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**Datasheet for the decision
of 16 August 2011**

Case Number: T 1642/09 - 3.2.07

Application Number: 04075710.6

Publication Number: 1577222

IPC: B65D 17/00

Language of the proceedings: EN

Title of invention:

Tin lid

Applicant:

Impress Group B.V.

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 54, 111(1)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Novelty - no (main and auxiliary requests I and II) - yes
(auxiliary request III)"

"Remittal - yes"

Decisions cited:

-

Catchword:

-



Case Number: T 1642/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 16 August 2011

Appellant: Impress Group B.V.
Zutphenseweg 51051
NL-7418 AH Deventer (NL)

Representative: 't Jong, Bastiaan Jacobus
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 24 February 2009
refusing European patent application
No. 04075710.6 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: H.-P. Felgenhauer
E. DufRASne

Summary of Facts and Submissions

- I. The applicant (appellant) has filed an appeal against the decision of the examining division refusing European patent application No. 04 075 710.6.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or, in the alternative, of one of the auxiliary requests I and II, all filed on 10 August 2011 or of the auxiliary request III filed during the oral proceedings.

- II. The wording of the claims 1 is as follows (the differences over claim 1 underlying the impugned decision have been emphasised by the Board):

a) Main request

"1. A lid (1) for a sheet metal container, which lid (1) comprises:

- a sheet metal body;
- an edge part (2) for seaming to a container;
- a score line (5) substantially arranged along the periphery of the sheet metal body and defining a tear-out part (3);
- a tab (4) attached to the tear-out part (3) of the sheet metal body;
- a furrow (6) arranged in the tear-out part (3) of the sheet metal body adjacent and parallel along the score line (5); and
- a furrow arranged in a lid part between the score line (5) and the edge part (2), and adjacent and parallel along the score line (5),

characterised in that the walls of the furrows are formed by one layer of sheet metal".

b) Auxiliary request I

"1. A lid (1) for a sheet metal container, which lid (1) comprises:

- a sheet metal body;
- an edge part (2) for seaming to a container;
- a score line (5) substantially arranged along the periphery of the sheet metal body and defining a tear-out part (3);
- a tab (4) attached to the tear-out part (3) of the sheet metal body;
- a furrow (6) arranged in the tear-out part (3) of the sheet metal body adjacent and parallel along the score line (5); **and**
- a furrow arranged in a lid part between the score line (5) and the edge part (2), and adjacent and parallel along the score line (5),
characterised in that the furrows being open at the side of the lid at which the tab (4) is attached, and having a centerline".

c) Auxiliary request II

"1. A lid (1) for a sheet metal container, which lid (1) comprises:

- a sheet metal body;
- an edge part (2) for seaming to a container;
- a score line (5) substantially arranged along the periphery of the sheet metal body and defining a tear-out part (3);

- a tab (4) attached to the tear-out part (3) of the sheet metal body;
- a furrow (6) arranged in the tear-out part (3) of the sheet metal body adjacent and parallel along the score line (5); and
- a furrow arranged in a lid part between the score line (5) and the edge part (2), and adjacent and parallel along the score line (5),
characterised in that the furrows being open at the side of the lid at which the tab (4) is attached, and having a centerline and wherein the distance of the centerline of the furrow (6) to the score line (5) is in the range of 0.75 - 2 times, preferably 1 time, the width of the furrow (6)".

d) Auxiliary request III

"1. A lid (1) for a sheet metal container, which lid (1) comprises:

- a sheet metal body;
- an edge part (2) for seaming to a container;
- a score line (5) substantially arranged along the periphery of the sheet metal body and defining a tear-out part (3);
- a tab (4) attached to the tear-out part (3) of the sheet metal body;
- a furrow (6) arranged in the tear-out part (3) of the sheet metal body adjacent and parallel along the score line (5); and
- a furrow arranged in a lid part between the score line (5) and the edge part (2), and adjacent and parallel along the score line (5),

characterised in that the tear out part (3) comprises recessed parts (8), wherein the recessed parts are terraced".

III. The following document, already referred to in the impugned decision, is considered:

D7: US-A-4 511 299.

IV. According to the impugned decision the feature added to the then claim 1, according to which a furrow is provided in a lid part between the score line and the edge part, and adjacent and parallel along the score line does not satisfy the requirement of Article 123(2) EPC. The lid according to that claim 1 further lacks novelty with respect to the lid disclosed in D7.

V. In the annex to the summons to oral proceedings (hereafter the "annex") the Board gave its preliminary opinion that claim 1 underlying the impugned decision appears as not violating the requirement of Article 123(2) EPC, but that the lid according to this claim appears to lack novelty over the lid disclosed in D7.

In a further communication in view of the amended sets of claims filed with letter dated 15 July 2011 the Board expressed the opinion that concerning claims 1 of the main and first auxiliary requests it appears that despite the attempt to further define the furrows in these claims, they are still not distinguished from the recesses 30 and 32 provided in the lid according to D7 (point 3). The Board furthermore gave its preliminary opinion concerning the feature of claim 1 of the then

main request and first auxiliary request according to which the furrows are "upwardly open" and have a "centerline" (point 3.1), as well as concerning the values for the distance between this "centerline" and the score line defined additionally in claim 1 according to the then first auxiliary request (point 5), also in relation to D7.

