

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 20 February 2008**

Case Number: T 0544/06 - 3.2.07

Application Number: 00910877.0

Publication Number: 1186546

IPC: B65D 41/34

Language of the proceedings: EN

Title of invention:
Bottle closing device

Patentee:
Saint-Gobain Calmar, S.A.

Opponent:
Valois S.A.S.

Headword:

-

Relevant legal provisions:
EPC Art. 54, 56, 84, 123(2)

Keyword:
"Novelty - yes"
"Inventive step - no (main request and second and third
auxiliary request)"
"Inventive step - yes (fourth auxiliary request)"
"Added subject-matter - yes (first auxiliary request)"
"Clarity - not a ground of opposition"

Decisions cited:
G 0001/03

Catchword:

-



Case Number: T 0544/06 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 20 February 2008

Appellant: Valois S.A.S.
(Opponent) Le Prieuré
F-27110 Le Neubourg (FR)

Representative: Kohler, Pierre
CAPRI
33, rue de Naples
F-75008 Paris (FR)

Respondent: Saint-Gobain Calmar, S.A.
(Patent Proprietor) Via Trajana 25
E-08020 Barcelona (ES)

Representative: Curell Aguilà, Marcelino
Dr. Ing. M. Curell Sunol I.I. S.L.
Agentes de Propriedad Industrial
Passeig de Gracia, 65 bis
E-08008 Barcelona (ES)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 9 February 2006
rejecting the opposition filed against European
patent No. 1186546 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
I. Beckedorf

Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 1 186 546 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division rejected the opposition. It held that the subject-matter of claim 1 of the patent as granted was novel and involved an inventive step.

- II. The appellant (opponent) filed an appeal against that decision.

- III. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed and that the patent be maintained unamended (main request). Alternatively, the respondent requested that the decision under appeal should be set aside and the patent be maintained in amended form in accordance with the first auxiliary request filed with letter of 16 January 2008, the second auxiliary request filed during the oral proceedings on 20 February 2008, the third auxiliary request filed with said letter of 16 January 2008, the fourth auxiliary request filed during said oral proceedings, or the fifth auxiliary request also filed during said oral proceedings.

- IV. The independent claim of the patent as granted (main request) reads as follows:

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a

longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13), generally parallel to said upper edge (7) in said mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion (13) and which are provided with an inner surface (23), close to said neck (5) in said mounted position, an outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43) so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion (43)."

The independent claim of the first auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13),

generally parallel to said upper edge (7) in said mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion (13) and which are provided with an inner surface (23), close to said neck (5) in said mounted position, an outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43) so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion (43) **so that through said two first protuberances (41) and said projecting portion (43) a leaf spring effect in the transverse direction on the tabs (21) is generated.**"

The independent claim of the second auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13), generally parallel to said upper edge (7) in said

mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion (13) and which are provided with an inner surface (23), close to said neck (5) in said mounted position, an outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43), **positioned between said two protuberances**, so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion (43)."

The independent claim of the third auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13), generally parallel to said upper edge (7) in said mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion

(13) and which are provided with an inner surface (23), close to said neck (5) in said mounted position, an outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43) so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion (43), **and wherein said inner surface (23) is provided with a recessed portion (44) corresponding with said projecting portion (43).**"

The independent claim of the fourth auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13), generally parallel to said upper edge (7) in said mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion (13) and which are provided with an inner surface (23), close to said neck (5) in said mounted position, an

outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43), **wherein said projecting portion (43) is substantially centred between both lateral surfaces (27)**, so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion (43) **so that through said two first protuberances (41) and said projecting portion (43) a leaf spring effect in the transverse direction on the tabs is generated.**"

The independent claim of the fifth auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A device for stopping bottles, having a neck (5) with an outer annular rim (9), said neck (5) defining a longitudinal axis (11) and an upper edge (7), said device being adapted to take on a mounted position on said neck (5) and said device comprising: [a] a main body (1), which comprises an annular portion (13), generally parallel to said upper edge (7) in said mounted position, said annular portion (13) having an outer edge region (19) and tabs (21) which are attached to said outer edge region (19) of said annular portion (13) and which are provided with an inner surface (23),

close to said neck (5) in said mounted position, an outer surface (25), opposite to said inner surface (23), lateral surfaces (27) and a lower surface (29), and [b] a sleeve member (3), with a hollow substantially cylindrical portion (39), said substantially cylindrical portion (39) being adapted to be placed over said tabs (21), characterized in that each of said tabs (21) is provided with two first protuberances (41) projecting from said inner surface (23) and which are adjacent said lateral surfaces (27), and wherein said outer surface (25) is provided with a projecting portion (43), **wherein said projecting portion (43) is substantially centred between both lateral surfaces (27) and wherein said projecting portion (43) forms a convex surface which starts from an intermediate point of said outer surface (25) and extends away from said outer edge region (19) and from said longitudinal axis (11)**, so that said cylindrical portion (39) pushes said tabs (21) against said outer annular rim (9) through said projecting portion(43)."

V. The documents cited in the present decision are the following:

D1: US-A-5 562 219

D2: US-A-4 773 553

D4: US-A-2 723 773

VI. The arguments of the appellant may be summarised as follows:

- (i) The subject-matter of claim 1 of the main request lacks novelty. In particular, D1 shows the features whereby (a) each of said tabs is provided

with two first protuberances projecting from said inner surface and which are adjacent said lateral surfaces, and (b) said outer surface is provided with a projecting portion so that said cylindrical portion pushes said tabs against said outer annular rim through said projecting portion.

D1 shows a tab with two protuberances on the lower end adjacent the lateral surfaces. In addition there is a third centrally positioned protuberance and a wall portion connecting the three protuberances. Claim 1, however, does not exclude these extra features.

Figure 3 of D1 in fact does not correspond to reality. D1 is an application filed by the appellant and in reality the tabs are not as shown in figure 3 but are of such a length that before the sleeve pushing the tabs against the outer annular rim of the neck is lowered they curve outwardly to form projecting portions. This could not be shown properly in figure 3 because of infringement problems with the proprietor of D2.

- (ii) The subject-matter of claim 1 of the main request lacks an inventive step. There is no leaf spring effect specified in claim 1 so that any arguments based on this effect made by the respondent are not based on the features of the claim. Moreover, the position of the projecting portion could be such that no leaf spring effect would be achieved, as was admitted by the respondent. In any case a leaf spring effect is not possible since the main body becomes so squashed when the sleeve is put in

place that no effect can occur. The claim does not provide the features which solve the problem of sealing which is the real problem to be solved in this technical area. The features of the claim only solve a problem of fixation. In any case the feature of claim 1 which is not disclosed in D1 is disclosed in D4 and it would be obvious for the skilled person to combine the teaching of these documents.

(iii) The amendment to claim 1 of the first auxiliary request does not comply *inter alia* with Article 123(2) EPC since there is no such general disclosure of the leaf spring effect, as presently claimed.

(iv) Claim 1 of the second auxiliary request lacks clarity. The claim states that the cylindrical portion pushes the tabs via the projecting portion. This could not, however, happen in practice.

The subject-matter of claim 1 of the second auxiliary request lacks an inventive step. The projecting portion on the outer surface of the tabs disclosed in D4 extends between the protuberances on the inside of the tabs as disclosed in D4 so that it would extend between the protuberances in the tab of D1 when the teaching of D4 is applied to the device disclosed in D1.

(v) Claim 1 of the third auxiliary request is not clear. The subject-matter of the claim also lacks an inventive step since D1 discloses the extra

features which the claim contains compared to claim 1 of the main request.

- (vi) The subject-matter of claim 1 of the fourth auxiliary request does not involve an inventive step. The projecting portion on the outer surface of the tabs as disclosed in D4 is positioned between the protuberances on the inner surface of the tabs and the claimed leaf spring effect is just a desired effect and hence is not a technical feature.

VII. The arguments of the respondent may be summarised as follows:

- (i) The subject-matter of claim 1 of the main request is novel. D1 does not show the features whereby (a) each of said tabs is provided with two first protuberances projecting from said inner surface and which are adjacent said lateral surfaces, and (b) said outer surface is provided with a projecting portion so that said cylindrical portion pushes said tabs against said outer annular rim through said projecting portion.

D1 shows a tab with a single projection on its inner surface which has two recesses formed therein. When identifying the number of projections the tab must be considered when viewed from the direction of the bottle and from that direction there is only one protuberance. D1 therefore does not disclose feature (a).

The arguments of the appellant concerning the correctness of the figure 3 of D1 are not relevant since it is only the actual disclosure of D1 which is relevant and that does not show any projecting portion on the outer surface. D1 therefore does not disclose feature (b).

- (ii) The subject-matter of claim 1 of the main request involves an inventive step. The distinguishing feature (b) of claim 1 solves the problem of fixing the main body of the device to bottles which have a neck which may not be exactly circular but may have some ovalness. The problem is solved because the raised projecting portion on the outer surface of the tabs produces a leaf spring effect on the inner protuberances which corrects for the imperfections in the rim of the bottle neck.

