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**Datasheet for the decision
of 8 July 2008**

Case Number: T 1355/06 - 3.2.07

Application Number: 94304050.1

Publication Number: 0629558

IPC: B65D 21/02

Language of the proceedings: EN

Title of invention:
Stackable container

Patentee:
MACROPLASTICS, INC.

Opponent:
ARCA Systems AB

Headword:

-

Relevant legal provisions:
EPC Art. 56, 100(c)

Relevant legal provisions (EPC 1973):

-

Keyword:
"Added subject-matter - (no)"
"Inventive step - (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 1355/06 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 8 July 2008

Appellant: ARCA Systems AB
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
30 June 2006 concerning maintenance of European
patent No. 0629558 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
E. Dufrasne

Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 0 629 558 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(c) EPC (added subject-matter).

The opposition division decided to maintain the patent in amended form based on the auxiliary request. It held that the subject-matter of claim 9 of the main request contravened Article 123(2) EPC, but that the subject-matter of claim 1 of the auxiliary request (claim 1 of patent as granted) did not contravene Article 123(2) EPC, was novel and involved an inventive step. In the auxiliary request claims 9 to 11 as granted were deleted.

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

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

The respondent (proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of the auxiliary requests 1 or 2, filed with letter dated 4 June 2008, or on the basis of the auxiliary request 3, filed during the oral proceedings before the Board on 8 July 2008.

- III. Claim 1 of the main request (the only request considered in this decision) which corresponds to claim 1 of the patent as granted and reads as follows:

"1. A container (10), the container having front (12), rear (14) and side (16, 18) sections formed with a bottom wall section (20) to form a containment volume, and having a plurality of corner portions; said front (12), rear (14) and side (16, 18) sections having an upper rim portion (32) with an inner edge, an outer edge and a top surface; the container being arranged to be stacked with other like containers; and the container being characterised by:
being a bulk container for use in the storage and transport of materials, and being arranged for lifting by a fork lift;
the upper rim portion (32) having a respective downwardly depending recess (80) associated with each of the upper corner portions; and
a respective nesting protrusion (78) extending downwardly from the bottom wall section (20) in association with each of the lower corner portions; each recess (80) extending through the inner edge and the outer edge of the upper rim portion (32) to form a gap therein, the recesses (80) providing a corresponding plurality of nesting recesses (80) formed in association with the upper corner portions so that two of said containers can be stacked with the nesting protrusions (78) of the upper container received by the nesting recesses (80) of the lower container with a substantially exclusive transfer of the vertical load through the corner portions of the lower container."

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

D1: EP-B-0 371 565

D2: GB-A-2 076 366

D3: US-A-3 680 735

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

- (i) The application as originally filed included the feature that the front, rear and side section were "integrally formed" with a bottom wall portion of the container in claim 1 as an essential feature of the invention so that the removal of the term "integrally" from the claim adds subject-matter. Although one of the other independent claims as originally filed (claim 15) did not include this expression it was dealing with a different aspect of the invention. This view is reinforced by the fact that all the embodiments of the invention have these sections integrally formed with a bottom wall portion.

Claim 1 as granted specifies that there is a recess in the upper rim portion which extends through the inner and outer edges thereof. The basis for this amendment is argued by the respondent to be the statement in the description that the rim portion is "broached". This term means "pierced" which does not necessarily mean that it passes all the way through. There is therefore no support in the application as originally filed for this amendment to claim 1.

- (ii) The subject-matter of claim 1 of the main request lacks an inventive step. D2 discloses all the features of claim 1 except the features that:

the upper rim portion has a respective downwardly depending recess associated with each of the upper corner portions;

a respective nesting protrusion extends downwardly from the bottom wall section in association with each of the lower corner portions; and

each recess extends through the inner edge and the outer edge of the upper rim portion to form a gap therein.

The provision of the recesses extending through the upper rim portion has no technical effect so that the problem to be solved is to find an alternative form of recess. To arrive at the features of claim 1 starting from D2 as the closest prior art the skilled person would remove the base strips 13 disclosed in D2 and use the corner feet 6 as protrusions whereby it would be necessary to cut away part of the top rim of the container at its corners in order to provide a recess for the feet acting as protrusions. In this respect the skilled person knows that the base strips 13 that are connected to the feet 6 are not essential features since they are only claimed in dependent claim 7 and hence the skilled person would dispense with them if necessary.

The skilled person would consult D1 which is in the same field. D1 discloses a container in which there are recesses in the corners of the upper rim portion which extend therethrough to form a gap. Also D3 discloses recesses in the corners of the

upper rim portion although in this case they do not extend all the way through. The skilled person would recognise that these recesses could be extended through the upper rim portion to form a gap.

Also starting from D3 the subject-matter of claim 1 is obvious to the skilled person when taking D2 into account.

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

- (i) In the application as originally filed it is nowhere stated that it is essential that the container should be integrally formed. The fact that independent claim 15 as originally filed did not include this feature shows that it was not essential to the invention. This feature is also not relevant to the problem to be solved.

The term "broach" implies passing all the way through. When a cask is broached it must be all the way through since otherwise the liquid contained therein could not get out. Since the recess passes all the way through the upper rim portion it must necessarily pass through the inner and outer edges. In the application as originally filed on page 7, lines 26 to 28 it is indicated that the drawings disclosed a broached rim and the drawings show a recess passing all the way through including through the inner and outer edges.

- (ii) The skilled person would have no reason to modify the structure of the container according to D2 in the manner suggested by the appellant. The modifications would result in the loss of a number of advantages of this container. In fact the problem to be solved is to find a more robust container.

The skilled person would have no reason to go to D1 to find a solution to the problem. First of all the container disclosed in D1 is not suitable for use with a fork lift. Moreover, in D1 the purpose of the recess in the upper surface of the corners is to allow it to receive a protrusion, which is in its lower surface, when stacked with a like container whereby the protrusion in its lower surface is provided to allow stacking with a further known type of container.

Also, there is no reason for the skilled person to consider D3 since the container disclosed therein is not suitable for use with fork lifts since it has handles.

Reasons for the Decision

- 1. *Article 100(c) EPC*
 - 1.1 The appellant argued that the application as originally filed disclosed the feature that the container was "integrally formed" as an essential feature which could not be deleted from claim 1 so that its absence from claim 1 of the patent as granted added subject-matter.

1.2 The application as originally filed describes a prior art integrally moulded container and the problems with such a container, see page 1, line 13 to page 3, line 2. On page 2, lines 19 to 23, it is mentioned that problems arise with less rigid material [than steel] "such as molded plastics". On page 3, lines 5 to 10, the problems to be solved are stated to be those encountered with the cantilevered force effect and increasing volumetric capacity without expanding the outer dimensions. In the first sentence of the next paragraph it is indicated that "the invention comprises a bulk container having front, rear and side sections **integrally joined** at the corners" (emphasis added by the Board). In the view of the Board the expression "integrally joined" includes all forms of joining which result in the parts forming a unity. This is not the same as "integrally formed" which requires that the formation step for the parts took place together, e.g. by moulding.

In the description of the embodiment on page 5, lines 8 and 9, it is stated that "Bulk container 10 is a unitary structure preferably manufactured by injection molding...". This part of the description thus describes first the structure - "unitary" - and then a preferred manner of achieving this structure - "injection molding". The rest of the description refers to a moulded structure. From this part of the description the skilled reader would therefore understand that the manner of achieving the unitary structure is not essential to the invention. This part of the description is consistent with the above mentioned passage on page 3, lines 11 to 13 which refers to sections being "integrally joined", i.e. forming a unit though not necessarily by moulding. The

skilled person reading the description of the application would thus understand that it is the integral joining to form a unitary structure that is essential and not the manner of producing this structure.

Originally filed independent claims 1, 6, 8 and 14 all specify a container with "front, rear and side sections integrally formed with a bottom wall portion".

Originally filed independent claim 15 does not mention the front, rear and side sections or the bottom wall portion and does not include the term "integrally formed". In the opinion of the Board the fact that some of the independent claims include the expression "integrally formed" does not mean that the non-inclusion of the expression in the granted independent claim 1 necessarily adds to the content of the application. As explained above when reading the description of the application the skilled person would realise that "integrally formed" was just one way of obtaining the desired unitary structure but was not a way that was mandatory for the invention.

- 1.3 The appellant further argued that the wording of claim 1 as granted, stating "each recess (80) extending through the inner edge and the outer edge of the upper rim portion (32) to form a gap therein" was not disclosed in the application as originally filed. The respondent freely agreed that this exact wording was not disclosed but argued that the wording in the description on page 3, lines 15 to 17 and page 7, lines 26 to 28 provided a basis for the amendment. In those passages the upper rim is said to be "broached" and a "recess" is indicated to be provided. The appellant argued that "broached" meant "piercing" and that it did not imply that the hole so

produced passed all the way through. The respondent countered this argument by referring to the well-known use of the term in the context of broaching a cask which undoubtedly meant passing all the way through the cask wall since otherwise liquid contained therein could not come out.

