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**Datasheet for the decision
of the Enlarged Board of Appeal
of 16 April 2012**

Case Number: R 0004/11
Appeal Number: T 1292/08 - 3.2.07
Application Number: 99116441.9
Publication Number: 0962391
IPC: B65B 61/18
Language of the proceedings: EN

Title of invention:

A method of applying fitments to containers and apparatus for use in the same

Patentee:

ELOPAK SYSTEMS AG

Opponent:

SIG Technology AG

Headword:

Pour spout fitments/ELOPAK SYSTEMS

Relevant legal provisions:

EPC Art. 112a, 113
EPC R. 104, 106, 107, 109(2) (a)

Keyword:

"Petition for review: - not clearly inadmissible - clearly unallowable"
"Violation of right to be heard - no"

Decisions cited:

-

Catchword:

-



Case Number: R 0004/11

DECISION
of the **Enlarged Board of Appeal**
of 16 April 2012

Petitioner
(Patent Proprietor)

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Decision under review:

**Decision of the Technical Board of Appeal
3.2.07 of the European Patent Office of
23 September 2010.**

Composition of the Board:

Chairman: W. van der Eijk
Members: B. Günzel
F. Edlinger

Summary of Facts and Submissions

I. This petition for review concerns decision T 1292/08 of Technical Board of Appeal 3.2.07 of 23 September 2010, by which European patent No. 0962391, application No. 99116441.9, was revoked. Petitioner is the patent proprietor.

II. The subject-matter of the patent in suit is a method for applying fitments to containers, such as containers for packaging milk and juice, and apparatus for use in the same.

III. Claim 1 of the patent as corrected by the examining division after grant reads as follows:

"1. Apparatus for use in applying fitments to containers, comprising an applicator (12) having at least two arms (32-38) distributed about an axis (58) and each having in a distal end zone thereof receiving means (50) to receive and carry a fitment (28) including a sealing flange (54), driving means (56) arranged to rotate said applicator (12) to cause one arm (32) carrying one fitment (28) to align said one fitment (28) with one container (16B) while placing the receiving means of another arm (36) in position to receive another fitment (28) from an adjacent track (46), and also arranged to move the applicator (12) axially to apply said one fitment (28) to said one container (16B) and to bring the receiving means (50) of said other arm (36) to a forward end position (Figure 2), and placing means (40-44) for engaging said other fitment (28) and moving said other fitment (28) from said track (46) towards said other arm (36),

characterized in that said forward end position (Figure 2) is at a predetermined spacing (d') from a waiting position in said track (46) of the sealing flange (54) of said other fitment (28)." (emphasis added by the Enlarged Board)

Independent method claim 4 was directed to a method of applying fitment (*sic*) to containers.

IV. In the opposition proceedings the opponent attacked the patent inter alia on the basis of lack of novelty of the subject-matter of claims 1 and 4 in relation to document WO-A-95/10408 (D1). D1 is mentioned in paragraph 0007 of the description of the patent in suit as disclosing an apparatus and method in accordance with the preambles of claims 1 and 4. Accordingly, the only point in dispute between the parties throughout all stages of the proceedings concerned the question as to whether D1 also disclosed the feature of the characterising part of claim 1 of the patent in suit, namely that a predetermined spacing (d') is provided. While the opponent, referring inter alia to figures 5 and 10 of D1, argued that this was the case, the proprietor contested this. The proprietor essentially argued that the reference to D2 and D3 made on page 9 of D1 showed that in D1 the closure of the fitment was intended to be collapsed into the pour spout. According to the proprietor, the opponent's contrary view was based on elements depicted in figures 5 and 6 of D1, figure 6 being a fragmentary view of figure 5, which were incorrectly numbered and which erroneously showed the fitment in an uncollapsed state. Therefore, when read correctly, D1 disclosed that in its forward end

position the anvil of the spider had already entered the pour spout and there was thus no spacing.

- V. The opposition division endorsed the proprietor's view that the information in figure 5 of D1 was incorrect and concluded that, the figures of D1 furthermore being schematic drawings, D1 did not exclude the possibility that in its forward end position the plug in D1 was at the same level as or partially inside the fitment. Hence, claim 1 differed from that prior art by its characterising feature and defined inventive subject-matter.
- VI. The opponent appealed the decision. On appeal both parties reiterated their positions.
- VII. As regards novelty, in an annex to the summons to oral proceedings the Technical Board of Appeal noted several inconsistencies between figures 4, 5 and 10 of D1, which seemed to prevent reliable information being derivable from the drawings as to whether the plug had entered the spout of the fitment at the point when the other fitment was being welded onto the package. By contrast, the written description seemed to imply that when the spider stopped to allow the welding, the next fitment had not been loaded from the track, i.e. the loading was due to the action of the cylinder.
- VIII. By the impugned decision Technical Board of Appeal 3.2.07 revoked the patent for lack of novelty of claim 1 in relation to D1. The only question to be decided was whether D1 also disclosed the characterising feature of claim 1.

In this respect the petitioner (proprietor) had argued that the fitments of D2 and D3, referred to in D1 as suitable fitments, were of the collapsible type, like the one shown in figure 10 of D1. Therefore, in D1 the movement effected by the rod (107) did not serve to move the fitment onto the plug, but rather served to collapse the fitment (point 3.4 of the Reasons).

This argument was refuted by the Board. According to the Board, in D1 it was pointed out that other suitable fitments may be used, i.e. not just those disclosed in D2 and D3. The outlines of the fitments shown in D1 at the top and at the bottom of figure 5 and in figure 6 were the same, and there did not appear to be any indication that if the fitment was considered to be of the collapsible type that it had actually been collapsed on the apparatus, i.e. when being pushed onto the spigot, or in any case before being welded onto the carton (point 3.5 of the Reasons).

The petitioner's argument that a collapsing of the fitment must have occurred during its collection on the spigot or during the fitting process was not supported by the disclosures of either D2 or D3. In D3, with reference to the embodiment of figure 12, it was indicated that the consumer fractures the link between the cap and the spout, which meant that this fitment cannot have been "collapsed" during the process of fitting it to the carton. Either of D2 and D3 clearly indicated that it could have occurred before this process or afterwards by the consumer (point 3.6 of the Reasons).

The Board could not agree that where a device, here the rod 107 and the piston 106, is described in a document to have a particular function that it can be concluded that it in fact does not perform that function but rather performs a completely different function which is not addressed anywhere in the document, unless the described function is definitively excluded. Figures 5 and 6 consistently showed the shape of the fitment as being unchanged whereas the conclusions of the declarations filed by the proprietor would require it to change its shape (point 3.7 of the Reasons).

The Board concluded that the characterising feature of claim 1 was also unambiguously disclosed in D1 (point 3.8 of the Reasons).

- IX. The petition for review was based on the ground that a fundamental violation of Article 113 EPC occurred in the appeal proceedings. The decision of the Board of Appeal relied upon a basis which had not been canvassed by the appellant/opponent, nor at the oral proceedings by the Board. So the petitioner had no opportunity of responding to that basis, which was the similarity in appearance of the outline of the fitment in figure 5 of D1 to the outline of the fitment in figure 6 of D1. This similarity was relied upon in sub-paragraphs 3.5 and 3.7 of the decision. This similarity went to the root of the invention because, in order to dismiss the expert evidence, the Board needed to be convinced that the fitment, when inserted through the hole in the carton wall 24, would not be in a collapsed condition (as taught by figure 10 of D1) but would remain uncollapsed and be collapsed later, i.e. "afterwards by the consumer", as mentioned in sub-paragraph 3.6, where

the Board referred to the description of the embodiment of figure 12 in D3, to which its attention had been drawn by the appellant during the oral proceedings. Since the relative appearance of the outlines of the fitments in figures 5 and 6 of D1 was not referred to by either the appellant or the Board and the Board misused the disclosure with reference to figure 12 of D3, the petitioner had no opportunity of challenging that basis for the Board's findings of a lack of novelty.

