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**D E C I S I O N**  
**of 27 September 2002**

**Case Number:** T 0145/01 - 3.2.7

**Application Number:** 94305405.6

**Publication Number:** 0635434

**IPC:** B65D 41/34

**Language of the proceedings:** EN

**Title of invention:**  
Pilfer-proof plastic cap

**Patentee:**  
YAMAMURA GLASS CO. LTD.

**Opponents:**  
(I) CROWN CORK AG  
(II) ALCOA DEUTSCHLAND GmbH, Verpackungswerke

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 84, 100(c), 123(2), 123(3)  
EPC R. 67

**Keyword:**  
"Scope of protection extended - (yes)"  
"Substantial procedural violation - (no)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0145/01 - 3.2.7

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.7**  
**of 27 September 2002**

**Appellant:**  
(Opponent I)

CROWN CORK AG  
Römerstrasse 83  
CH-4153 Reinach (CH)

**Representative:**

Hepp, Dieter  
Hepp, Wenger Ryffel AG  
Friedtalweg 5  
CH-9500 Wil (CH)

**Other party:**  
(Opponent II)

ALCOA DEUTSCHLAND GmbH, Verpackungswerke  
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D-67547 Worms (DE)

**Representative:**

Grosse, Rainer, Dipl.-Ing.  
Gleiss & Grosse  
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**Respondent:**  
(Proprietor of the patent)

YAMAMURA Glass CO. LTD.  
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**Representative:**

Cross, Rupert Edward Blount  
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**Decision under appeal:**

Interlocutory decision of the Opposition Division  
of the European Patent Office posted 20 December  
2000 concerning maintenance of European patent  
No. 0 635 434 in amended form.

**Composition of the Board:**

**Chairman:** A. Burkhart  
**Members:** P. A. O'Reilly  
E. Lachacinski



## Summary of Facts and Submissions

- I. The appellant (opponent I) filed an appeal against the decision of the Opposition Division to maintain amended the European patent No. 0 635 434.
- II. Opposition was filed by opponents I and II against the patent as a whole and based on Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(c) EPC (extension beyond the content of the application as filed). The Opposition Division held that the grounds for opposition did not prejudice the maintenance of the patent in amended form in accordance with the main request filed in the oral proceedings on 5 December 2000.
- III. The appellant requested that the decision of the Opposition Division be set aside and the patent be revoked. The appellant further requested the reimbursement of the appeal fee.

The respondent (proprietor) requested that the appeal be dismissed and that the patent be maintained on the basis of their only request which corresponded to their main request filed during the oral proceeding before the Opposition Division. The request comprises claims 1 to 8.

The single independent claim of the main request reads as follows:

- "1. A pilfer-proof plastic cap comprising  
an internally screw-threaded upper cap body (1);  
a lower band member (2);  
a plurality of bridges (3, 3a);

an annular wall (5); and  
a plurality of stopper tabs (7);

wherein

said upper cap body (1) and said lower band member (2) are integrally molded together with said plurality of bridges (3, 3a) interposed between said cap body (1) and said lower band member (2);

said annular wall (5) extends upwardly and inwardly from said lower band member (2) and is integrally formed with said lower band member (2);

said plurality of stopper tabs (7) projects inwardly from said annular wall (5) each stopper tab extending from border lines at the said annular wall when the cap is screwed onto a bottle mouth, each of the stopper tabs (7) consisting of a pair of triangular surface walls with the border lines between each said surface wall (7c, 7d) and the annular wall (5), a ridge line between a pair of triangular surfaces (7c, 7d) and the border lines of each tab (7) converging at a base (6) where the annular wall (5) is connected to the lower edge of the band member (2);

wherein each stopper tab of said plurality of stopper tabs (7) is respectively formed with constantly-decreasing sawtooth cross sections from an upper edge of said annular wall to the base (6) joining said annular wall to said band member; with one of said triangular surface walls (7d) extending substantially in the radial direction from the annular wall to the respective ridge line, and the other said triangular surface wall (7c), which is leading in the cap-closing direction of rotation when screwing said cap to a bottle mouth, being of shallow inclination and elongate relative to the radial length of said one of said triangular surface walls."

IV. The appellant based his appeal on Articles 84, 100(c), 123(2) and 123(3) EPC. The appellant argued essentially as follows:

The patent as granted extends beyond the content of the application as originally filed. The tabs and their triangular form were originally only disclosed in combination with other features of the specific example, in particular with the feature that the tabs are thinner at the ridge line than at the rest of the tab. The amendment therefore adds to the content of the application as originally filed.

The amendment to the patent whereby the features concerning the saw toothed cross-section of the tabs were introduced into claim 1 was not originally disclosed. It was not disclosed in the embodiment on which this amendment is based that the surface walls forming the saw toothed cross-section necessarily had a triangular shape. Other shapes are possible which are consistent with view of the cross-section shown in Figure 10 of the patent drawings. The feature that the saw toothed cross-section has a constantly-decreasing cross-section was also not originally disclosed.

The feature of the granted claim 1 that the stopper tabs are formed by inwardly folding the aperture edge of the annular wall in the radial direction has been deleted. Claim 1 as maintained therefore extends the protection conferred by the claims, contrary to Article 123(3) EPC.

The amendments to introduce the saw toothed cross-section and its shallow inclination are not clear, contrary to Article 84 EPC.

The grounds for the decision of the Opposition Division do not deal with the opposition ground under Article 100(c) EPC concerning the amendments made in the grant proceedings. This is a substantial procedural violation which justifies the reimbursement of the appeal fee in accordance with Rule 67 EPC.

V. The respondent argued as follows:

The application as filed did disclose that the embodiment whereby the tabs have a saw toothed cross-section also implied that the tabs were formed by triangular walls surfaces. According to the description of this embodiment Figure 10 varies in plan view from the embodiment of Figures 1 to 6 which disclose triangular wall surfaces. Therefore, the application as filed disclosed a saw toothed cross-section formed by triangular wall surfaces. Also, the original description indicated that the stopper tabs could be easily deformed when they are thinner at the ridge line than at the rest of the tab. Therefore, this feature was not an essential feature of the tabs which required that it also be included in claim 1. With regards to the constantly decreasing cross-section this feature must occur in order to effect a saw toothed cross-section as disclosed in the application as filed.

The removal of the feature that the stopper tabs are formed by inwardly folding the aperture edge of the annular wall in the radial direction does not offend against Article 123(3) EPC. The feature is removed as it could give the impression that the tabs are physically bent during manufacture. There is no precedent in the application as filed for stating that the formation of the walls was due to bending or

folding. Since the claims originally covered the possibility that the manufacture was by some other method there was no extension of the scope of protection by the deletion of this feature.

- VI. The other party (opponent II) made no submissions in the appeal proceedings.
  
- VII. In a preliminary opinion issued in preparation for oral proceedings the Board expressed the opinion that the amendment to remove the feature that the stopper tabs are formed by inwardly folding the aperture edge of the annular wall in the radial direction may offend against Articles 123(2) and 123(3) EPC. The Board also expressed the view that certain other amendments may not be in conformity with Articles 123(2) and/or 123(3) EPC. The Board further expressed the view that certain amendments did not appear to have been made to meet a ground of opposition and thus may not be admissible in the opposition proceedings. The view was also expressed that some amendments may not be clear in the sense of Article 84 EPC.
  
- VIII. Oral proceedings were arranged at the request of the respondent. After receipt of the summons the respondent withdrew the request for oral proceedings and indicated that they would not attend the appointed oral proceedings. The appellant and the other party had already indicated that they would not attend the oral proceedings. The oral proceedings were therefore cancelled.