It is correct that the claim includes possibilities which do not solve this problem. However, in accordance with G 1/03 (OJ EPO 2004, 413) embodiments which do not work should be ignored. The projecting portion on the outer face of the tabs which is disclosed in D4 does not produce a transverse leaf spring effect. There is also no reason why the skilled person would combine the teachings of D1 and D4.

- (iii) The amendment to claim 1 of the first auxiliary request complies with Article 123(2) EPC. Page 3, lines 13 to 28 of the application as originally filed explains just one way of obtaining the leaf spring effect and there is no limitation to just

one way of achieving the effect so that a general reference to the effect in the claim is justified.

- (iv) Claim 1 of the second auxiliary request is clear. In practice the tabs actually are pushed against the outer rim of the bottle neck to compensate for variations in ovalness. The subject-matter of the claim also involves an inventive step. The expression "between said two first protuberances" does not mean "over the protuberances" so that a leaf spring effect would always be obtained, which is not obvious.
- (v) Claim 1 of the third auxiliary request is clear. The subject-matter of the claim also involves an inventive step since the extra feature of this claim compared to claim 1 of the main request is not disclosed in D1 which has no recessed portion on the inner surface, and its provision is not obvious.
- (vi) The subject-matter of claim 1 of the fourth auxiliary request involves an inventive step. The extra features of this claim compared to claim 1 of the main request are not to be found in either D1 or D4 and there is no hint in the prior art to provide them.

Reasons for the Decision

Main request

1. *Novelty*

1.1 The respondent argued that claim 1 lacks novelty in view of D1. The discussion of lack of novelty over D1 centred on two features, namely: (a) each of the tabs is provided with two first protuberances projecting from the inner surface and which are adjacent the lateral surfaces, and (b) the outer surface is provided with a projecting portion so that the cylindrical portion of the sleeve pushes said tabs against the outer annular rim through the projecting portion.

1.2 With regard to feature (a) the question to be decided is whether the catch 13 at the end of tab 12 of D1 can be considered to correspond to this feature.

According to the respondent this catch comprises a single protuberance which is provided with two recesses.

According to the appellant this feature comprises three protuberances linked to each other at their extremities by a connecting wall portion. The appellant argued that claim 1 did not exclude the presence of an extra protuberance and a connecting wall portion. The respondent agreed that claim 1 allowed an extra protuberance but disagreed that it allowed a connecting wall portion as this would create a single protuberance as viewed from the direction of the bottle.

1.2.1 In the view of the Board the form of the catch disclosed in D1 can be considered to be either: three protuberances linked along their extremities by a wall portion, of which two protuberances are adjacent to the lateral surfaces; or a single protuberance with a pair of recesses therein. Both descriptions are valid since both define the same actual form. The difference between the descriptions lies only in the manner of describing the feature, i.e. indicating individual parts, or indicating an overall form and then specifying the parts which are removed, i.e. the recesses.

Since both descriptions are valid it is acceptable to apply either description. When the first description is taken then this means that D1 discloses the feature (a) and in addition a central inwardly directed protuberance and a wall portion connecting the extremities of the protuberances. The respondent accepted that claim 1 does not exclude such a central inwardly directed protuberance and the Board agrees with this. The respondent, however, argues that claim 1 excludes a connecting wall portion.

The Board does not agree with the respondent in this respect. The claim states: "...said device comprising...". By this wording the claim specifies which features must be present but does not exclude the presence of any further features. This means that the presence of a wall portion is not excluded. The Board cannot agree with the argument of the respondent that as seen from the direction of the bottle there is only one protuberance. The claim does not define the protuberances from a particular direction of viewing but rather defines them in relation to the inner surface of the tab. Since there

are two lateral protuberances projecting from the inner surface of the tab disclosed in D1 the fact that a wall portion links their extremities cannot change this. The Board concludes therefore that feature (a) is disclosed in D1.

1.3 With respect to feature (b) the appellant explained that it was the applicant for D1 and that in reality the figure 3 of the document (which does not show a projecting portion on the outside surface) was wrong and this had been drawn deliberately wrongly at the time of drafting D1 to avoid conflict with D2. According to the appellant the end of the tab in reality was arranged so that it did not quite snap fit over the rim of the bottle but was left pushed out, at an angle to the bottle neck axis. This was to enable a stress in the longitudinal direction to be created when the securing hoop or sleeve was moved over the tabs. This meant that before the hoop was moved downwards the tabs curved outwardly, such that their lower ends formed projecting portions.

