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

**Case Number:** T 1070/02 - 3.2.7

**Application Number:** 99850059.9

**Publication Number:** 0957030

**IPC:** B65D 1/44

**Language of the proceedings:** EN

**Title of invention:**  
Plastic container

**Applicant:**  
REXAM AB

**Opponent:**  
-

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54, 111(1)

**Keyword:**  
"Novelty (yes); remittal to first instance for further prosecution"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 1070/02 - 3.2.7

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.7  
of 22 July 2004

**Appellant:** REXAM AB  
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**Representative:** Rostovanyi, Peter  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 20 March 2002  
refusing European application No. 99850059.9  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** A. Burkhart  
**Members:** H. E. Felgenhauer  
E. Lachacinski

## Summary of Facts and Submissions

- I. The appellant (applicant) filed an appeal against the decision of the Examining Division refusing the European patent application No. 99 850 059.9

The Examining Division held that the subject-matter of claim 1 as filed with letter dated 24 August 2001 lacks novelty (Article 54 EPC) with respect to the plastic container according to document D2 (WO-A-97 03885). According to the decision under appeal the feature added to claim 1 in order to amend it, according to which "said grooves (9) make the container essentially retain its shape even if its dimensions change" explains a further function or effect of the grooves and does not in this case change the subject-matter of claim 1.

- II. The appellant requested that the decision under appeal be set aside and the case be remitted to the Examining Division for an examination with respect to inventive step,

(i) based on claims 1 to 11 filed with letter dated 24 August 2001 (main request);

(ii) based on claims 1 to 10 filed with the statement setting out the grounds of appeal (auxiliary request I);

(iii) based on claims 1 to 9 filed with the statement setting out the grounds of appeal (auxiliary request II);

(iv) Furthermore, as auxiliary request III, oral proceedings are requested.

III. The only prior art document referred to in the decision under appeal is document

D2: WO-A-97 03885.

Furthermore document

D1: EP-A-1 009 615

has been taken into consideration.

IV. Claim 1 underlying the decision under appeal, which corresponds to claim 1 according to the main request, reads as follows:

"1. A plastic container for thermally treatable liquid, comprising a body (1) whose side wall is formed with areas which are adapted to take up deformation as the volume of the container changes, wherein said areas for taking up deformations comprise elongate, expansion/contraction-compensating grooves (9) which are formed in the body (1) and which are directed in such manner that their projections on a plane, in which the centre axis (C) of the container is positioned, extend in the same direction as does said centre axis (C); wherein said grooves (9) make the container essentially retain its shape even if its dimensions change".

V. The appellant argued essentially as follows:

- (i) Claim 1 is directed to a container which essentially retains its shape even if its dimensions change as illustrated by figure 3 of the application. The prior art container referred to in Figure 2 has movable panels and is therefore without shape-retaining ability.
- (ii) The container according to document D2 does not essentially retain its shape due to the fact, that this container comprises panels which are movable, which thus can move temporarily outwardly to relieve an increase of pressure during the heating step of pasteurization and then return inwardly during cooling, and due to the fact that the panels are flexible.
- (iii) The panels according to document D2 move and vary their shapes in spite of the presence of ribs 164, which according to the contested decision are set equal to the grooves defined in claim 1 of the application. Since in the container according to document D2 the panels are intended to move, the ribs cannot have the function of retaining the shape of the container.
- (iv) The subject-matter of claim 1 is likewise novel with respect to the container according to document D1. This container

comprises ribs which are substantially eliminated after filling and thus do not have the function to make the container to essentially retain its shape.

## **Reasons for the Decision**

### 1. *Subject-matter of claim 1*

Claim 1 is directed to a plastic container comprising a body whose side wall is

(a) formed with areas which are adapted to take up deformation as the volume of the container changes,

wherein said areas for taking up deformation

(b) comprise elongate, expansion/contraction-compensating grooves which are formed in the body and which

(c) are directed in such manner that their projections on a plane, in which the centre axis of the container is positioned, extend in the same direction as does said centre axis (C); wherein

(d) said grooves make the container essentially retain its shape even if its dimensions change.