With respect to claim 1 of the then second auxiliary request, which is identical to claim 1 of present auxiliary request III, the Board mentioned that a corresponding claim 1 has not been filed during the examination proceedings and that in case such a request is admitted it appears to lie in the interest of procedural efficiency to examine besides novelty also inventive step (points 7 and 7.1).

VI. The submissions of the appellant relevant for the present decision can be summarized as follows:

- (i) Defining in claim 1 the second furrow between the edge part and the score line does not add subject-matter. It is directly and unambiguously derivable from figures 2A and 3 and is connected with the problem addressed by the invention, i.e. increasing the resistance to peaking, as is done for the other furrow.
- (ii) Claim 1 according to the main request clearly defines that the structure of recesses of the formed lid comprise one layer of sheet metal, which clearly distinguishes this lid over the one according to D7, the furrows of which each have a

wall comprising three layers of sheet metal plied together as can be clearly derived from figure 6.

(iii) Claims 1 according to auxiliary requests I and II clearly define that the furrows have a centerline, namely the line of symmetry of the cross-section of the furrows, which has, as can be derived from figures 2A and 3 of the application, a symmetrical shape. The lids defined by these claims 1 are consequently novel over the lid according to D7, the recesses of which, as can be clearly derived from figure 6, do not allow to distinguish a centerline.

(iv) The lid according to claim 1 of auxiliary request III is novel with respect to the one disclosed by D7, since the tear-out part of the known lid does not comprise recessed parts. Considering the circumstances of the present case the Board should exercise its discretion and remit the case for further prosecution based on the claims of this request, so giving the opportunity of inventive step to be examined by two instances.

VII. Oral proceedings took place on 16 August 2011, at the end of which the present decision was announced.

Reasons for the decision

1. *Amended claims 1 - requirement of Article 123 (2) EPC*

1.1 According to the impugned decision (reasons, point 1) the feature comprised in claim 1 of the then only request and presently comprised in claims 1 of all requests according to which a (further) furrow is arranged in the lid between the score line and the edge part adjacent and parallel with the score line infringes the requirement of Article 123(2) EPC. The examining division accepted that such a furrow is shown in figures 2A and 3 as originally filed but considered that no positive effect associated with this furrow, for the peaking problem, or any other problem, is disclosed. Based on this disclosure it is concluded in the impugned decision that the introduction of this feature into claim 1 adds information which was not present in the application as filed.

1.2 In this respect the Board gave in the annex its preliminary opinion that the introduction of this feature does not seem to violate the requirement of Article 123(2) EPC. It expressed the opinion that the feature in question is a structural feature and that the information added by this feature solely concerns the structure of the lid, which, as indicated in the impugned decision appears to be disclosed by the representation of the lid in figures 1, 2A and 3. Further, present claim 1 does not require an effect, or intended use for this second furrow to comply with the requirement of Article 123(2) EPC.

For the Board no reason is apparent to deviate from its preliminary opinion in this respect.

The Board has furthermore verified that the further features added to claims 1 of all requests do, as far as they can be considered as distinguishing from D7, satisfy the requirement of Article 123(2) EPC.

2. *Disclosure of D7*

In line with the impugned decision (reasons, point 2) and as indicated in the annex, for the Board D7 discloses a lid comprising all features of the preambles of the claims 1 of all requests, which are all identical (see D7, column 2, lines 40 - 47; figure 7). The recesses 30 and 32 in the lid of D7 can be seen as furrows, irrespective of their shape and the manner in which they have been formed in the lid. The claim does not contain any further definition in this respect.

3. *Claim 1 according to the main request*

3.1 Claim 1 according to the main request has been filed in response to the annex in an attempt to further define both the furrow arranged in the tear-out part and the one arranged in the lid part between the score line and the edge part, by stating that "walls of the furrows are formed by one layer of sheet metal". This should establish novelty over the lid according to D7 which comprises two furrows 30, 32 each of which has a wall resulting from the plying of the single layer of sheet metal (D7, column 2, lines 56 - 67; figures 2 and 5).

3.2 At the beginning of the oral proceedings the Board expressed its view that the above mentioned, characterising, feature of claim 1 is ambiguous.

The reason is that this feature can on the one hand be understood as relating to the process of how the walls of the furrows achieve their final form, namely by forming one layer of sheet metal into a wall and on the other hand, as relied upon by the appellant, as relating to the (final) structure or shape of the furrows. For the Board figures 2 to 5 of D7 showed the process in which one layer of sheet metal was deformed to produce the furrows, of which the respective walls adjacent the score line were, in the end, still formed by that one layer of sheet metal, which is still distinguishable as a single layer in the final product.

The appellant could not present a convincing argument why the Board's interpretation of this feature was to be disregarded.

In view of this result it can be left open whether the lid of claim 1, considering the appellant's interpretation of this feature, can be considered as being clearly distinguished from the lid with furrows 30 and 32 of D7.

The lid of claim 1 according to the main request thus lacks novelty over the lid disclosed by D7 (Article 54 EPC).

4. *Claims 1 according to auxiliary requests I and II*

4.1 The claims 1 according to the auxiliary requests I and II have been filed in response to the communication of the Board dated 8 August 2011 indicating that the previously claimed feature of "the furrows (6) being upwardly open" appears to be unclear since a direction depending on a particular arrangement of the lid is referred to.

The Board considers that in this respect the claims 1 of the present requests now clearly define "that the furrows being open at the side of the lid at which the tab (4) is attached".

However, the Board remains of the opinion that this feature cannot help to distinguish the lid of these claims 1 over the one disclosed in D7 since, as indicated in the communication (point 3.1), the recesses 30 and 32 are likewise upwardly open, more in particular also open at the side of the lid at which the tab is attached (see D7, figure 6).

4.2 The claims 1 according to the auxiliary request I and II further comprise the feature according to which the furrows have a centerline.

The appellant argued that the claimed centerline is intended to define for each cross-section of the furrows a straight vertical line acting as a line of symmetry, i.e. the collection of points equidistant to the side walls of the furrows as defined in Merriam Webster's Collegiate Dictionary, produced by the appellant.

Further, due to the lack of any definition in this respect in the claims 1 concerned and in the disclosure of the application in suit the symmetry argument cannot be accepted either. Such a limited interpretation would have required more specific support, such as for instance a centerline drawn in the figures.

The Board indicated in this respect at the oral proceedings that this feature cannot distinguish the lid of these claims 1 over the lid of D7. One reason, already referred to in the communication (point 3.1), is that each cross-section of the recesses of the lid of D7 has a central point, the collection of these central points along the longitudinal extension of the furrow results in a centerline. Another reason, as referred to at the oral proceedings, is that a centerline can also be seen as the collection of points midway between the edges of each recess as seen from above and lying in the plane of the lid, such a centerline likewise being present in the furrows 30 and 32 of the lid according to D7 (see figures 6 and 7).

The Board considers the above definition to be also a valid definition of a "centerline".

- 4.3 Claim 1 according to auxiliary request II comprises the further feature that "the distance of the centerline of the furrow (6) to the score line (5) is in the range of 0.75 - 2 times, preferably 1 time, the width of the furrow (6)".

The Board in its communication (point 5) indicated that from figure 6 of D7 values for the distance between the

"centerline" of the furrows as defined above by the Board and the score line appeared derivable that lay in the range defined above. Since the appellant failed to give a convincing argument as to why the disclosure of D7 cannot be considered as outlined the Board does not see any reason for deviating from its preliminary opinion.

Hence neither the lid according to claim 1 of auxiliary request I nor the lid according to claim 1 of auxiliary request II is novel as compared to the lid according to D7 (Article 54 EPC).

5. *Claim 1 according to auxiliary request III*

5.1 Claim 1 according to auxiliary request III comprises the characterising feature "that the tear-out part (3) comprises recessed parts (8), wherein the recessed parts are terraced".

5.2 The Board considers valid the argument of the appellant that in view of the finding of the impugned decision that claim 1 then on file has been amended in a manner violating the requirement of Article 123(2) EPC (cf. point 1 above) it was not appropriate in the first instance proceedings to file a further request comprising, next to the features of this claim 1, e.g. the ones of claim 6 as originally filed. It thus considers, despite its doubts expressed in the communication dated 8 August 2011 (cf. section V above), it appropriate to admit the set of claims according to auxiliary request III into the proceedings.

5.3 The Board furthermore considers the argument of the appellant correct that for the tear-out part of the lid according to D7, as defined at its outer circumference by score line 28 (column 2, lines 52 - 55; figures 6, 7), it is not disclosed that it comprises recessed parts. The lid according to the claim 1 concerned is thus novel with respect to the one according to D7 and also with respect to the further prior art on file such that the requirements of Article 54 EPC are fulfilled.

6. *Remittal - Article 111 (1) EPC*

6.1 The appellant acknowledged that remittal and subsequent examination of inventive step, possibly at two instances, is not a matter of right but lies within the discretion of the Board. It argued that the circumstances of the present case need to be taken into consideration. It was only at the appeal stage that it was established that the examining division did not take the right approach in its assessment that claim 1 then on file had been amended contrary to Article 123(2) EPC due to the added definition of a further, outer, furrow. Thus further attempts to amend claim 1 during the examination proceedings based on a claim 1 comprising both furrows were bound to be unsuccessful. It further argued that in the event that, after remittal, inventive step is examined the appellant has the opportunity to base its arguments on evidence (e.g. concerning the effect(s) of recessed parts provided on the tear-out part). This opportunity would be taken away in case only the Board examined and decided on inventive step.

6.2 The Board is of the opinion that taking the above into account and weighing it against the facts speaking against remittal as expressed in its communication dated 8 August 2011 (cf. section V above) it is appropriate to remit the case to the department of first instance for further prosecution on the basis of the claims of auxiliary request III according to Article 111(1) 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 for further prosecution on the basis of auxiliary request III filed during the oral proceedings.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders