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D E C I S I O N
of 22 July 2004

Case Number: T 0146/02 - 3.2.5

Application Number: 90312858.5

Publication Number: 0445465

IPC: B29C 49/00

Language of the proceedings: EN

Title of invention:

Refillable polyester container and preform for forming the same

Patentee:

CONTINENTAL PET TECHNOLOGIES, INC.

Opponents:

Rexam AB
PEPSICO, Inc.

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Extension beyond the content of the application as filed
(yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 0146/02 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 22 July 2004

Appellant: PEPSICO, Inc.
(Opponent 02) 700 Anderson Hill Road
Purchase, New York 10577 (US)

Representative: Körber, Wolfhart, Dr. rer.nat.
Patentanwälte Mitscherlich & Partner
Sonnenstrasse 33
D-80331 München (DE)

Respondent: CONTINENTAL PET TECHNOLOGIES, INC.
(Proprietor of the patent) 7310 Turfway Road
Suite 490
Florence KY 41042 (US)

Representative: Jenkins, Peter David
PAGE WHITE & FARRER
54 Doughty Street
London WC1N 2LS (GB)

Party as of right: Rexam AB
(Opponent 01) Box 836
S-201 80 Malmö (SE)

Representative: Rostovanyi, Peter
AWAPATENT AB,
Box 5117
S-200 71 Malmö (SE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
12 December 2001 concerning maintenance of
European patent No. 0445465 in amended form.

Composition of the Board:

Chairman: W. Moser
Members: W. Widmeier
H. M. Schram

Summary of Facts and Submissions

- I. The appellant (opponent 02) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent No. 0 445 465 in amended form.

The Opposition Division held that the grounds of opposition based on Articles 100(a) EPC (lack of novelty and lack of inventive step), 100(b) EPC and 100(c) EPC did not prejudice the maintenance of the patent in amended form.

- II. Oral proceedings were held before the Board of Appeal on 22 July 2004.

- III. The appellant and the other party (opponent 01) requested that the decision under appeal be set aside and that the European patent No. 0 445 465 be revoked in its entirety.

The respondent (patent proprietor) requested that the appeal be dismissed.

- IV. Claim 1 of the patent in suit as maintained by the Opposition Division reads as follows:

"1. A preform (10) for use in blow molding a container suitable for refilling, the preform (10) being an injection molded polyester member having:
a closed bottom end and an open top end, a neck finish (12) at the open top end, an elongated body-forming portion (20) which on blow molding will form a body of the container, a shoulder-forming portion (18) disposed

between the neck finish (12) and the body-forming portion (20) and which on blow molding will form a shoulder of the container, the shoulder-forming portion (18) tapering in increasing wall thickness from the neck finish (12) to the body forming portion (20), and a base forming portion (22) which on blow molding will form a base of the container, the base-forming portion having a generally hemispherical outer surface (26) at the closed bottom end and a thickened portion between the bottom end and the body forming portion (20), the thickened portion having an increased wall thickness as compared to the wall thickness of the body-forming portion (20), characterised in that the base-forming portion (22) has a generally hemispherical inner surface (28) at the bottom end and the thickened portion has an upper cylindrical portion of the increased wall thickness and a lower tapered portion which gradually reduces in wall thickness towards the bottom end."

V. The appellant and the other party argued essentially as follows:

In the application as filed, the thickness of the preform wall decreases from the lower end of the cylindrical portion until the end of the bottom portion of the preform, thus it decreases in particular in the hemispherical portion of the bottom portion of the preform (cf. claim 1 as filed). The thickness of the preform wall thus decreases, as shown in Figure 7 and explained in column 4, lines 24 to 28 of the application as filed (published version), from position S until position T of the preform. However, claim 1 of the patent in suit as maintained by the Opposition

Division leaves it open whether the thickness of the hemispherical portion of the preform tapers towards the bottom end. This claim therefore covers embodiments having a constant wall thickness in the hemispherical bottom portion or even having an increasing wall thickness towards the bottom end. Such embodiments are not disclosed in the application as filed. Consequently, the subject-matter of claim 1 of the patent in suit is not in accordance with Article 123(2) EPC.

VI. The respondent argued essentially as follows:

Claim 1 is to be interpreted such that the portion of decreasing wall thickness of the preform is from the lower end of the cylindrical portion of the base forming portion, designated in Figure 7 as position S, to the beginning of the hemispherical portion of the bottom end. Thus, the hemispherical portion does not necessarily have a decreasing wall thickness. This is in accordance with the application as filed where in Figure 7 a distinction is made between a tapered portion below the cylindrical portion and a hemispherical portion below this tapered portion. The passage in column 4, lines 29 to 33 of the application as filed (published version) is to be understood as a reference to a preferred embodiment having a decreasing wall thickness also in the hemispherical portion. Thus, the subject-matter of claim 1 of the patent in suit does not extend beyond the content of the application as filed.

Reasons for the Decision

1. Claim 1 of the application as filed defines a preform with a bottom having a generally hemispherical inner and outer surface with the wall thickness of said bottom gradually reducing in thickness towards the closed end. This implies that the hemispherical portion of the bottom of the preform has a gradually reducing wall thickness. Column 4, lines 24 to 26 of the application as filed (published version) describes that "the diameter of the section ST gradually reduces so as to reduce the wall thickness of the section ST". The section ST is shown in Figure 7 of the application as filed with a gradually reducing wall thickness (except of the dome forming end portion). Column 4, lines 26 to 28 and Figure 7 of the application as filed (published version) show that the lower part of the section ST is of hemispherical configuration. This hemispherical configuration is described in detail in column 4, lines 29 to 33 of the application as filed (published version) with inner and outer hemispherical surfaces "having different centers so that there is a continued gradual decrease in wall thickness". This passage does not refer to a preferred embodiment. It refers to further features of the preform, because it is linked to the previous text by "furthermore" rather than "preferably". In the absence of any other disclosure as to the wall thickness of the hemispherical portion, the application as filed exclusively supports a hemispherical portion with a gradually reducing wall thickness towards the bottom end.

2. Claim 1 of the patent in suit as maintained by the Opposition Division specifies in its preamble that the base-forming portion has a portion with a generally hemispherical outer surface and a thickened portion. In its characterising portion claim 1 specifies that the base-forming portion "has a generally hemispherical inner surface (28) at the bottom end" and that "the thickened portion has an upper cylindrical portion of the increased wall thickness and a lower tapered portion which gradually reduces in wall thickness towards the bottom end". Thus, only the lower tapered portion of the thickened portion is defined to have a decreasing wall thickness. The wall thickness of the hemispherical portion is not specifically defined. The respondent admitted that the claim should not be construed to mean that the hemispherical portion is also tapered. The claim encompasses therefore embodiments having a hemispherical portion with a constant wall thickness or a decreasing or an increasing wall thickness towards the bottom end of the preform.

Consequently, the subject-matter of claim 1 of the patent in suit as maintained by the Opposition Division extends beyond the content of the application as filed and thus does not meet the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

P. Martorana

W. Moser