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Datasheet for the decision of 26 February 2010

Case Number: T 0564/08 - 3.2.07

Application Number: 98941711.8

Publication Number: 0950615

IPC: B65D 43/26

Language of the proceedings: EN

Title of invention:
Covering device

Patentee:
UNI-CHARM CORPORATION and DAI NIPPON PRINTING CO., LTD.

Opponents:
KIMBERLY-CLARK WORLDWIDE, INC.
The Procter & Gamble Company

Headword:
-

Relevant legal provisions:
EPC Art. 100(c)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Amendments (all requests): unallowable"

Decisions cited:
T 0170/87

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0564/08 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 26 February 2010

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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 8 January 2008 concerning maintenance of European patent No. 0950615 in amended form.**

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
E. Dufrasne

Summary of Facts and Submissions

I. The two appellants (opponents 01 and 02) lodged an appeal against the interlocutory decision of the Opposition Division intending to maintain European patent No. 0 950 615 in amended form.

Oppositions had been filed against the patent as a whole based on Articles 100(a) to (c) EPC (lack of novelty, lack of inventive step, insufficient disclosure and added subject-matter).

II. Oral proceedings before the Board took place on 26 February 2010.

(a) The appellants requested that the decision under appeal be set aside and that the patent be revoked.

(b) The respondent (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or, in the alternative, on the basis of one of the auxiliary requests 1 to 4, all filed with letter dated 22 January 2010, or on the basis of sets of claims each containing a single one of the independent claims according to the main and first to third auxiliary requests and the corresponding dependent claims.

III. The appellants argued essentially as follows:

Added subject-matter - Articles 100(c) and 123(2) EPC

The feature that "the vertical plate is formed so as to be completely separated from the outer frame" present in each independent claim of all the respondent's requests is not directly and unambiguously derivable from the originally filed application.

There is a clear distinction made in the original application between "separate(d)" - meaning that there is still some connection, either by thin parts or by partial slits - and "completely separate" - meaning that there is no connection whatsoever. The references to "separate(d) from the outer frame" cannot therefore be of support for the amendment "the vertical plate is formed as to be completely separated from the outer frame". Claims 1, 2, 5 and 11 can, in that respect, not help either, as they show the same distinction between complete separation (no direct connection whatsoever) and separation (still allowing connecting parts).

The possible identical use of the terms "separate" and "completely separate" for the absence of any direct connection between either the horizontal plate or the vertical plate and the outer frame on pages 8 and 9 cannot detract from the above conclusion, in particular because there can still be a connection, as by the linear connecting part 93 for the horizontal plate, despite the mention that it is separate from the other parts of the outer frame.

All figures are schematic and therefore also figure 1 cannot be seen as evidence for the absence of any kind of connection between the vertical plate and the outer

frame. By the absence of any information in the originally filed application for a "complete separation" between the vertical plate and the outer frame the respondent's argumentation in this respect is an unsubstantiated allegation.

IV. The respondent argued essentially as follows:

Added subject-matter - Articles 100(c) and 123(2) EPC

Since figure 1 shows a gap between the vertical plate and the outer frame, it is clearly derivable from said figure that there is a complete separation, i.e. there exists no mechanical interconnection between the vertical plate and the outer frame.

In the first two embodiments discussed in the originally filed application no mechanical interconnection between the outer frame and the vertical plate exists and the terminology used in this respect is "separated" or "completely separated". This has to be understood as being in contrast to the third embodiment having the vertical plate "separated by thin parts" from the outer frame, i.e. having the vertical plate not completely mechanically decoupled from the outer frame.

"Completely separated" does not mean that the parts are "floating in the air" but that there is no direct mechanical interconnection between the vertical plate and the outer frame.

According to page 8, lines 7 to 9 and 27 to 31 of the original application the outer frame and the vertical

wall are two different elements. Since the vertical plate is completely separated from the vertical wall, the vertical plate is also completely separated from the outer frame, see figures 6 and 7.

Reasons for the decision

1. *Added subject-matter - Article 100(c) EPC*

Claim 1 as originally filed reads as follows:

"A lid assembly comprising:
a lid body having an outer frame to be fitted on a container body, which is provided with an dispensing opening therein;
a hinged lid pivotally joined to the lid body so as to close the dispensing opening hermetically; and
a hinged joint between the lid body and the hinged lid, provided with an elastic biasing means for biasing the hinged lid in an opening direction; wherein
the outer frame is provided in its part on the side of a free end part of the hinged lid with a vertical plate and a horizontal plate;
the hinged lid is provided on its free end part with a stopping projection, the vertical plate is provided with a catching projection that catches the stopping projection of the hinged lid, and the stopping projection can be disengaged from the catching projection by pressing the horizontal plate to bend the vertical plate".

Claim 2 as originally filed reads as follows:

"The lid assembly according to claim 1, wherein a recess sunk below an outer surface of the outer frame is formed in a part of the outer frame on the side of the free end part of the hinged lid, the vertical plate is formed in the recess so as to be separated from the outer frame, and the horizontal plate is extended from the vertical plate in a direction away from the hinged lid".

Claim 5 as originally filed reads as follows:

"The lid assembly according to claim 1, wherein a top plate sunk below an outer surface of the outer frame is connected to the outer frame by a vertical wall, the dispensing opening is formed in the top plate, the horizontal plate and the vertical plate are formed by forming slits in parts of the outer frame and the vertical wall on the side of the free end of the hinged lid, and the horizontal plate and the vertical plate are separated from the other parts of the outer frame and the vertical wall by the slits".

Claim 11 as originally filed reads as follows:

"The lid assembly according to claim 1, wherein a top plate sunk below an outer surface of the outer frame is connected to the outer frame by a vertical wall, the dispensing opening is formed in the top plate, the horizontal plate and the vertical plate are formed in thin parts of the outer frame and the vertical wall on the side of a free end of the hinged lid, and the horizontal plate and the vertical plate

are separated from the other parts of the outer frame and the vertical wall by the thin parts".

1.1 Independent claim 1 of the main, first and second auxiliary requests comprises the feature (emphasis added by the Board):

"the **vertical plate** (92) is formed in the recess (60) so as to be **completely separated** from the **outer frame** (33)",

independent claim 1 of the third and fourth auxiliary requests comprises the feature:

"the **vertical plate** (92) is formed in the recess (60), so as to extend from the recess and be **completely separated** from the **outer frame** (33)",

independent claims 4 and 5 of the main, first, second and third auxiliary requests comprise the feature:

"the **vertical plate** (92) is formed so as to be **completely separated** from the **outer frame** (33)".

1.2 Since each independent claim of all the respondent's requests involves the feature that "the **vertical plate** is formed so as to be **completely separated** from the **outer frame**" the discussion on Article 100(c) EPC is focused on the question whether said feature is directly and unambiguously derivable from the originally filed application.

1.3 In the originally filed application the following expressions with respect to the vertical plate in

combination with the term "separate" have been used (emphasis added by the Board):

"the **vertical plate** may be formed in the recess so as to be **separated** from the **outer frame**", see page 2, lines 7, 8;

"the horizontal plate and the **vertical plate** may be **separated** from the **other parts of the outer frame and the vertical wall by the slits**", see page 2, lines 16 to 18;

"the horizontal plate and the **vertical plate** may be **separated** from the **other parts of the outer frame and the vertical wall by the thin parts**", see page 2, lines 24 to 26;

"the **vertical plate** 92 and the horizontal plate 90 are **separate** from the **outer frame** 33", see page 5, lines 1 and 2;

"A slit 91 is formed in the outer frame 33 and the vertical wall 28 of the lid body 21 at a position corresponding to the free end of the hinged lid 23 thereby forming a horizontal plate 90 and a **vertical plate** 92 **separate** from the **other parts in the outer frame** 33 and the **vertical wall** 28. The slit 91 has a U-shaped slit 9la formed in the outer frame 33, and a pair of straight, vertical slits 9lb formed in the vertical wall 28. The U-shaped slit 9la completely separates the horizontal plate 90 from the other part 33a of the outer frame 33, and the vertical slits 91b **completely separates** the **vertical plate** 92 from the **other part** 28a **of the vertical wall** 28", see page 8,

lines 27 to 36;

"The horizontal plate 90 and the **vertical plate** 92 are **separate** from the **other parts** 33a and 28a **of the outer frame** 33 **and the vertical wall** 28", see page 9, lines 1 to 3;

"The horizontal slits 95a of the pair of slits 95 separate the horizontal plate 90 from the other part 33a of the outer frame 33, and the vertical slits 95b **separate** a **vertical plate** 92 **from the other part** 28a **of the vertical wall** 28", see page 11, lines 14 to 17;

"The **vertical plate** 92 is **completely separate** **from the other part** 28a **of the vertical wall** 28", see page 11, lines 20 to 21;

"A thin part 6l is formed in the outer frame 33 and the vertical wall 28 of the lid body 21 at a position corresponding to the free end of the hinged lid 23 to form a horizontal plate 90 and a **vertical plate** 92 **separate from other parts** 33a and 28a **of the outer frame** 33 **and the vertical wall** 28. The thin part 61 has a U-shaped thin wall 6la formed in the outer frame 33, a pair of straight, vertical thin walls 61b formed in the vertical wall 28, and a lower thin wall 61c formed in a lower end part of the vertical wall 28. The U-shaped thin wall 6la separates the horizontal plate 90 from the other part 33a of the outer frame 33, and the vertical thin walls 61b **separate the vertical plate** 92 **from the other part** 28a **of the vertical wall** 28", see page 13, lines 5 to 15;

"Since the horizontal plate 90 and the **vertical plate** 92 **are separated from the other part** 33a **of the outer frame** 33 **and the vertical wall** 28a **by the thin part** 61", see page 15, lines 7 to 9;

"the **vertical plate** is formed in the recess so as to be **separated from the outer frame**", see claim 2;

"the horizontal plate and the **vertical plate are separated from the other parts of the outer frame and the vertical wall by the slits**", see claim 5;

"the horizontal plate and the **vertical plate are separated from the other parts of the outer frame and the vertical wall by the thin parts**", see claim 11.

1.4 Accordingly, a **complete separation** in respect of the vertical plate is mentioned in the originally filed application only in connection with "the other part 28a of the vertical wall 28" of the second embodiment shown in figures of 5 to 11, and discussed on page 8, lines 27 to 36 and page 11, lines 20 to 21. Figures 1 and 3 of the first embodiment do not contradict this either, as these also show a vertical wall 28, from which the vertical plate is completely separate. This also means that figure 1 not necessarily **only** shows a complete separation between the vertical plate and the outer frame. This is particularly so since original claim 2 defines the recess 60 as "formed in a part of the outer frame" (i.e. it is a part of the outer frame) and the vertical plate "is formed in the recess" (i.e. by necessity the vertical plate is part of the outer frame's recess).

1.5 Therefore the Board concludes that the claimed "**complete separation**" between the vertical plate and the outer frame is not explicitly disclosed in the originally filed application. This was not contested by the respondent.

1.6 The above references (see point 1.3) to a vertical plate being separate(d) from the (other parts of the) outer frame cannot help in this respect, as correctly pointed out by the appellants, as this term has to be seen as signifying that still a connection is present between the vertical plate and the (other parts of the) outer frame, either by thin parts or by the fact that the slits are only partial. This conclusion is in particular based on the references on page 2, lines 24 to 26 (separated by thin parts), page 11, lines 14 to 17 (slit not extending totally around the horizontal plate), page 13, lines 9 to 15 (separated by thin parts) indicating that a distinction should be made between "separating" and "completely separating". In this respect the application is to be seen as its own dictionary, particular in view of the use of this term, contrary to its common meaning.

1.7 The above meaning of the term "separate" also counts for claims 1, 2, 5 and 11, where in particular for claims 5 and 11 the separation allows for a connection still to be present, as its dependent claims further qualify it: claim 6 makes the separation "complete", whereas claim 8 allows a part to still be "partly connected".

1.8 The question at stake is therefore whether it is implicit to the skilled person from the originally

filed application that there is a "**complete separation**" between the vertical plate and the outer frame.

1.8.1 The respondent argued firstly that since figure 1 shows a gap between the vertical plate and the outer frame, it is clearly derivable from said figure that there is a complete separation, i.e. there exists no mechanical interconnection between the vertical plate and the outer frame.

The Board cannot follow this argument for the following reasons:

The first is already given in point 1.4 above: For such a definite feature the figure must be unequivocal in the sense that only the conclusion proposed by the respondent is the right conclusion, which is not the case here.

The second is that figures in patent documents, as figure 1, are generally schematic. The Board concurs further, in respect of this feature which amounts to a "negative feature" involving the absence of any direct connection, with decision T 170/87 (OJ EPO 1989, 441). The figure simply does not allow this definitive conclusion.

1.8.2 The respondent argued further that it is clear to the skilled person reading the originally filed application with a mind willing to understand the invention and its embodiments that the expressions "**separated**" and "**completely separated**" as used in connection with the first and second embodiments refer to a complete separation, i.e. to a **separation without any mechanical**

interconnection between the horizontal and the vertical plate and the (respective other parts of the) outer frame, in contrast to the expression "**separated by thin parts**" as used in connection with the third embodiment defining a **weak mechanical coupling.**

The Board also cannot follow this argumentation for the following reasons:

Firstly, as said, if an application is to function as explanatory for the invention, its use of terms should be consistent. The respondent proposes an inconsistent use of the term "separate(d)", which the Board cannot adhere to.

Secondly, as explained in points 1.6 and 1.7 above and argued by the appellants, the Board has found a perfectly acceptable explanation for the distinction between "completely separate(d)" and "separate(d)".

Thirdly, as argued by the appellants, the second embodiment (of which a modification is shown in figures 8 to 11) does not necessarily have a separation without a mechanical interconnection between the two parts, as the horizontal plate, though mentioned as being separate from the rest of the outer frame, is still directly connected to it by the linear connecting part 93.

Finally, assuming that the expression "separation without any mechanical interconnection" used by the respondent means that there is no action/reaction-connection between the horizontal/vertical plate and the outer frame, the Board cannot find basis in the

originally filed application for the respondent's position that the expressions "separated" and "completely separated" as used for the first two embodiments of the originally filed application define such a separation. The purpose of the invention is only mentioned as improving convenience (opening easily by a single touch), improving safety and reliability. The only other possible reference is on page 2, lines 27 to 29 of the originally filed application, where it is stated that "the vertical plate can be bent to release the stopping projection (from) the catching projection by pressing the horizontal plate without bending the outer frame". However, this merely indicates that a certain amount of bending of the vertical plate which is required for releasing the stopping projection does not cause any bending of the outer frame. This passage does not imply that no mechanical interconnection, i.e. no action/reaction-connection between the vertical plate and the outer frame exists. The parts connecting the vertical plate and the outer frame can be for example soft enough, so that they do not transmit any or only an ignorably low bending force from the vertical plate to the outer frame. Thus, no information about the absence of any kind of mechanical interconnection, i.e. action/reaction-connection between the vertical plate and the outer frame can be derived from the originally filed application.

In any case, as argued by the appellants, the indicated purposes of the invention give no clue as to the importance of having a "complete separation", which makes this feature even less implicit.

1.8.3 The respondent argued additionally that the expressions "completely separated" and "separated" are used in connection with the first and the second embodiments as being identical to each other and that this is directly apparent from the comparison of the passages on page 8, lines 33 to 36 and on page 9, line 1 to 3 of the originally filed application. On page 8, lines 33 to 36 the expression "completely separate" is used with respect to the horizontal and vertical plate. In the directly following paragraph the expression "separate" is used in the same context and in the same manner as the expression "completely separate".

The first of the above mentioned passages of the originally filed description refers to the second embodiment shown in figures 6 and 7 and determines that "[t]he **U-shaped slit** 9la **completely separates** the **horizontal plate** 90 from the **other part 33a of the outer frame 33**, and the **vertical slits** 91b **completely separates** the **vertical plate** 92 from the **other part 28a of the vertical wall 28**", and the second of the above mentioned passages of the originally filed description determines that "[t]he **horizontal plate** 90 and the **vertical plate** 92 are **separate** from the **other parts 33a and 28a of the outer frame 33 and the vertical wall 28**".

The Board comments on that as follows:

Firstly, the description in question only relates to the second embodiment, not the first embodiment.

Secondly, the description of the other form of the same second embodiment, that of figures 8 to 11, contradicts

this assumption in that the "separation" can allow for a connection still to be present, as the linear connecting part 93 between the horizontal plate and the outer frame (see page 11, lines 11 to 20).

Thirdly, also the relevant claims 5, 6 and 8 for the second embodiment contradict this, as independent claim 5 uses the term "separated" where the dependent claim 6 then further qualifies this as "completely separate" to illustrate no direct connection and claim 8 then further qualifies this as "still partly connected".

Finally, the respondent was also not in position to identify any other part of the originally filed application providing a hint to the skilled reader of the application that the expressions "completely separated" and "separated" should be considered as signifying the same, for all embodiments.

1.8.4 To the respondent's argument that since according to page 8, lines 7 to 9 and 27 to 31 the outer frame and the vertical wall are two different elements and the vertical plate is completely separated from the vertical wall then automatically the vertical plate must also be completely separated from the outer frame, the Board comments as follows:

The respondent's argument is in itself contradictory, since it would only be valid under the condition that the vertical wall and the outer frame identify one and the same object. Further, from the presence of a separation between the vertical plate and the vertical wall one simply cannot derive any conclusion about the

relationship (connection or separation) between the vertical plate and the outer frame. The schematic figures 5 to 7 cannot help here either.

1.9 For the above mentioned reasons the Board concludes that the feature that "the vertical plate is formed so as to be completely separated from the outer frame" as present in any independent claim of any of the respondent's requests is not directly and unambiguously derivable from the originally filed application.

Thus the ground for opposition of Article 100(c) EPC prejudices the maintenance of the patent according to any of the requests.

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:

G. Nachtigall H. Meinders