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**Datasheet for the decision
of 30 January 2013**

Case Number: T 1242/10 - 3.2.07

Application Number: 97920177.9

Publication Number: 907576

IPC: B65D 43/08, B65D 5/74,
B31B 3/28, B65D 5/06

Language of the proceedings: EN

Title of invention:
Flat-top container with an opening fitment

Patent Proprietor:
Tetra Laval Holdings & Finance S.A.

Opponent:
SIG Technology AG

Headword:
-

Relevant legal provisions:
EPC Art. 56, 100(c)
RPBA Art. 13(1)

Keyword:
"Amendments: allowable"
"Late-filed document: not admitted"
"Inventive step: yes"

Decisions cited:
-

Catchword:
-



Case Number: T 1242/10 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 30 January 2013

Appellant: SIG Technology AG
(Opponent) Laufengasse 18
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Respondent: Tetra Laval Holdings & Finance S.A.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
22 April 2010 concerning maintenance of the
European patent No. 907576 in amended form.

Composition of the Board:

Chairman: H.-P. Felgenhauer
Members: K. Poalas
E. Kossonakou

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent No. 0 907 576 in amended form.
- II. Opposition had been filed against the patent as a whole based on Articles 100(a) EPC (lack of novelty and inventive step) and 100(c) EPC (unallowable amendments).

The opposition division found that the subject-matter of claims 1, 7 and 10 according to the main request filed during the oral proceedings on 18 March 2010 meets the requirements of the EPC.

- III. Oral proceedings took place before the Board on 30 January 2013.
- (a) The appellant requested that the decision under appeal be set aside and that the European patent No. 0 907 576 be revoked.
- (b) The respondent (patent proprietor) requested that in setting aside the decision under appeal the patent be maintained on the basis of the following documents:

claims 1 to 6: filed as main request at the oral proceedings,

description: columns 1 to 4 as filed at the oral proceedings, columns 5 to 11 of the patent specification,

figures 1 to 15: of the patent specification.

IV. The following documents are referred to in the present decision:

- D1: US 3 785 113 A (filed together with the notice of opposition),
- D6: DE 43 43 985 A (filed together with the grounds of appeal),
- D7: US 4 8149 865 A (filed during the appeal proceedings on 14 December 2012).

In the present decision when reference is made to the originally filed application it is the WO 97/39958 A - publication to which is referred.

V. Independent claim 1 according to the main request reads as follows (amendments over claim 1 as granted are marked in bold or struck through):

"A paperboard-based container (2) formed from a blank (400) folded along fold lines, the container having side panels (4) with upper and lower end sections, and the upper end sections (80,82,84,86) defining inner and outer opposed pairs ~~with cut-outs~~, **each upper end section having a cut-out** (103,105,107,109), folded towards one another, wherein the cut-outs combine to define an aperture (112) which receives a fitment (10) **having a flange (116) at the interior of the container** sealed to the upper end sections around the aperture, CHARACTERIZED IN THAT each of the inner opposed upper end section pairs (102,104) is divided along fold lines (96,98) into a

middle region (88,90) and lateral side regions (92,94), and folded under the outer pairs (106,108) with each side region between a respective middle region and a respective outer end section, to form a flat container top".

VI. The appellant's arguments can be summarised as follows:

Amendments - Article 100(c) EPC

The term "flat container top" in claim 1 of the main request has no basis in the originally filed application, Since in the originally filed application only the term "generally flat(tened)" in connection with the container top has been used, see the claim 1, line 12 and page 4, line 9, the term "flat container top" present in claim 1 of the main request has no basis in the originally filed application and thus the opposition ground according to Article 100(c) EPC holds against claim 1.

Admittance of D7 into the appeal proceedings

D7 has been filed as reaction to the Board's communication considering the container shown in figures 32 and 38 of D6 as not being a flat top container.

The subject-matter of claim 1 according to the main request differs from the container known from D7 only in that each upper end section has a cut-out, wherein the cut-outs combine to define an aperture which receives a fitment. The skilled person seeking to provide said known container with a central aperture would apply the teaching of D6 proposing the provision

of a cut-out to each upper end section of the container and would then arrive at the subject-matter of claim 1 without exercising an inventive activity.

Thus D7 is a highly relevant document and should be admitted into the proceedings.

Inventive step - Article 56 EPC

The container of claim 1 according to the main request differs from the one known from D1 in that it has a flat top and in that each upper end section has a cut-out, wherein said cut-outs combine to define an aperture which receives a fitment sealed to the upper end sections around the aperture.

The technical problem to be solved is to provide a container in which a fitment can be produced at an advantageous central location in the upper end of the known container.

The skilled person seeking to solve the above-mentioned problem would apply the teaching of D6 proposing the provision of a cut-out to each upper end section of the container and would then arrive to the subject-matter of claim 1 without exercising an inventive activity.

VII. The respondent argued essentially as follows:

Amendments - Article 100(c) EPC

The expression "flat container top" present in claim 1 of the main request has a basis in line 3 of page 4 of the originally filed application and thus the

opposition ground according to Article 100(c) EPC does not hold.

Admittance of D7 into the appeal proceedings

D7 is a *prima facie* not highly relevant document, which had been filed very late in the appeal proceedings, i.e. after oral proceedings before the Board had been arranged. It should thus not be admitted into the proceedings.

Inventive step - Article 56 EPC

Even if the person skilled in the art were to choose to apply the teaching of D6 to the container of D1, which would be very unlikely, the result would not be a container according to claim 1 of the main request since none of these documents refers to a container having a flat top.

Reasons for the decision

1. *Amendments - Article 100(c) EPC*

- 1.1 In the introductory part of the description of the originally filed application describing the "field of the invention" and "the background of the invention" distinction is made between "gable-top container, either flattened or erect" and containers having "flat upper ends", i.e. "flat ended containers", see page 2, line 13 to page 3, line 24.

- 1.2 In the subsequent chapter titled "summary of the invention" it is defined that the present invention concerns a "flat-top container", see page 4, line 3. It is for the skilled reader evident that said "flat top container" corresponds to the "flat ended container" mentioned on page 3 of the originally filed application.
- 1.3 In lines 6 to 9 of page 4 of the originally filed application it is further stated how this "flat-top" is achieved, namely by dividing the upper end sections in an overlapping manner "to form a generally flat end of the container". Similarly, in the originally filed claim 1, lines 11 to 13 is further stated that "the upper end sections being folded and sealed to form a generally flattened top of the container".
- 1.4 The Board considers that the expression "generally" used in connection with the expressions "flattened top of the container" and "flat end of the container" in the originally filed claim 1 and on page 4 of the originally filed description is used in order to encompass also minor deviations from an "absolutely" flat top, said deviations being due to the manner in which the flat top is manufactured and thus encompassing constructional tolerances. Accordingly, the above-mentioned expressions do not define anything different than a "flat top container" as defined in the first line of the chapter "summary of the invention" of the originally filed application.
- 1.5 Thus, the use of the term "flat container top" in claim 1 according to the main request does not generate

subject-matter extending beyond the content of the application as filed.

1.6 From the above follows that the ground of opposition according to Article 100(c) EPC does not hold.

2. *Admittance of D7 into the appeal proceedings*

2.1 Article 13(1) RPBA provides that any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject matter submitted, the current state of the proceedings and the need for procedural economy.

2.2 In the present case the inventive step issue was dealt with in point 3.3 of the opposition division's decision. In its grounds of appeal the appellant submitted its arguments concerning the opposition division's decision, filed for the first time document D6 and argued lack of inventive step referring *inter alia* to the combination of the teachings of D1 and D6. The respondent filed with its letter dated 17 January 2011 a response to the grounds of appeal and replied under points 11 to 14 of its letter to the appellant's arguments based *inter alia* on the disclosure of D6.

2.3 The Board sent on 14 November 2012 a communication pursuant to Article 15(1) RPBA as an annex to the summons to oral proceedings, setting out its view on the assessment of inventive step taking *inter alia* into consideration the combination of the teachings of D1 and D6. With said communication the Board drew the

attention of the parties to the fact that the admissibility of any requests and submissions filed thereafter would have to be considered under Articles 12 and 13 RPBA.

2.4 The appellant filed on 14 December 2012 document D7 and argued lack of inventive step based on the combination of the teachings of D7 and D6. The justification given by the appellant in favour of the admission of D7 was that it represented its reaction to the Board's opinion expressed in its communication evaluating the container shown in figures 32 and 38 of D6 as not being a flat top container.

2.5 The Board cannot follow the appellant's arguments (cf. point VI) for the following reasons.

2.6 According to Article 12(2) RPBA the statement of grounds of appeal should contain the appellant's complete case. This was in the present case obviously not the case, since the appellant filed document D7 after oral proceedings had been arranged. It is noted in this respect, that the fact that the Board in its communication annexed to the summons to oral proceedings expressed a provisional, non-binding opinion concerning a specific evaluation of the arguments and evidences put forward by the appellant in its grounds of appeal cannot be understood as an invitation to the parties to file an additional document.

2.7 In addition, according to established jurisprudence of the Boards of Appeal of the EPO (Case Law of the Boards of Appeal of the EPO, 6th edition, 2010, VII.C.1.2.2) a

late filed document would only be considered *prima facie* highly relevant and then very exceptionally be admitted into the proceedings, if it was thus highly likely that said document would prejudice the maintenance of the patent in suit. In the present case the Board considers that a paperboard container according to D7 made out of single blank and having a fitment 70 positioned eccentrically on an outer top closure panel 14 can not be combined with the fluid container shown in the figures 32 and 38 of D6, said last container being made of four paperboard-free laminated films folded between each other in such a way that enables them to be cut and sealed together in such a manner that film end sections are drawn together to form a non-flat top, said top being provided with projecting seams and a central pouring opening. Thus, D7 is not considered by the Board as being a highly relevant document in the sense of the above-mentioned established jurisprudence of the Boards of Appeal of the EPO.