X. The petitioner requested that the impugned decision be set aside and the proceedings at the appeal level be reopened. Reimbursement of the fee for the petition for review was also requested. Oral proceedings were requested as an auxiliary request.

XI. By Order of the Enlarged Board of Appeal, as composed under Rule 109(2)(a) EPC, of 17 February 2012 the petitioner was summoned to oral proceedings.

In a communication accompanying the summons the Enlarged Board expressed the preliminary opinion that the petition appeared not to be clearly inadmissible. It appeared, however, to be clearly unallowable. The petitioner's allegation that the link made by the Technical Board in its decision between figures 5 and 6 of D1 had not been in the proceedings before appeared to be incorrect. In the declaration of 23 August 2010 filed by the petitioner in the appeal proceedings in support of its submissions, the petitioner's expert and, hence, the petitioner itself, had made a link between the way in which the fitments are depicted in figures 5 and 6, by describing these figures uniformly,

even if incorrectly, according to the petitioner, as both showing the fitments as not collapsed. The scope of review proceedings being strictly limited to examining whether the appeal proceedings were flawed by one of the fundamental procedural defects exhaustively listed in Article 112a EPC in conjunction with Rule 104 EPC, the Enlarged Board was not entitled to examine whether the Technical Board had correctly decided the case before it as to its substance. Furthermore, the onus of submitting convincing arguments to the Board as to why the characterising feature of claim 1 was not disclosed in D1 rested with the petitioner. A party had no right to be told in advance in every detail the exact reasoning on which a board of appeal bases its decision.

XII. Oral proceedings were held before the Enlarged Board as composed under Rule 109(2)(a) EPC on 16 April 2012.

In these oral proceedings the petitioner explained that its objection that its right to be heard had been violated by the Board was intended to be based on the fact that the Board had not given the petitioner prior notice of its intention to refute the petitioner's expert's opinion relating to figures 5 and 6 of D1 and figure 12 of D3 for the reasons which were given by the Board in its decision. This had prevented the petitioner from being able to show to the Board that these reasons were technically wrong.

At the end of the oral proceedings the Enlarged Board gave its decision that the petition was rejected unanimously as clearly unallowable.

Reasons for the Decision

1. *Admissibility*

1.1 The written reasons for the Technical Board's decision were dispatched on 7 December 2010. The petition was filed on 17 February 2011. The fee for the petition was paid on the same day. The petition is based on the ground that a fundamental violation of Article 113 EPC had occurred. Hence, the requirements of Article 112a(4) EPC in conjunction with Rule 107 are fulfilled. Since the patent was revoked, the petitioner is also adversely affected by the decision.

1.2 In the petition the petitioner based its allegation that a substantial violation of Article 113 EPC occurred in the appeal proceedings on the submission that two technical aspects of the case, which were relied upon in the Board's written decision as being decisive, had not been raised before in the appeal proceedings. On the basis of that submission and for the purpose of examining the admissibility of the petition before the Enlarged Board in its composition according to Rule 109(2)(a) EPC, the Enlarged Board is satisfied that the petitioner could not, as prescribed by Rule 106 EPC, raise the objection during the appeal proceedings since the petitioner discovered that deficiency only when the written reasons for the decision were notified to him. The petition is therefore not clearly inadmissible.

2. *Allowability of the petition*

2.1 As regards the - procedural - substance of the complaint made, the Enlarged Board notes, as it already did in its communication accompanying the summons to oral proceedings, that in point 8 of the declaration of 23 August 2010 filed by the petitioner in the appeal proceedings in support of its submissions, the petitioner's expert, Mr. Leslie Pape, and, hence, the petitioner itself, made a link between the way in which the fitments are depicted in figures 5 and 6, by describing these figures uniformly (even if incorrectly, according to the petitioner) as both showing the fitments as not collapsed. Hence, the petitioner's allegation in the petition that the link made by the Board between both figures (by referring to the correspondence in the outline of the fitments in figures 5 and 6) had not been in the proceedings before, is disproved by the petitioner's own submissions on file. The same applies to the description of the embodiment in figure 12 of D3, which according to the petitioner was "misused" by the Board. It is acknowledged in the petition that the issue of figure 12 was discussed in the oral proceedings. Furthermore, the Board's reasoning in point 3.6 of the Reasons with respect to figure 12 of D3 takes up an argument used by the appellant, as is apparent from point VI(ii) of the Summary of Facts and Submissions of the impugned decision. The petitioner did not contest the correctness of this summary of the appellant's submissions.

2.2 Hence, it appears that the only complaint the petitioner could be making would be that in its

decision the Technical Board differs from the petitioner's expert's interpretation of the discussed prior art in both above mentioned contexts.

However, according to the clear wording of Article 112a EPC and as confirmed by the preparatory documents to the EPC 2000 (see Synoptic presentation EPC 1973/2000 - Part I: the Articles, OJ EPO, Special edition 4/2007, page 126, point 5) and by the established jurisprudence of the Enlarged Board of Appeal (see Case Law of the Boards of Appeal of the European Patent Office, 6th edition 2010, VII.E.15.1), the scope of review proceedings is strictly limited to examining whether the appeal proceedings were flawed by one of the fundamental procedural defects exhaustively listed in Article 112a EPC in conjunction with Rule 104 EPC.

2.3 Under no circumstances is the Enlarged Board entitled to examine whether the Technical Board has correctly decided the case before it as to its substance. Therefore, the criticism advanced by the petitioner in its petition that the Technical Board had erroneously interpreted D1 as showing a fitment that "would remain un-collapsed [when inserted through the hole in the carton wall] and be collapsed later", can as such not be a subject of the present petition proceedings. The same applies to the petitioner's submission that the Board had misused the disclosure with reference to figure 12 of D3.

2.4 At the oral proceedings before the Enlarged Board the petitioner pointed out that in its petition it had wanted to express that the petitioner's right to be heard was violated as a result of the Board not having

communicated to the petitioner prior to the taking of the decision that, and the reasons why, it intended to reject the petitioner's expert's assessment of figures 5 and 6 of D1 and figure 12 of D3. As a result of this omission the petitioner had no opportunity of convincing the Board that the conclusions on which the Board intended to base its decision were technically wrong.

2.5 However, a party has no right to be told in advance in detail how the board of appeal will decide on the arguments advanced by the party. In order for the decision to comply with Article 113 EPC it is sufficient that the party concerned had an adequate opportunity to present its point of view to the Board before a decision is taken, that the Board considers the arguments presented by the party and that the decision is based on a line of reasoning that can be said to have been in the proceedings, either as a result of having been submitted by a party or raised by the Board (established jurisprudence of the Enlarged Board, see R 1/08 of 15 July 2008, points 3 and 3.1 of the Reasons, R 2/08 of 11 September 2008, point 8.2 of the Reasons and the summary of prior jurisprudence in R 12/09 of 15 January 2010, point 11 of the Reasons). That this was the case in the proceedings before the Technical Board with respect to the points referred to by the petitioner cannot be denied. In particular, the petitioner's arguments regarding the confusing or erroneous content of D1 and its submissions on how that document should be read correctly, on which submissions the petitioner built its conclusion that the feature of the characterising part of claim 1 of the patent in suit was not disclosed in D1, were discussed at length

in the proceedings and dealt with by the Board in its decision. The same applies to the petitioner's expert's argument relating to figure 12 in D3, since the criticised passage in point 3.6 of the Reasons for the Board's decision corresponds to an argument raised by the appellant (see VI(ii) of the Summary of Facts and Submissions of the impugned decision). The fact that the Board did not accept but, on the contrary, refuted the petitioner's arguments, whether for correct or incorrect reasons, does not give rise to a violation of its right to be heard.

2.6 Therefore, the petition had to be rejected as being clearly unallowable.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chairman:

W. Crasborn

W. van der Eijk