## Reasons for the Decision



*Article 100(c) EPC*

1. The appellant has argued that the feature of the tabs being formed by triangular surface walls was originally only disclosed in combination with other features of the specific example, in particular with the feature that the tabs are thinner at the ridge line than at the rest of the tab. The feature of the thinner ridge line was disclosed on page 12, lines 14 to 17 of the application where the feature is indicated as facilitating easy deformation of the tabs. The feature is also mentioned on page 14, lines 21 to 24 and is visible in Figures 2 and 9. There is no indication that the feature is essential for the functioning of the tabs. Rather the fact that it is described on page 14, lines 23 to 24 as "...facilitating the stopper tabs to easily deform themselves..." implies that the stopper tabs can deform without this feature, so that the feature is helpful but not essential. In the opinion of the Board therefore the skilled reader would understand that other features of the embodiments, e.g. triangular surface walls, may be provided without necessarily also providing the feature that the tabs are thinner at the ridge line than at the rest of the tab. Therefore the ground under Article 100(c) EPC does not succeed.

*Article 123(3) EPC*

2. The appellant argued that the deletion from claim 1 as granted of the feature that the stopper tabs "are formed by inwardly folding the aperture edge of said annular wall (5) in the radial direction so that" leads to an extension in the protection.

The claim is directed to a product. The deleted feature

indicates both a final result in the product and how that result is achieved. Whether or not the method of achieving a result has an effect on the final product, depends on the circumstances and the method specified. When a plastics material has been bent to a shape that is different to the one in which it was originally molded this is normally immediately evident and has effects on the properties of the material at the point of bending, e.g. on its strength. This would not be the case where the desired shape has been directly molded. Claim 1 as amended now includes within its caps having tabs which have been directly molded in the required shape without being subject to folding. This possibility would have been excluded by the wording of the patent as granted. This means that the scope of protection has been extended to cover subject-matter not previously protected, contrary to Article 123(3) EPC.

*Articles 84 and 123(2) EPC*

3. The appellant also argued that the amendments to claim 1 were not clear and extended the content of the patent beyond the content of the application as filed. Since the patent has to be revoked because the amendments to claim 1 do not comply with Article 123(3) EPC it is not necessary for the Board to decide upon the grounds under Articles 84 and 123(2) EPC.

*Reimbursement of the appeal fee*

- 4.1 The appellant raised, amongst other grounds, the ground of Article 100(c) EPC in his grounds for opposition. According to the minutes of the oral proceedings before the Opposition Division the feature against which this

ground was directed was discussed under Article 123(2) EPC. During the oral proceedings the Opposition Division informed the parties that they were of the opinion that claim 1 in its amended form complied with Article 123(2) EPC. The subsequent written grounds for the decision of the Opposition Division, although treating amendments to the patent under Article 123(2) EPC, did not contain any discussion of the feature that had been the subject of the ground under Article 100(c) EPC.

- 4.2 In the opinion of the Board the Opposition Division took account of the ground of opposition under Article 100(c) when coming to their opinion in the oral proceedings regarding Article 123(2) EPC. This emerges from the fact that the minutes of the oral proceedings specifically mention the disputed feature, albeit under Article 123(2) EPC which has the same content as Article 100(c). This mention indicates that the feature was not ignored in the considerations of the Opposition Division. Indeed, in the communication accompanying the invitation to oral proceedings the Division expressed an opinion on the ground (see point 4 of communication date 22 February 2000). However, the division failed to give their written reasons regarding this ground.

In the opinion of the Board however this failure to give the written reasons does not in this instance constitute a substantial procedural violation. There is no doubt that the Opposition Division considered the ground, nor is there any doubt that the appellant was able to give his arguments on the ground, both in the written and in the oral proceedings. Thus, the appellant's right to be heard under Article 113(1) EPC has not been infringed. There remains the lack of

reasons in the decision. The reasons for a decision serve on the one hand to allow the parties to see why a decision was arrived at, i.e. transparency, and on the other hand to allow a party who wishes to appeal to explain to a Board of Appeal why the decision comes to a wrong conclusion. In the present case the point of view of the Division had already been indicated in the invitation to oral proceedings so that the reasons why the Division came to the decision were apparent. Moreover, as already indicated above in the opinion of the Board the present appeal does not succeed on the basis of the ground under Article 100(c) EPC.

- 4.3 In the opinion of the Board therefore there has been no substantial procedural violation which would justify a reimbursement of the appeal fee in accordance with Rule 67 EPC.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for the reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

D. Spigarelli

A. Burkhart