1.4 In the view of the Board the term "broached" implies passing all the way through. To suggest otherwise would go against the normal meaning of the term. If a rim is broached then necessarily it means that the recess so formed passes all the way through which includes passing through the inner and outer edges of the rim. The Board concludes therefore that the wording used in the claim, although differing from that used in the description as originally filed, does not extend the content of the application as originally filed.

1.5 The Board concludes therefore that the ground of opposition under Article 100(c) EPC does not succeed.

2. *Inventive step*

2.1 The principal argument of the appellant started from D2 as the nearest prior art document.

The parties agreed that the subject-matter of claim 1 is distinguished over the disclosure of D2 by the features that:

the upper rim portion has a respective downwardly depending recess associated with each of the upper corner portions;

a respective nesting protrusion extends downwardly from the bottom wall section in association with each of the lower corner portions; and

each recess extends through the inner edge and the outer edge of the upper rim portion (32) to form a gap therein.

- 2.2 In the view of the appellant the provision of a recess which extends through the inner and outer edges of the rim portion to form a gap has no technical effect which means that the problem to be solved is merely to provide an alternative solution.

In order to arrive at a container according to claim 1 when starting from the container disclosed in D2 the appellant indicated that it would be necessary to remove the base strips connecting the bottoms of the corner feet to the central feet, use the corner feet as protrusions, remove the nesting protrusions on the top rim of the container in two of its corners, and cut away part of the top rim of the container at its corners to produce a recess extending through the inner and outer edges of the rim into which the feet could nest. According to the appellant such an alternative solution is to be found in D1 to which the skilled person would turn since the lack of technical effect means that the skilled person does not need an incentive to turn to this document.

- 2.3 The Board cannot follow the argumentation of the appellant in this respect.

The constructional changes required to be made to the container disclosed in D2 are considerable and would

mean that some advantages of that container were lost. The bottom surfaces of the feet of the container of D2 include recesses which accept the protrusions 22 provided on the top rim of the container in two of its corners. These protrusions, together with these recesses, provide lateral stability of the stacked containers. The other two corners of the top rim are provided with recesses 23. Together with the aforementioned protrusions these recesses allow the containers to be stacked one on top of another. They also allow facing top surfaces of two like containers to be brought together with mating protrusions and recesses to create a large internal space between the two containers into which a third like container can be placed thus saving space when the containers are to be transported in an empty state (see page 2, lines 37 to 42). The advantages would be lost if the constructional changes proposed by the appellant were to be enacted, as they result in the elimination of the protrusions 22 and the recesses 23 when cutting away a portion of the container's top rim to make space for the feet.

D1 discloses a stackable container which can be stacked either with like containers or with two other known types of containers which have specific constructions. The container of D1 is not disclosed as suitable for lifting by a folk truck since it does not have the two recesses in the bottom area which are provided in containers suitable for lifting by a fork lift. It is true that the container does have a recess in its upper rim at each corner that extends from the inner to the outer edge of the rim. However, no explicit reason for this shape of recess is stated in the document. The respondent argued that this shape resulted from a need

to nest with the protrusion in its lower part when like containers are stacked and that the shape of the corner protrusions on the lower part was dictated by the need to further nest with two other specific types of containers. The appellant was unable to refute this argument. The Board can see no disclosure in this document which would cause the skilled person to take this feature of the recess from the container disclosed in D1 and apply it for a different purpose to the container of D2.

2.4 The appellant alternatively argued that the skilled person would turn to D3 in order to solve the problem. The Board first notes that D3 does not disclose a bulk container suitable for lifting by a fork lift since it is provided with handles for manual handling. The container is stackable with like containers and has external strengthening ribs on the exterior surfaces of its corners which are inserted into corresponding recesses provided in the interior of the upper surfaces of the corners. The appellant suggested that the removal of the rim above the corners would produce a recess as specified in claim 1. There is, however, no reason for the skilled person to change the construction in the manner suggested by the appellant, i.e. by extending the recesses from the interior to the exterior to form a gap. In fact, this measure would remove the functionality of the recesses in the interior of the upper surface since the ribs could no longer engage in these to provide lateral stability for the stacked containers.

2.5 If the skilled person were to start from D3, as also argued by the appellant, then the need to modify the construction of D2 as well as D3 in order to arrive at

the container according to claim 1 would also arise and the skilled person would have no reason to make these modifications for the reasons already explained above with respect to D2 as the closest prior art.

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

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders