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D E C I S I O N
of 9 September 2005

Case Number: T 0673/04 - 3.2.5

Application Number: 92202075.5

Publication Number: 0511720

IPC: B29C 49/06

Language of the proceedings: EN

Title of invention:

Method for producing a hot fillable, collapse resistant polyester container

Patentee:

CONTINENTAL PET TECHNOLOGIES, INC.

Opponents:

Constar International Holland (Plastics) BV
Rexam AB

Headword:

-

Relevant legal provisions:

EPC Art. 100(c), 76

Keyword:

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

Decisions cited:

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Catchword:

-



Case Number: T 0673/04 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 9 September 2005

Appellant I: CONTINENTAL PET TECHNOLOGIES, INC.
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Appellant II: Constar International Holland (Plastics) BV
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Other Party: Rexam AB
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
16 March 2004 concerning maintenance of
European patent No. 0511720 in amended form.

Composition of the Board:

Chairman: W. Moser
Members: W. R. Zellhuber
H. M. Schram

Summary of Facts and Submissions

I. Appellant I (patent proprietor) and appellant II (opponent 01) both lodged an appeal against the decision of the Opposition Division maintaining the European patent No. 0 511 720 in amended form.

The patent in suit was filed as a divisional application of the European Patent application EP-A 0 200 564 (hereinafter called "earlier application").

II. The Opposition Division held that the grounds for opposition submitted by appellant II and the other party (opponent 02) under Article 100(a) EPC (lack of novelty, Article 54 EPC, and lack of inventive step, Article 56 EPC), Article 100(b) and Article 100(c) EPC (extension beyond the content of the earlier application as filed, Article 76 EPC) did not prejudice the maintenance of the patent in suit as amended.

III. Appellant I requested that the decision under appeal be set aside and that the patent in suit be maintained on the basis of the following documents:

- (i) main request: claims 1 to 28 as granted; or
- (ii) first auxiliary request: claims 1 to 26 and 28 filed as first auxiliary request on 12 July 2004; or
- (iii) second auxiliary request: claims 1 to 27 filed as second auxiliary request on 12 July 2004.

As an auxiliary request, appellant I further requested oral proceedings.

- IV. Appellant II and the other party requested that the decision under appeal be set aside and that the patent in suit be revoked in its entirety.

Appellant II further requested that the appeal of appellant I be rejected as inadmissible because it had not been properly substantiated. In addition, appellant II requested oral proceedings as an auxiliary measure.

- V. Claim 13 according to the main request reads as follows:

"13. A thermal collapse-resistant highly oriented polyester container (52) suitable for use in hot fill applications, the container (52) having been stretch blow moulded from a preform (26), the container (52) including a finish portion (58), a container body portion having a sidewall (56), and a base portion (54), characterised in that the sidewall density of the container (52) is from 1.350 to substantially but less than 1.370 grams/cubic centimeter, which density corresponds to 14 to 30% crystallinity, and the stretch ratio of the sidewall (56) is greater than 8 to 1 but less than 12 to 1."

Claim 12 of the first auxiliary request and claim 12 of the second auxiliary request also concern a thermal collapse-resistant highly oriented polyester container; these claims include the last feature of claim 13 according to the main request, viz. "... the stretch

ratio of the sidewall (56) is greater than 8 to 1 but less than 12 to 1".

- VI. By a communication dated 17 March 2005, annexed to the summons to attend oral proceedings on 21 June 2005, the Board made mention that, as regards the requirements of Article 76 EPC, it appeared that the feature of claim 13 of the main request "...and the stretch ratio of the sidewall (56) is greater than 8 to 1 but less than 12 to 1" was not disclosed in the earlier application as filed.

Since this objection appeared to apply also to claim 12 of the first and second auxiliary requests, neither of the requests of appellant I appeared to be allowable.

- VII. On 20 May 2005, the representative of appellant I informed the Board that he would not attend the oral proceedings and requested a decision based on the written proceedings.

By a communication dated 1 June 2005, the Board informed the parties that, in accordance with the established jurisprudence of the boards of appeal, such a statement was to be treated as equivalent to a withdrawal of the auxiliary request of appellant I for oral proceedings, and notified the parties that the oral proceedings due to take place on 21 June 2005 had been cancelled.

Reasons for the Decision

1. *Admissibility of the appeals*

The appeal of appellant II was filed in accordance with the requirements of Articles 107 and 108 EPC and is thus admissible, which, in fact, was not in dispute.

The appeal of appellant I also was filed in accordance with the requirements of Articles 107 and 108 EPC and is thus admissible. In the Board's judgement, in the statement setting out the grounds for appeal, the grounds why, in appellant's I view, the decision under appeal was incorrect were specified and adequately substantiated.

2. *Extension (Article 100(c) EPC)*

The subject-matter of the patent in suit must not extend beyond the content of the earlier application as filed (Article 100(c) EPC in connection with Article 76 EPC).

2.1 Claim 13 of the main request, as well as claim 12 of the first and second auxiliary requests, respectively, concern a thermal collapse-resistant highly oriented polyester container characterized *inter alia* in that "... the stretch ratio of the sidewall (56) is greater than 8 to 1 but less than 12 to 1".

The earlier application as filed, which does not comprise any claims directed to a container, refers to a range of a draw or stretch ratio in the passage on

page 17, lines 4 to 9 (published version) and in claim 4.

- 2.2 On page 17, lines 4 to 9 (published version), the earlier application as filed makes mention of the following: "Figure 13, for example, shows how strain induced crystallization raises the density of polyester to a maximum level somewhat less than 1.37 g/cm^3 at a total draw ratio greater than 8 to 1 but less than 12 to 1 for typical polyester".

In the Board's judgement, that general statement does not imply that, in particular, the stretch ratio of the side wall of the container for which protection is sought should be greater than 8 to 1 but less than 12 to 1.

- 2.3 Claim 4 of the earlier application as filed is directed to a method of forming a container wherein "the total wall draw ratio is in the range of 8-10 to 1."

Accordingly, claim 4 does not disclose a stretch ratio of the side wall of the container either.

- 2.4 Since the earlier application as filed does not contain any further passages from which it could be deduced that the stretch ratio of the sidewall of the container should be greater than 8 to 1 but less than 12 to 1, the subject-matter of claim 13 according to the main request as well as the subject-matter of claim 12 according to the first and second auxiliary requests, respectively, extends beyond the content of the earlier application as filed.

The ground for opposition mentioned in Article 100(c) EPC thus prejudices the maintenance of the patent in suit.

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:

M. Dainese

W. Moser