2.8 For the above-mentioned reasons, the Board exercises its discretion in accordance with Article 13(1) RPBA not to admit D7 into the appeal proceedings.

3. *Inventive step - Article 56 EPC*

3.1 The embodiment illustrated in figure 9 of D1, referred to by the appellant, is a carton blank formed into a tube which can be folded to form a flat base with overlapping lower panel end portions 105 and 106, and a gable top formed by convergent upper panel end portions 113 sealed along the upper finned edges 112. When the upper and lower end portions are closed and sealed a

- container is formed. Said container does not apparently have a separate closure fitted to it, but it is to be opened by breaking the seal at one end of the panel fins 112.
- 3.2 The paperboard-based container according to claim 1 differs thus from the one known from D1 in that each upper end section has a cut-out, wherein said cut-outs combine to define an aperture which receives a fitment having a flange at the interior of the container sealed to the upper end sections around the aperture, wherein a flat top is formed.
- 3.3 The effect of the above-mentioned differentiating features is the provision of a fitment at the top of the container and the prevention of wicking of liquid products into the paperboard substrate of the container by the means of the fitment, see paragraphs [0001] and [0007] of the patent specification.
- 3.4 The problem to be solved starting from the paperboard based container of D1 can thus be seen in the provision of a fitment at the top of the container and the prevention of wicking of liquid products into the paperboard substrate of the container.
- 3.5 The appellant argues that the skilled person seeking to provide the container known from D1 with a fitment would take into consideration the teaching of D6. The embodiment depicted in the figures 32 to 38 of D6 concerns a liquid container having four sides each with an upper end section having a cut-out which combine to create an opening for receiving a fitment having a flange at the interior of the container sealed to the

upper end sections around the aperture. The skilled person applying said teaching to the container known from D1 would then arrive at the subject-matter of claim 1 without the exercise of an inventive activity.

3.6 The Board cannot follow the above-mentioned appellant's argument for the following reasons:

3.7 Where the container of D1 is a paperboard-based container formed from **a** blank, the embodiment depicted in the figures 32 and 38 of D6 is made out of **four** blanks, each of said blanks having a four layers structure. The first layer of the blanks is a polyester film, the second layer is aluminium foil, the third layer is an extended nylon film and the fourth layer is a polyethylene film, see column 25, lines 26 to 32 of D6. This means that as far as it concerns the material used for the fabrication of the container the structure of the container known from D6 is different from the one of the container known from D1. Since the wall of the container disclosed in D6 is not paperboard-based the problem mentioned under point 3.4 above concerning the prevention of wicking of liquid products into the paperboard substrate of the container does not occur in D6. Therefore, the skilled person seeking to solve that problem would not take into consideration the teaching of D6, since the container known in D6 is not made of paperboard and also not formed from a blank and thus not confronted with the problem referred to in point 3.4 above at all.

3.8 But even if, for the sake of the argument, the skilled person would take into consideration the teaching of D6, the Board considers that he would not arrive at a

container according to claim 1 for the following reasons.

- 3.9 The container depicted in the figures 32 and 38 of D6 is produced by a particular fabricating technique in which two opposed end sections of four non-paperboard-based side panels are folded between the other two in such a way that enables them to be cut and sealed in such a manner that when all four panels are cut and sealed together, their end sections form a central opening. There is no information in D6 or otherwise available that the top of the container shown in figures 32 and 38 can be formed by providing and folding a single paperboard-based blank as defined in claim 1. Furthermore, there is no information in D6 and it is also not derivable from the figures 32, 37 and 38 of D6 that the upper surface of the container depicted therein, said upper surface including four projecting seams "b", forms a flat container top.
- 3.10 Since on the one hand the container produced according to the embodiment depicted in figure of D1 is a paperboard-based gable-top container and on the other hand D6 fails to give an indication towards the formation of a flat top container by providing and folding a paperboard-based blank, it is not apparent how the combination of the corresponding teachings of said documents could lead to a container as defined in claim 1.
- 3.11 From the above the Board concludes that the subject-matter of claim 1 according to the main request involves an inventive step and meets therefore the requirements 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 documents:

claims 1 to 6: filed as main request at the oral proceedings,
description: columns 1 to 4 as filed during the oral proceedings,
columns 5 to 11 of the patent specification,
figures 1 to 15: of the patent specification.

The Registrar:

The Chairman:

G. Nachtigall

H.-P. Felgenhauer