It submitted a statement of grounds on 25 June 2015.
- 10 On 10 August 2015, the invalidity applicant requested an extension of ten weeks to file its observation. This extension was granted on 11 August 2015 but no observations were received during the extended deadline.

Submissions and arguments of the RCD proprietor

- 11 The RCD proprietor requests that the Board annuls the contested decision, reject the application for invalidity and order the invalidity applicant to bear the costs. Its arguments are, in essence, the following:
- The RCD proprietor agrees with the contest decision's findings on no lack of novelty. Thus this issue will not be discussed at the appeal stage.
 - The characteristic features of the contested design maybe described as two thick rectangular mattresses and one thin rectangular mattress, which are placed in a straight line right above a visible thin bedframe. This visible, thin bed frame has a rectangular shape following the lines of the mattresses above it. At the very end of the four corners of the rectangular shaped bedframe, four legs are placed which are shaped in such a way that the straight line in which the mattresses are placed above it, is continued. In contrast, the sides of these legs follow a diagonal line towards the frame. The bed frame and the legs have a sleek yet robust, modern design with distinctive facets and subtle round edges. The headboard is supported by the bed frame directly; whilst the bed frame remains visible (the headboard is not part of the contested RCD). The legs and frame have a certain size in proportion to each other and

to the beds placed on top of it. All these design features create a sleek, modern and light yet strong visual appearance.

- In identifying the characteristic features of a design, it is necessary to look both at the design as registered and the design as incorporated in the product (see in that respect 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679). Therefore, reference is made to the following pictures of the contested RCD as incorporated in the double-box spring beds marketed by the RCD proprietor.



- Taking into account the general principles on the informed user's definition, the contested decision is insufficiently precise and wrong in relation to the knowledge and level of attention of said informed user.
- The informed user is not just familiar with double box-spring bed designs. It does not have an interest in 'beds' in general but in double box-spring beds in particular. Thus it will show a high degree of attention when observing and comparing designs of said quite expensive kind of beds.
- Finally, the informed user is aware of the required standardized features for a double box-spring bed to function.
- Therefore, the informed user will pay particular attention to the shapes, lines and contours, placing and dimensions of the supporting structure of a double box-spring bed.
- The designer's freedom is rather limited as regards standard features such as the dimensions which are required to fit standard accessories like bed linen, two rectangular mattresses and a smaller rectangular one placed at the top and four legs per bed (eight in total).
- The designer's freedom lies in the shape, lines and contour placing and dimension of the supporting structure.
- In light of the above, the informed user will notice the clear differences in overall impression created by D1 and D2 and the contested RCD.
- The differences showing that the contested RCD possesses individual character are summarized as follows:

<i>The prior designs</i>	<i>The contested RCD</i>
The head board is placed behind the bed frame.	A headboard (not part of the design) is to be placed on the bed frame (see dotted lines).
The bedframe is completely rectangular, in the sense that it has no round edges. It is quite sturdy and has simple lines. It is shaped	The bedframe has a sleek, modern design with distinctive facets and subtle round edges.

like it is made out of four small wooden) planks.	
Eight legs placed about 10 cm away from the corners of each bed and two additional legs placed in the middle of each bed, i.e. ten legs.	Four legs placed at the very end of the four corners of the bedframe which is quite unusual.
The legs are not part of the bedframe. They are attached with a distinct rectangular-shaped element.	The legs are part of the bedframe and form a diagonal line towards the frame.
Block shaped/tube shaped legs.	The legs have distinctive facets and subtle round edges.
Clean robust simple visual appearance.	Sleek, modern and light, yet strong visual appearance.

Reasons

- 12 The appeal complies with Articles 55 to 57 CDR and Article 34(1)(c) and (2) CDR. It is therefore admissible.

Article 25(1)(b) CDR in conjunction with Articles 4 to 7 CDR

- 13 Under Article 25(1)(b) CDR a Community design may be declared invalid if it does not fulfil the requirements of Articles 4 to 9 CDR.
- 14 Under Article 4(1) CDR a design is to be protected as a Community design to the extent that it is new and has individual character.
- 15 Novelty is defined by Article 5(1) CDR in the following terms:

‘1. A design shall be considered new if no identical design has been made available to the public:

(a) ...

(b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.’

- 16 Individual character is defined by Article 6 CDR:

‘1. A 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 design which has been made available to the public:

(a) ...

(b) in the case of a registered Community design, before the date of filing of the application for registration or, if a priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.’

17 The question posed pursuant to Articles 5 to 7 CDR is essentially whether, prior to the filing date of the contested RCD, an identical design or a design that produces the same overall impression on the informed user, had been made available to the public.

The earlier design and its divulgation

18 The conclusion of the contested decision that the prior designs D1 and D2 have been made available to the public before the filing date of the contested RCD and may thus be regarded as earlier designs within the meaning of Article 7 CDR has not been contested before the Board and is endorsed by the Board.

Individual character

a. The informed user

- 19 It is apparent from Recital 14 in the preamble to the CDR that, when assessing whether a design has individual character, account should be taken of the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 43).
- 20 According to the case-law, an ‘informed user’ within the meaning of Article 6 CDR is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied. An informed user is particularly observant and has some awareness of the state of prior art, that is to say the previous designs relating to the product in question that have been disclosed on the date of filing, or the priority date, of the contested design (09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 23 and 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 62, confirmed by 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 54).
- 21 The status of ‘user’ implies that the person concerned uses the product in which the design is incorporated, in accordance with the purpose for which that product is intended (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 46; and 09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 24).
- 22 Although the informed user is not the well-informed and reasonably observant and circumspect average consumer who normally perceives a design as a whole and does not proceed to analyse its various details, he is also not an expert or specialist capable of observing in detail the minimal differences that may exist between the designs at issue. Thus, the qualifier ‘informed’ suggests that, without being a designer or a technical expert, the user 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, § 59 and 10/09/2015, T-526/13, Sacs à main, EU:T:2015:614, § 25).

- 23 The contested RCD is registered for ‘bedsteads, beds, composite beds, beds (part of -)’. However, taking into account the design itself, the contested RCD can be seen to consist of a bed (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 56). The informed user to be taken into account is whoever habitually purchases such an item, puts it to its intended use and has become informed on the subject by browsing through catalogues of, or including, beds, visiting the relevant stores or stands, downloading information from the Internet, etc. (by analogy, 18/09/2007, R 250/2007-3, tavoli, § 12). The Board does not agree with RCD proprietor’s claim that the product to be taken into account would be limited only to double box-spring beds. There is nothing in the contested RCD as registered which would support such a claim.

b. The designer’s degree of freedom in developing its design

- 24 The designer’s degree of freedom in developing his/her design is established, *inter alia*, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned. The more the designer’s freedom in developing the contested design is restricted, the more likely minor differences between the designs at issue will be sufficient to produce a different overall impression on the informed user (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67 and 72 and 10/09/2015, T-526/13, Sacs à main, EU:T:2015:614, § 28).
- 25 The greater the designer’s freedom in developing the challenged design, the less likely it is that minor differences between the designs at issue will be sufficient to produce a different overall impression on an informed user. Conversely, the more the designer’s freedom in developing the challenged design is restricted, the more likely minor differences between the designs at issue will be sufficient to produce a different overall impression on an informed user. Therefore, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that the designs which do not have significant differences produce the same overall impression on an informed user (10/09/2015, T-526/13, Sacs à main, EU:T:2015:614, § 29).
- 26 In the opinion of the Board, the designer’s freedom in developing a design of a bed is not substantially limited. It is only limited insofar as that the bed must be a more or less comfortable item of furniture on which a person can sleep. In order to do that it must consist of at least a frame and some kind of a mattress on top of it. In addition, it is limited to some extent due to the fact that bed sizes are often standardised due to the standard size of mattresses. Moreover, there are limitations in the proportions since the frame of the bed must be construed in a way that it properly supports the mattresses. Otherwise, a bed can have different shapes, proportions and decorations. In general, for such products new and innovative design solutions are not hindered by severe technical or standardization constraints.

c. Overall impression produced on the informed user

- 27 The RCD proprietor challenges the Invalidity Division’s assessment. It argues that the overall impression produced by the contested design is different from that produced by the prior designs. It claims that even slight differences must be taken

into consideration in the assessment of the individual character of the designs at issue. In that connection, it submits a detailed analysis of those designs and concludes that the overall impressions that the designs at issue produce are different.

- 28 The beds share the following features: a bedframe, a headboard (although the exact shape of the headboard does not form part of the contested RCD as it has been disclaimed by dotted lines), four thick rectangular elements on a visible, thin bedframe. The bedframe also has a rectangular shape, following the lines of the elements on it.
- 29 On the other hand, in particular, the Board agrees with the following differences between the contested RCD and the prior designs D1 and D2 mentioned by the RCD proprietor:
- in the RCD the headboard is placed on the bed frame, while in the prior designs it is placed behind the bed frame;
 - the RCD has only four legs which are attached to the very end of the four corners of the bedframe. The prior designs have four legs placed approximately 10 cm away from the corners of the bedframe. In addition they have at least two, but probably actually four additional legs at the end of the middle parts of the beds and in the case of D2, at least one, but probably actually two, further legs placed at the middle part of the bed;
 - in the RCD the legs are part of the bedframe and form a diagonal line towards the frame, while in the prior designs the legs are not part of the frame and are attached with a horizontal and rectangular-shaped element;
 - in the RCD the legs have a distinct shape and round edges, while in D1 the legs are tube-shaped and in D2 the legs are block shaped.
- 30 The Board also notes that, at least in D2, the headboard is wider than the actual bed which allows the sidetable to fit partially in front of the headboard. Further, the contested RCD has two additional rectangular elements on the top of it, which are thinner than the elements below them. It is not clear from the images of the prior designs whether such elements are also included in the prior designs, because they are covered by sheets. It seems that there is an additional mattress in both of them, but what can not be seen is whether it consists of one mattress or two mattresses as in the contested RCD.
- 31 In the opinion of the Board, all of these differences are notable in the overall impression of the designs and will not escape the informed user's notice. They change the appearance of the products in a manner that will not go unnoticed by an observant user. As can also be seen from the other examples of prior art presented by the invalidity applicant, it is a rather standard feature of beds that they contain either one or two mattresses which are thicker than the bed frame and the width of the bed frame follows the width of the mattress(es). The informed user therefore also takes into account the form of the legs, their amount and the way that they are attached to the bed, as they are important elements that affect the stability of the bed. The aforementioned notable differences in the designs are sufficient to deduce that they produce a different overall impression on the informed user. Consequently, the overall impression of the prior designs is not of such a nature so as to deprive the contested RCD of its individual character pursuant to Article 6 CDR. The aforementioned differences are also, even more

so, sufficient to deduce that the signs are not identical. Therefore, the contested RCD also does not lack novelty.

- 32 It follows from all the above considerations that the contested decision erred in finding that the design produce the same overall impression. Accordingly, the appeal must be upheld, the contested decision annulled and the application for a declaration of invalidity as far as it is based on the prior designs D1 and D2 rejected.
- 33 However, the Board also notes that the contested decision did not decide on whether the contested RCD should be declared invalid on the ground of Article 25(1)(b) CDR, based on the other prior designs claimed by the invalidity applicant.
- 34 According to the second sentence of Article 60(1) CDR, the Board may either remit the case to the department responsible for the decision appealed for further prosecution or exercise any power within the competence of that department. Given the parties' legitimate interest that the case be examined in full by both instances of the Office, the case is remitted to the Invalidity Division for re-examination of the request for declaration of invalidity as far as it is based on the further prior designs claimed by the invalidity applicant under Article 25(1)(b) CDR.

Conclusion

- 35 Consequently, the Board concludes that it is appropriate to uphold the appeal and annul the decision as far as it is based on the prior designs D1 and D2 and remit the case to the Invalidity Division for re-examination as outlined above.

Costs

- 36 Since at this stage of the procedure there is no losing party, the Board deems it equitable, pursuant to Article 70(2) CDR, that each party bears its own costs in the appeal proceedings. As regards the costs of the invalidity proceedings, those costs must be fixed by the Invalidity Division in its forthcoming decision.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Remits the case to the Invalidity Division for further prosecution of the request for declaration of invalidity;**
- 3. Orders each party to bear its own costs in the appeal proceedings.**

Signed

Th. M. Margellos

Signed

H. Salmi

Signed

E. Fink

Registrar:

Signed

H.Dijkema