Claim 1 thus essentially defines a container which comprises areas to take up deformation as the volume, and thus the dimensions of the container, change (feature (a)), the type of these areas as being grooves

(features (b) and (c)) and the manner in which these grooves function to take up deformation (feature (d)).

In this context feature (d) defines the manner in which, as defined by features (a) and (b), deformation of the container is taken up. Seen from a different point of view the combination of features (a), (b) and (d) can be considered as constituting a more complex functional feature according to which deformation is taken up in the specific manner as defined by feature (d).

The assumption underlying the decision under appeal that the mere addition of a feature explaining a further function/effect of the grooves (feature (d)) does not in this case change the subject-matter of claim 1 (grounds, No. 1.1) can thus not be maintained.

In the decision under appeal no reason is given which would justify the allegation that in this particular case feature (d) can be excluded from consideration when the subject-matter of claim 1 is determined.

The Board considers that at present no reason is apparent which would justify feature (d) being considered as not changing the subject-matter of claim 1 in this particular case since, as indicated above, this feature clearly defines the condition or constraint under which another function defined in claim 1 (features (a), (b)) is performed.

## 2. *Novelty*

According to the decision under appeal the subject-matter of claim 1 according to the main request lacks

novelty in view of the container according to document D2.

According to this decision (grounds, No. 2.1) grooves 164 of the known container are considered as being in a form in which they are in fact suitable for the use according to features (a) and (b). This assumption, for which no basis is given in the decision, is not supported by the disclosure of document D2. As pointed out by the appellant this document discloses a container with flexible panels which "accommodate both an increase and subsequent decrease in pressure during pasteurization" (page 1, lines 5 to 7), the panels thus having a function corresponding to the one according to features (a) and (b).

Such a function is not explicitly disclosed with respect to ribs 164, which according to document D2 can be provided optionally to stiffen the wall of the container between panels (page 2, lines 21 to 23). Due to the these ribs being provided optionally, panels being provided to accommodate pressure variations and due to the fact that the function disclosed with respect to the ribs is one to stiffen wall portions, it furthermore cannot be concluded that the function according to features (a) and (b) is implicitly disclosed for ribs 164.

The thus erroneous conclusion given in the decision under appeal, according to which the grooves are in a form in which they are in fact suitable for the stated use, appears to be based on the correct assumption that during a pressure variation acting on the container the grooves 164 - if present - will undergo some



deformation. Assessing novelty with respect to claim 1 however the inherent capacity of the grooves to deform must, next to panels as areas having the function according to feature (a), not be confused with the provision of grooves according to feature (b) which, according to feature (a), are adapted to take up deformations.

This applies even more taking into account that the grooves according to claim 1 are furthermore adapted to take up deformation in the specific manner defined by feature (d).

In this connection the Board finds it worth noting that, contrary to what appears to be derivable from the arguments of the appellant (cf. grounds of appeal, paragraph bridging pages 1, 2), the fact that the panels according to document D2 are movable as such, does not exclude that the function according to feature d) is performed since, as can be derived from figure 3 of the application, the grooves 9 defined in claim 1 appear to be movable as well. The manner in which these panels are movable (page 6, lines 19 to 28; page 7, lines 16 to 22; Figures 4, 6) is however one which is different from the one defined by feature (d) since this movement of the panels results in a different shape of the panels; accordingly the shallow central wall of each panel can adopt three positions, namely an initial position, an inwardly bowed one and an outwardly bowed one (cf. page 7, lines 16 to 22; Figures 4, 6).

For completeness sake it shall be indicated that likewise the container according to document D1, which

has been referred to in the communication of the Examining Division and in the grounds of appeal, does not disclose grooves according to features (a), (b) and (d). According to this document any wide-width ribs of a container, which exhibit creep under pressure are replaced by one or a plurality of scribe lines (cf. claim 1).

The subject-matter of claim 1 according to the main request is thus novel in the sense of Article 54 EPC.

3. Since according to the decision under appeal the application has been refused solely due to lack of novelty the Board considers it as appropriate to make use of the power conferred upon it by Article 111(1) EPC to remit the case to the first instance for further prosecution.

It is to be noted that further examination is not limited to one of inventive step, as might be concluded from the request of the appellant, but could, in case it applies, also comprise examination of other requirements of the EPC.

**Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

A. Burkhart