1.3.1 The Board cannot accept this argument of the appellant. The skilled person will read D1 as it is written. There is nothing to suggest to the skilled person that figure 3 of D1 is wrong. The tabs are described as forming a snap-fastening means (see column 6, lines 59 to 62) and that is what is shown in figure 3. Even if the argument of the appellant had been accepted D1 still would not disclose feature (b) since the outer surface would have no projecting portion. The outer surface would merely be curved which is not the same as having a portion projecting from the surface. The Board concludes therefore that feature (b) is not disclosed in D1.

1.4 Therefore, the subject-matter of claim 1 of the main request is novel in the sense of Article 54 EPC.

2. *Inventive step*

2.1 The parties agreed that for the discussion of inventive step the closest prior art is represented by D1 which discloses all the features of claim 1 except for feature (b) as explained in point 1 above.

The provision of a projecting portion on the outer surface of the tab solves the problem of increasing the security of the attachment of the main body of the bottle stopping device to the bottle rim.

This problem is already solved in D4. D4 provides a projecting portion 25b on the outer surface of the tab. One of the purposes of this projection is to press the inner protuberance (rib 2a) more tightly against the rim of the bottle neck (see column 3, lines 29 to 37). It is hence obvious for the skilled person to choose this known solution to the problem. There is no technical impediment against the skilled person providing this feature on the outer surface of the tab of D1.

2.2 The respondent argued that the tab arrangement of D4 did not produce the leaf spring effect. The Board notes, however, that neither this effect nor the technical features necessary to obtain it are mentioned in claim 1 of the main request. This argument therefore need not be considered further.

2.3 The respondent referred to G 1/03 (*supra*) to support its argument that non-working solutions could be ignored. In the present case when the raised portion on the outer surface is directly opposite one of the protuberances a leaf spring effect is excluded.

In the said decision, however, it is only "a feature without a technical meaning" which the Enlarged Board considered would not restrict the scope of a claim (see decision reasons point 2, second paragraph, last sentence). That is therefore quite a different situation to the present one where the feature has a clear technical meaning and effect, i.e. the raised portion presses the main body tabs inwards against the bottle, though it may not in all positions have a particularly desired technical effect. Since the feature always has a technical meaning it cannot be discounted when it does not have the desired effect.

2.4 Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC.

First auxiliary request

3. *Article 123(2) EPC*

3.1 The amendment to claim 1 of this request compared to claim 1 of the main request essentially adds the transverse leaf spring effect as a functional feature of claim 1. The leaf spring effect is mentioned in the application as originally filed on page 3, lines 13 to 28. It is explained there that when the distance between the apex of the projection portion and the first

protuberance is approximately equal to half the width of the tab a leaf spring effect is obtained. The leaf spring effect is also mentioned on page 5, lines 7 to 13 which refers to the preceding mention of the effect when describing the shape of the second protuberance, i.e. the projecting portion. On page 9, lines 2 to 9 an implicit reference is made to the leaf spring effect in connection with figure 16 wherein the curvature of the tab due to pressure of the sleeve on the projecting portion is described. In this case the projecting portion is positioned centrally.

From the above it emerges that both the explicit and the implicit disclosures of the leaf spring effect explicitly or implicitly indicate that the effect is derived from the central location of the projecting portion. Claim 1 of this request does not include any limitation as to the position of the projecting portion so that the claim as amended includes the leaf spring effect occurring without any limitation as to the position of the projecting portion. Such an unlimited disclosure of the leaf spring effect is not, however, to be found in the application as originally filed.

- 3.2 The Board concludes therefore that claim 1 as amended according to this request does not comply with Article 123(2) EPC.

Second auxiliary request

4. *Clarity*

- 4.1 The appellant argued that in reality the projecting portion does not push the tabs against the outer rim of

the bottle neck through the projection portion because the main body becomes completely squashed in use. This part of the claim, however, was already contained in claim 1 of the patent as granted. Clarity is not a ground of opposition so that it is not open for the appellant to attack this part of the claim on this ground.

4.2 The Board therefore rejects the arguments of the appellant regarding lack of clarity.

5. *Inventive step*

5.1 Compared to claim 1 of the main request claim 1 of this request contains the extra feature that the projecting portion is positioned between the two first protuberances.

The positioning of the projecting portion between the protuberances does not, however, necessarily produce the desired leaf spring effect since the central position as referred to in the description is not mentioned in claim 1 and the width of the protrusion is not specified so that the effect may not occur. In this respect the description of the patent makes it clear that the projecting portion is positioned centrally in order to obtain the effect (see paragraph [0010]).

5.2 The skilled person considering the application of the teaching of D4 to the device of D1 and knowing that it is intended that the inner protuberance 25a at the end of the tab should be pressed inwardly as best as possible would also consider placing the projection portion 25b at the end of the tab of D1. This would

automatically mean that it would be positioned between the protuberances of that tab.

- 5.3 Therefore, the subject-matter of claim 1 of the second auxiliary request does not involve an inventive step in the sense of Article 56 EPC.

Third auxiliary request

6. *Clarity*

The appellant raised the objection of lack of clarity of the amendments made to claim 1 of this request compared to claim 1 of the main request. It is not, however, necessary to consider this objection here as the request is not allowable for other reasons as is explained below.

7. *Inventive step*

- 7.1 Compared to claim 1 of the main request claim 1 of this request contains the extra feature that the inner surface is provided with a recessed portion corresponding with said projecting portion.

The Board notes that this claim does not specify the manner in which the recessed portion is "corresponding" with the projecting portion. It could just correspond in position and/or it could correspond in one or more dimensions. In the absence of an indication of the manner of the correspondence and of any effect resulting from the correspondence the provision of the feature must be considered to be one which comes within the normal design practice of the person skilled in the art. In this respect it should be noted that, as already

indicated above with respect to novelty of claim 1 of the main request, it is not excluded by the wording of the claim that there are more than two protuberances and that they may be connected by a wall portion, which would mean that the provision of a recess would have no effect, in particular it would not necessarily produce a leaf spring effect (which in any case is not claimed as a feature in claim 1).

- 7.2 Therefore, the subject-matter of claim 1 of the third auxiliary request does not involve an inventive step in the sense of Article 56 EPC.

Fourth auxiliary request

8. *Article 123(2) EPC*

8.1 The first extra feature (compared to claim 1 of the main request) of claim 1 of this request is that the projecting portion is substantially centred between both lateral surfaces. A basis for this amendment may be found in the application as originally filed on page 3, lines 29 to 30.

8.2 The second extra feature of claim 1 of this request is that the leaf spring effect is specified to be in the transverse direction. A basis for this amendment may be found in the application as originally filed on page 3, lines 17 to 23.

8.3 Also, these two features are disclosed in combination since the first feature is disclosed in the application as originally filed at the cited part of the description as being the projection which is explained in the

preceding paragraph as causing the leaf spring effect in the transverse direction.

8.4 The Board is therefore satisfied that the amendments to claim 1 of this request comply with Article 123(2) EPC. They further limit the subject-matter of claim 1 as granted, thus the requirements of Article 123(3) EPC are also fulfilled.

9. *Inventive step*

9.1 The features introduced into claim 1 of this request (compared to claim 1 of the main request) solve the problem of providing a fixing device which is capable of adapting itself to variations in the bottle dimensions, e.g. ovalness of the rim of the bottle neck, at the same time as it maintains pressure of the tabs against the bottle neck rim (see column 1, line 54 to column 2, line 8 of the patent in suit).

9.2 The appellant argued that the tabs are so squashed in use that no effect can arise. The appellant offered no proof to support this allegation so that it may be discounted.

9.3 In D4 the projecting portion 15b on the outer surface is positioned away from the extremity of the tab where there is a protuberance 25a on the inner surface. This positioning results in a leaf spring effect in the longitudinal direction. It has been indicated above that when applying the teaching of D4 to the device of D1 the skilled person would consider moving the projecting portion to the extremity of the tab. Such a move does not, however, produce a transverse leaf spring effect

when it is applied to the device of D1 since the presence of the wall portion connecting the protuberances on the inner surface of the tab of D1 means that the protuberances are held together and cannot flex such as to produce that leaf spring effect. In order to produce a leaf spring effect it is necessary to remove the wall portion and ensure that the central protuberance extends away from the inner surface to a lesser extent than the lateral protuberances do. There is nothing in either D1 or D4 to suggest carrying out such a measure in addition to combining the teaching of these documents and changing the position of the projecting portion on the outer surface.

9.4 The appellant argued that the transverse leaf spring effect is not a feature but just a desire. The Board cannot agree with the appellant in this respect. The transverse leaf spring effect requires a certain arrangement of the projecting portion and protuberances, as presently claimed, in order that the effect is achieved. The feature therefore has structural implications which means that it is more than just a desire.

9.5 Therefore, the subject-matter of claim 1 of the fourth auxiliary request involves an inventive step in the sense of Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent on the basis of the following:
 - claims 1 - 13 filed as auxiliary request 4 during the oral proceedings;
 - description pages 2, replacement pages 2a and 3 as filed in the oral proceedings and description pages 4 and 5 as granted;
 - figures 1 - 21 as granted.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders