

**Internal distribution code:**

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

**Datasheet for the decision  
of 16 December 2016**

**Case Number:** T 1848/12 - 3.2.07

**Application Number:** 07109447.8

**Publication Number:** 1864914

**IPC:** B65D21/02, B65D43/02, B65D51/24

**Language of the proceedings:** EN

**Title of invention:**  
Container assembly having stacking means

**Patent Proprietor:**  
N.V. Nutricia

**Opponent:**  
Å&R Carton Lund AB

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54(1), 56, 84, 104(1), 123(2)  
RPBA Art. 12(4), 13(1), 13(3)  
EPC R. 80

**Keyword:**

Late-filed documents - admitted (no)  
Apportionment of costs - (no)  
Late-filed argument - admitted (no)  
Novelty - main request (no)  
Amendments - first and second auxiliary requests - allowable  
(no)  
Late-filed third and fourth auxiliary requests - admitted  
(yes)  
Claims - clarity - third auxiliary request (no)  
Amendments - fourth auxiliary requests - allowable (yes)  
Novelty - fourth auxiliary request (yes)  
Inventive step - fourth auxiliary request (yes)

**Decisions cited:**

G 0009/91, G 0010/91, G 0007/93, G 0003/14, T 1705/07,  
T 1067/08, T 0520/01, T 1676/08, T 1799/08, T 0253/95

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 1848/12 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 16 December 2016**

**Appellant I:**  
(Patent Proprietor)

N.V. Nutricia  
Eerste Stationsstraat 186  
2712 HM Zoetermeer (NL)

**Representative:**

Nederlandsch Octrooibureau  
P.O. Box 29720  
2502 LS The Hague (NL)

**Appellant II:**  
(Opponent)

Å&R Carton Lund AB  
Box 177  
221 00 Lund (SE)

**Representative:**

Zacco Sweden AB  
P.O. Box 5581  
114 85 Stockholm (SE)

**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
18 June 2012 concerning maintenance of the  
European Patent No. 1864914 in amended form.**

**Composition of the Board:**

**Chairman** K. Poalas  
**Members:** G. Patton  
G. Weiss

### **Summary of Facts and Submissions**

I. Appellant I (patent proprietor) and appellant II (opponent) each lodged an appeal against the interlocutory decision of the opposition division maintaining European patent No. 1 864 914 in amended form.

II. The opposition was filed against the patent as a whole and based on Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(c) EPC (allowability of amendments).

The opposition division found that the subject-matters of claims 1 of the then main request (patent as granted) and the then first and second auxiliary requests did not fulfil the requirements of Article 54(1) EPC, while the then third auxiliary request was found to meet the requirements of the EPC. The late-filed documents D15 and D16 were not admitted into the proceedings for *prima facie* lack of relevance.

III. Oral proceedings took place before the board on 16 December 2016.

Appellant I (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained according to the main request (patent as granted) or, alternatively, according to the first auxiliary request filed on 25 April 2013 or, alternatively, according to the second auxiliary request filed on 16 November 2016 or, alternatively, according to the third or fourth auxiliary request submitted at the oral proceedings before the board. It further requested that documents D15 to D28 not be admitted into the proceedings and that costs be

apportioned due to the unnecessary time invested in reviewing and considering these documents.

Appellant II (opponent) requested that the decision under appeal be set aside and that the European patent be revoked. It further requested that documents D15 and D16, not admitted by the opposition division, and documents D17 to D28, filed for the first time in the appeal proceedings, be admitted into the proceedings.

#### IV. Documents

The following documents of the opposition proceedings are of relevance for the present decision:

D3: US-A-2002/134783;  
D4: JP-A-2005-008217;  
D6: EP-A-1 512 637;  
D7: US-A-4 759 478;  
D12: US-B-6 478 183;  
D13: WO-A-2005/075314 and  
D14: WO-A-93/17920.

The following documents D15 and D16 were not admitted by the opposition division (see impugned decision, point II.2):

D15: US-A-5 353 946 and  
D16: US-B-6 845 878.

The following documents were filed for the first time in the appeal proceedings:

D17: US-A-4 286 713;  
D18: US-A-5 535 910;  
D19: US-A-2 627 991;

D20: US-A-4 736 870;  
D21: WO-A-2003/070582;  
D22: US-A-4 892 213;  
D23: WO-A-99/15423;  
D24: EP-A-0 990 408;  
D25: GB-A-2 121 673;  
D26: US-A-2005/040168;  
D27: USD 384 502 S and  
D28: US-A-5 219 087.

V. Claim 1 of the main request (patent as granted) reads as follows:

"A container assembly (1) comprising a container part (3) and a lid part (2), said lid part comprising a connection portion (8) for connection to said container part and a lid (7) being pivotably connected to said connection portion, and the side remote from said lid of said connection portion and the side of the lid remote from the connection portion are provided with first complementary stacking means (9, 14, 22, 25, 20, 23, 24), characterized in that said complementary stacking means comprise a cam (9) provided on the lid on the side remote from said connection portion."

Claim 1 of the first auxiliary request reads as follows (amendments with respect to claim 1 of the main request in bold):

"A container assembly (1) comprising a container part (3) and a lid part (2), said lid part comprising a **circumferential** connection portion (8) for connection to said container part and a lid (7) being pivotably connected to said connection portion, and the side remote from said lid of said connection portion and the side of the lid remote from the connection portion are

provided with first complementary stacking means (9, 14, 22, 25, 20, 23, 24), characterized in that said complementary stacking means comprise a cam (9) provided on the lid on the side remote from said connection portion."

Claim 1 of the second auxiliary request reads as follows (amendments with respect to claim 1 of the main request in bold):

"A container assembly (1) comprising a container part (3) and a lid part (2), said lid part comprising a **circumferential** connection portion (8) **defining an opening therethrough** for connection to said container part and a lid (7) being pivotably connected to said connection portion **for closing said opening**, and the side remote from said lid of said connection portion and the side of the lid remote from the connection portion are provided with first complementary stacking means (9, 14, 22, 25, 20, 23, 24), characterized in that said complementary stacking means comprise a cam (9) provided on the lid on the side remote from said connection portion."

Claim 3 of the third auxiliary request reads as follows (amendments with respect to claim 3 of the main request in bold):

"A container assembly (1) comprising a container part (3) and a lid part (2), said lid part comprising a connection portion (8) for connection to said container part and a lid (7) being pivotably connected to said connection portion, and the side remote from said lid of said connection portion and the side of the lid remote from the connection portion are provided with first complementary stacking means, characterized in

that the bottom (4) of said container part (3) and the side of said lid being remote from said connection portion are provided with second complementary stacking means (5, 9, 14, 22, 25) wherein said first and second stacking means on said lid are identical, **and comprise a circumferential cam extending near the outer circumference of said lid.**"

Claim 1 of the fourth auxiliary request reads as follows (amendments with respect to claim 1 of the main request in bold):

"A container assembly (1) comprising a container part (3) and a lid part (2), said lid part comprising a connection portion (8) for connection to said container part and a lid (7) being pivotably connected to said connection portion, and the side remote from said lid of said connection portion and the side of the lid remote from the connection portion are provided with first complementary stacking means (9,14, 22, 25, 20, 23, 24), characterized in that said complementary stacking means comprise a **circumferential** cam (9) provided on the lid on the side remote from said connection portion **said cam extending near the outer circumference of said lid and being provided with interruptions (10).**"

Claim 13 of the fourth auxiliary request reads as follows (amendments with respect to claim 15 of the main request in bold and strikethrough):

"The lid part **of the ~~for a~~** container assembly according to any one of the preceding claims, wherein said lid part is injection moulded as one part, in particular injection moulded from PE, PP, or the like."



VI. Appellant I argued in substance essentially as follows:

*Admissibility of documents D15 to D28*

Appellant II has given no reasons why the opposition division was wrong in deciding not to admit D15 and D16 into the proceedings.

The filing of documents D17 to D28 for the first time in the appeal proceedings constitutes an abuse of procedure.

Hence, documents D15 to D28 should not be admitted into the proceedings.

*Apportionment of costs*

Costs should be apportioned for having to review and consider documents D15 to D28, irrespective of their admission into the proceedings.

*Main request*

The disclosure of figures 15 to 17 of D14 is rather unclear. It concerns an embodiment on its own, i.e. a container in itself, since it contains material and has a closed bottom. The skilled person will then see no reason to combine this disclosure with the container of figures 3 to 5 or 9 to 13. In D14 there is no direct and unambiguous disclosure of an assembly as claimed in claim 1.

If the barbs and the cam of the frame part 1 in figures 15 to 17 of D14 were to be regarded as being the connection portion, the stacking means 32 would not be provided on said connection portion, contrary to claim

1. Novelty should then be acknowledged for this reason as well.

According to claim 1 the side of the connection portion remote from the lid is to be provided with the stacking means. In order to fall within the scope of claim 1, the stacking means in the embodiment of figures 15 to 17 of D14 would have to be located on the flat bottom of the frame part 1. Since this is not the case, novelty of the claimed subject-matter should be acknowledged.

By the same token, the inwardly-outwardly complementary stacking means 31, 32 of the embodiment shown in figures 15 to 17 of D14 should also not be regarded as falling within the scope of claim 1.

*First auxiliary request*

The board does not have the power to introduce *ex officio* an objection not raised by appellant II.

The term "circumferential" introduced in claim 1 is to be interpreted in the light of the contested patent, excluding the possibility that the connection portion is located "at or near a circumference".

Hence, the requirements of Article 123(2) EPC are fulfilled.

*Second auxiliary request*

The features introduced into claim 1 of the second auxiliary request with respect to claim 1 of the first auxiliary request, specifying that the circumferential connection portion defines "an opening therethrough"

and that the lid is "for closing said opening", enable the term "circumferential" to be clarified as meaning "annular". The interpretation of appellant II concerning the existence of two openings is not realistic in view of the patent specification as a whole.

Hence, the requirements of Article 123(2) EPC are fulfilled.

*Third auxiliary request*

Since the claims of the third auxiliary request are based on the claims of the patent as granted, they are not open to lack of clarity objections.

The wording of claim 3 clearly specifies that the cam is provided only on the lid, and so the requirements of Article 84 EPC are fulfilled.

*Fourth auxiliary request*

The amendments introduced into claim 3 of the fourth auxiliary request aim at overcoming the objection of lack of clarity raised against claim 3 of the third auxiliary request. The requirements of Rule 80 EPC are therefore fulfilled.

The expression "remote from" used in claim 1 excludes the configuration of D4 where the stacking means are on the same side of the lid part. The claimed invention is not related to a lid and a connection portion which are co-planar as in D4. The lid and the connection portion in D4 are not suitable for being stacked on one another via the ribs 121, 122.

The cam 121 in D4 is continuous and so does not comprise interruptions as claimed. The subject-matter of claim 1 is therefore novel.

With its letter dated 2 December 2016, appellant II raised for the first time an objection of lack of inventive step on the basis of the combination of the teachings of D6 and D12. The amendments introduced into the claims of the auxiliary requests filed with the letter dated 16 November 2016 cannot justify such a late-filed new line of argument. This could already have been presented during the opposition proceedings, at the latest with appellant II's statement setting out the grounds of appeal. Claim 1 of the fourth auxiliary request is merely based on claim 1 of the former withdrawn third auxiliary request. Hence, this new line of argument should not be admitted into the proceedings.

The embodiment shown in figures 15 to 17 of D14 can be regarded as the closest prior art to claim 1 of the fourth auxiliary request.

The feature of claim 1 of a circumferential cam with **interruptions** is not disclosed in said closest prior art.

In view of the technical effects associated with the above-mentioned distinguishing feature, the objective technical problem is to be seen in enabling the cleaning of the top of the lid and the whipping away of debris (see contested patent, paragraphs 14 and 24). Even when considering the technical problem specified by appellant II of reducing material costs, the skilled person would not think of implementing the solution which is disclosed in D12 to the container assembly of

D14. There are in fact many ways to reduce the amount of material used in the container assembly of D14. Further, the skilled person would be prevented from doing so, as he would realise that the function of the rib on which the cam 31 is provided would no longer be guaranteed. As a consequence, the subject-matter of claim 1 of the fourth auxiliary request involves an inventive step.

VII. Appellant II argued in substance essentially as follows:

*Admissibility of documents D15 to D28*

Documents D15 to D28 should be admitted into the proceedings since they are highly relevant for assessing the patentability of the claimed subject-matters of the contested patent. This holds true in particular in view of appellant I's late-filed auxiliary requests of 16 November 2016.

*Apportionment of costs*

Appellant I also filed several new auxiliary requests at a late stage of the appeal proceedings. In view of the course of the present appeal proceedings it is fair that each party should bear its own costs.

*Main request*

The embodiment shown in figures 15 to 17 of D14 is to be used similarly to the configurations shown in figures 3 to 5 and 9 to 13, i.e. in connection with a container. Consequently, the skilled person will directly and unambiguously derive that said embodiment discloses all the features of claim 1.

The lid part 2 shown in figure 16 is not designed to contain material but merely to provide a space to arrange the portioning scoop. The bottom of the frame part 1 of the reclosing top of D14 is to be torn open. Therefore, even though said bottom is shown as being closed in figures 15 to 17, the skilled reader of D14 will immediately realise that it has to be torn open as in the other embodiments of D14.

The frame part 1 as a whole is considered to be the connection portion claimed in claim 1. The stacking means 32 shown in figures 15 to 17 is provided on the connection portion 1. A design as disclosed in figures 15 to 17 of D14 is not excluded from claim 1 of the main request.

The term "side" used in claim 1 equates to the whole surface opposite to the lid. It is not specified in claim 1 that the stacking means should be provided at the portion of the connection portion most remote from the lid. As a result, the configuration of figures 15 to 17 falls within the scope of claim 1, including the inwardly-outwardly complementary stacking means 31, 32.

*First auxiliary request*

There appears to be no reason why the term "circumferential" introduced into claim 1 should be limited to only the meaning given in the description, as long as other possible meanings are not excluded and, for a skilled person, technically feasible and understandable. Hence, the requirements of Article 123(2) EPC are not fulfilled.

*Second auxiliary request*

The features added to claim 1 of the second auxiliary request specify that the circumferential connection portion comprises an opening to be closed by the lid. Consequently, claim 1 of the second auxiliary request encompasses embodiments of the container assembly comprising two openings (one not closed by the lid part and one in the connection portion closed by the lid) which are not provided for in or derivable from the application as originally filed, contrary to the requirements of Article 123(2) EPC.

*Third auxiliary request*

The third auxiliary request was filed during the oral proceedings before the board, i.e. late, and so should not be admitted into the proceedings.

The subject-matter of claim 3 is not present as such in the claims of the patent as granted, such that it may be examined whether the amendments introduce non-compliance with respect to Article 84 EPC.

Due to the wording of claim 3 it is not clear whether the cam is provided at the bottom of the container **and** the lid, or only at the lid.

As a result, the requirements of Article 84 EPC are not fulfilled.

*Fourth auxiliary request*

The requirements of Rule 80 EPC are not fulfilled since the amendments made to claim 3 are not occasioned by a ground for opposition.

Document D4 discloses all the features of claim 1 of the fourth auxiliary request. In particular, the lid and the connection portion in D4 are suitable for being stacked on one another via the ribs 121, 122. A connection portion as disclosed in D4 is not excluded from claim 1 since the expression "remote from" used in claim 1 also encompasses the configuration of D4 where the stacking means are on the same side of the lid part. The cam 121 in D4 comprises two interruptions at both its ends. Consequently, the subject-matter of claim 1 of the fourth auxiliary request lacks novelty.

The new objection of lack of inventive step based on the combination of the teachings of D6 and D12 is justified in view of the late filing of appellant I's auxiliary requests with letter dated 16 November 2016. This new line of argument is based on documents which were present in the opposition-appeal proceedings from the very beginning. It should therefore be admitted into the proceedings.

The embodiment shown in figures 15 to 17 of D14 can be regarded as the closest prior art. The only distinguishing feature of claim 1 vis-à-vis said closest prior art is that the circumferential cam is provided with interruptions. In view of the technical effect associated with this distinguishing feature, the problem to be solved can be seen in the reduction of the material costs of the container assembly of D14. D12 mentions a similar problem and the corresponding solution. The skilled person would have no technical difficulties in implementing the solution known from D12 in the container assembly of D14. By doing so, he would arrive at the subject-matter of claim 1 of the fourth auxiliary request without the exercise of



inventive activity.

Documents D3, D6 and D7 provide evidence that container lids with a hinged portion integrally formed from a plastic polymer material are well known to the person skilled in the art. Therefore the subject-matter of claim 13 does not involve an inventive step.

### **Reasons for the Decision**

1. Admissibility of documents D15 to D28

1.1 Documents D15 and D16

1.1.1 As put forward in its statement setting out the grounds of appeal, appellant II requests the admission into the proceedings of documents D15 and D16, which had not been admitted by the opposition division (see impugned decision, point II.2).

1.1.2 Documents D15 and D16 were filed late in the opposition proceedings with appellant II's letter dated 19 April 2012 against claim 1 of the patent as granted, see page 5, chapter with the heading "New, highly relevant documents" of said letter. With letter of 13 September 2011 appellant I had already filed amended auxiliary requests to be discussed at the oral proceedings before the opposition division. In view of the above-mentioned letters and the discussion at the oral proceedings before the opposition division (see minutes, point 3), there is **no specific reason** which justifies the late filing of said documents being considered as an appropriate and immediate reaction to developments in the first-instance proceedings, such as the preliminary opinion of the opposition division dated 13 December 2011 or arguments/amendments presented/filed by appellant I. In that context, the

opposition division applied the correct criterion of required *prima facie* relevance in a reasonable manner (G 7/93, OJ EPO 1994, 775, Reasons 2.6). Consequently, the board sees no reason to conclude that the opposition division exercised its discretion incorrectly.

- 1.1.3 The above assessment of the proper exercise of the opposition division's discretion was given in the board's preliminary opinion annexed to the summons to oral proceedings, see point 4.2, and has not been contested by appellant II in its subsequent written submissions or orally during the oral proceedings.
- 1.1.4 For the above reasons documents D15 and D16 are not admitted into the proceedings (Article 12(4) RPBA).
- 1.2 Documents D17 to D28
  - 1.2.1 Documents D17 to D28 were filed for the first time with appellant II's statement setting out the grounds of appeal.
  - 1.2.2 The board considers that appeal proceedings, which are largely determined by the factual and legal scope of the preceding proceedings, are not about bringing an entirely fresh case to the board. This means that an appellant is not at liberty to bring about the shifting of its case to the appeal proceedings as it pleases, and so compel the board either to give a first ruling on the critical issues or to remit the case to the opposition division. Conceding such freedom to an appellant would run counter to orderly and efficient opposition-appeal proceedings. In effect, it would allow a kind of "forum shopping" which would jeopardise the proper distribution of functions between the

departments of first instance and the boards of appeal and would be unacceptable for procedural economy generally (G 9/91, OJ EPO 1993, 408, Reasons 6; T 1705/07 of 10 June 2010, not published in OJ EPO, Reasons 8.4; T 1067/08 of 10 February 2011, not published in OJ EPO, Reasons 7.1 to 7.2).

1.2.3 This is reflected in Article 12(4) RPBA, which states that:

*"Without prejudice to the power of the Board to hold inadmissible facts, evidence or requests which **could have been presented** or were not admitted in the first instance proceedings, everything presented by the parties under (1) shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in (2)" (emphasis added by the board).*

1.2.4 The present board realises that everything "could" have been presented earlier and therefore applies the more lenient "should have been presented". Among the reasons for the admission of D17 to D28 given by appellant II in its statement setting out the grounds of appeal (see in particular pages 2 and 6 to 8), appellant II presented no argument as to the documents D17 to D28 had not been presented during the first-instance proceedings.

1.2.5 Contrary to appellant II's view, the cleaning of the lid, i.e. the interruptions of the cam provided on the lid, was already a focus point in the opposition proceedings, since these features had already been included in claim 1 of the fifth auxiliary request filed with letter dated 13 September 2011 (becoming the sixth auxiliary request with letter dated 20 April 2012

and the second auxiliary request during the oral proceedings). That was when any further documents relevant to this point could/should have been filed, as an appropriate response. It is also noted that these features were also present in dependent claims 4 and 5 of the patent as granted, and a clear indication concerning their technical effect was given in paragraphs 14 and 24 of the contested patent. Finally, the stacking of lids onto lids and containers onto lids was already disclosed in documents filed during the opposition proceedings, see for instance D4, figures 6a and 6b; so there was no need to give further evidence of the corresponding skilled person's common general knowledge.

- 1.2.6 For the above reasons documents D17 to D28 too are not admitted into the proceedings (Article 12(4) RPBA).
- 1.2.7 The above was the board's preliminary opinion provided to the appellants in the annex to the summons to oral proceedings, point 4.3. At the oral proceedings, appellant II argued only for the admission of D17, holding the view that D17 should be admitted in response to the amendments introduced in the set of claims of the fourth, fifth and sixth auxiliary requests which were filed late by appellant I only one month before the oral proceedings (see appellant I's letter dated 16 November 2016).

For appellant II, appellant I cannot claim that it would not be prepared to discuss D17, since the document was filed with appellant II's statement setting out the grounds and, until the oral proceedings, no final decision had been taken by the board on its admission. As it was still possible that

D17 would be admitted, appellant I was required to be aware of its disclosure.

1.2.8 The board cannot share appellant II's view for the reason given by appellant I, i.e. that there appears to be no reason for singling out D17 with respect to the other documents D18-D28. The amendments introduced in the claims of the said late-filed fourth, fifth and sixth auxiliary requests do not justify the admission of D17, since they do not constitute a change in substance, but rather merely aim in essence at clarifying the meaning of the subject-matter of the sets of claims which had already been on file so far.

## 2. Apportionment of costs

2.1 Appellant I requests apportionment of costs for the fact that it had to review and consider documents D15 to D28, irrespective of their (non-)admission into the present proceedings. It considers that these documents should have been filed in due time during the opposition proceedings.

2.2 The board cannot grant this request. Preparations for discussing the admission of late-filed documents into the proceedings during the opposition-appeal proceedings and, if they are admitted, preparations for discussing their relevance in respect of the patentability of the claimed subject-matter are part of the normal work that can be expected of any party to the proceedings and/or its representative in opposition-appeal proceedings.

2.3 Therefore, appellant I's request for apportionment of costs is refused (Article 104(1) EPC).

3. Main request

3.1 Amendments

Appellant II has not pursued in appeal the ground for opposition of Article 100(c) EPC against the claims of the patent as granted. The board cannot find fault in the finding of the impugned decision, point II.4.1, in this respect that the ground for opposition pursuant to Article 100(c) EPC does not hold against the main request.

3.2 Novelty - claim 1

3.2.1 Appellant II has contested that the subject-matter of claim 1 of the main request is novel over D14.

3.2.2 Document D14 discloses a lid part ("reclosable container top"), said lid part comprising a connection portion ("frame part" 1) for connection to a container part ("sleeve" 7) (see for instance "point formed barbs" 9 of "neck" 8 shown in figures 1 and 2, also appearing in figures 15 to 17) and a lid ("lid part" 2), being pivotably connected to said connection portion 1, and the side of said connection portion 1 remote from said lid 2 and the side of the lid 2 remote from the connection portion 1 are provided with first complementary stacking means, said complementary stacking means comprising a cam ("radially inwards directed flange" 31) provided on the lid on the side remote from said connection portion (see page 7, line 31, to page 8, line 14, and figures 15 to 17).

3.2.3 As a consequence, the board cannot find fault in the finding of the impugned decision, point II.4.2, that

the subject-matter of claim 1 of the main request lacks novelty over D14 (Article 54(1) EPC).

3.2.4 The board considers that the reclosable container top of figures 15 to 17 is to be used similarly to the configurations shown in figures 3 to 5 and 9 to 13. This appears clearly from the "point formed barbs" 9 of "neck" 8 in figures 1 and 2, which are also present in figures 15 to 17. Consequently, the skilled person will directly and unambiguously derive that D14 discloses a container assembly comprising a container part 7 and a lid part as shown in figures 15 to 17 (page 4, line 27, to page 5, line 3).

3.2.5 At the oral proceedings appellant I held the view that the disclosure of figures 15 to 17 of D14 is rather unclear. For appellant I, the skilled person would consider this disclosure as an embodiment on its own, i.e. a container in itself, as it appears to be designed for containing material (see figure 16) and it also comprises a closed bottom (see bottom of frame part 1). The skilled person will then see no reason to combine this disclosure with the other embodiments of D14, in particular to regard this container as being assembled with the containers 7 in figures 3 to 5 or 9 to 13. In view of the absence of any direct and unambiguous disclosure of an assembly as claimed in claim 1, i.e. a container and a lid part, said lid part comprising a lid and a connection portion, novelty should be acknowledged.

3.2.6 The board cannot share this view for the reasons already given under point 3.2.4 above. Further, as put forward by appellant II at the oral proceedings, the lid part 2 shown in figure 16 is not designed to contain material but merely to provide a space to

arrange the portioning scoop. In the other embodiments of D14 a similar space for the portioning scoop is provided instead in the frame part 1, see page 8, lines 15 to 17. As also explicitly mentioned in the same passage of D14, figures 16 and 17 show "a reclosing top" as in figures 1 and 2 (see for instance page 3, line 23; page 4, line 20). The bottom of the frame part 1 of this reclosing top is to be torn open by pulling the tear open string 14 (page 5, lines 4 to 7; figure 1). Therefore, even though the bottom of the frame part 1 is depicted as being closed in figures 15 to 17, the skilled reader of D14 will immediately realise that it has to be torn open as in the other embodiments of D14.

3.2.7 Appellant I further argued that, should **the barbs and the cam** of the frame part 1, i.e. the cam positioned close to said barbs in figure 17, be regarded as the connection portion to be connected to an additional container, the stacking means 32 of figures 15 to 17 would not be provided on said connection portion, contrary to claim 1. In the embodiment of figures 15 to 17, the lid part would then comprise three distinct parts: the lid, the connection portion (the barbs and the cam) and the bottom part (provided with the stacking means 32 and the flat bottom). This would be contrary to claim 1, which specifies that the lid part has only two distinct parts. Novelty should then have to be acknowledged.

3.2.8 The board cannot share this view for the reasons already given under points 3.2.2 and 3.2.4 above. There is no reason to arbitrarily distinguish two distinct parts in the frame part 1 of the embodiment of figures 15 to 16 of D14. The frame part 1 as a whole is considered to be the connection portion in accordance with claim 1 of the main request. As put forward by



appellant II at the oral proceedings, the stacking means 32 shown in figures 15 to 17 is regarded as being provided on the connection portion 1. Such a design as disclosed in figures 15 to 17 of D14 is not excluded from claim 1 of the main request.

- 3.2.9 Appellant I also argued that according to claim 1 of the main request the side of the connection portion remote from the lid is to be provided with the stacking means, which would not be the case in the embodiment shown in figure 15 to 17. According to appellant I, in order to comply with this feature of claim 1, the stacking means in the embodiment of D14 should be located on the flat bottom of the frame part 1. Since this is not the case, novelty of the claimed subject-matter had to be acknowledged.

By the same token, the inwardly-outwardly complementary stacking means 31, 32 of the embodiment shown in figures 15 to 17 of D14 would also not be regarded as falling within the scope of claim 1 of the main request.

- 3.2.10 Again, the board cannot share this view. The expression used in claim 1 of the main request concerning the side of the connection portion remote from the lid leaves completely open where exactly the stacking means should be provided on the connection portion. In fact the term "side" used in this expression equates to the whole surface opposite to the lid, i.e. the whole surface of the frame part 1 facing downwards in the embodiment of figures 15 to 17. Indeed, it is not specified in claim 1 that the stacking means should be provided at a portion of the connection portion which is the **most** remote from the lid, which would then indeed be the flat bottom of the frame part 1. As a result, the

configuration of figures 15 to 17 falls within the scope of claim 1 of the main request, including the inwardly-outwardly complementary stacking means 31, 32.

#### 4. First auxiliary request

The first auxiliary request corresponds to the first auxiliary request underlying the impugned decision.

##### 4.1 Amendments

4.1.1 With respect to claim 1 of the main request, claim 1 of the first auxiliary request further comprises the term "circumferential" for the connection portion (see point V above).

4.1.2 Appellant II has not raised in appeal any objection based on Article 123(2) EPC against this request (see impugned decision, point II.5.1).

4.1.3 The board, however, considers that the term "circumferential" introduces new embodiments not originally envisaged and not derivable from the application as originally filed, contrary to the requirements of Article 123(2) EPC.

4.1.4 Appellant I has contested the power of the board to introduce *ex officio* an objection which had not been raised by appellant II, arguing that:

- a "new ground" is not allowed in appeal, except with the approval of the patentee, which is not the case here (G 10/91, OJ EPO, 1993, 420; T 520/01 of 29 October 2003, not published in OJ EPO); and

- the board is required to be strictly impartial (T 1676/08 of 9 March 2012; T 1799/08 of 18 June 2013; T 253/95 of 17 December 1997, none of them published in OJ EPO).

- 4.1.5 The board notes that the claims were amended during the opposition proceedings and hence are open to examination pursuant to Article 123(2) EPC. Further, the impugned decision explicitly deals under point II.5.1 with this issue for the very same request, so that it belongs to the legal framework of the appeal.
- 4.1.6 An objection based on Article 123(2) EPC cannot be considered as being a new ground as alleged by appellant I in the sense of G 10/91. Further, in T 520/01 (*supra*), cited by appellant I, the ground at stake (Article 100(b) EPC) was not maintained by the opponent in opposition proceedings and not discussed in the impugned decision. As this is not the case here, this decision does not apply.
- 4.1.7 Regarding the decisions cited by appellant I with respect to the need for strict neutrality, the board notes the following:
- 4.1.8 T 1676/08 (*supra*), Reasons 11, concerns the neutrality of the board during the oral proceedings.
- 4.1.9 In T 1799/08 (*supra*), Reasons 10 and 11, the opponent was passive, not even attending the oral proceedings, after the board had raised an issue in writing. The board concluded that it could not perform the job in place of the opponent.
- 4.1.10 In T 253/95 (*supra*), Reasons 3, the board stated that a new argument could not have been sent in writing before

the oral proceedings for partiality reasons since doing so would unduly provide the party having the burden of proof with time to prepare an answer. The board did, however, admit a new objection pursuant to Article 123(2) EPC raised *ex officio* at the oral proceedings (Reasons 2).

- 4.1.11 Consequently, none of the above-mentioned decisions reflects the present case, and therefore they do not have to be taken into consideration by the board.
- 4.1.12 In fact, the board is required to review the impugned decision as a whole, i.e. including point II.5.1, and pursuant to Article 111(1) EPC may exercise the power of the opposition division.
- 4.1.13 According to the established case law, the board has wide powers to consider all possible objections under the EPC against the first auxiliary request, since the amendments must be examined fully for compatibility with the EPC, see Case Law of the Boards of Appeal, 8th Edition, 2016, IV.D.3.4.3.
- 4.1.14 Therefore, the board has the power to examine in the present case whether the first auxiliary request fulfils the requirements of Article 123(2) EPC. This applies *de facto* to the other auxiliary requests discussed in the present decision.
- 4.1.15 At the oral proceedings, appellant I explicitly withdrew its request for referral to the Enlarged Board of Appeal filed with its letter dated 16 November 2016, page 2, "First auxiliary request", concerning the above (a "new ground" not allowed in appeal and the need for strict impartiality of the board).

- 4.1.16 As put forward in the annex to the summons to oral proceedings and discussed during said oral proceedings, the board considers that the term "circumferential" introduced in claim 1 teaches new embodiments not originally envisaged and not derivable from the application as originally filed. This contravenes the requirements of Article 123(2) EPC.
- 4.1.17 The adjective "circumferential" in fact also encompasses the meaning that the connection portion, as a whole, is located **at or near a circumference** of a part, be it the lid or the container or another undefined part of the assembly.
- 4.1.18 The definition given in the impugned decision (extending around the whole periphery), point II.3, is considered by the board to be too restrictive, since it does not encompass other possible interpretations. For instance, a connection part as in D3, see edge 38 in figures 2 and 7, can also be considered as being circumferential, i.e. located at the circumference of the container or the lid.
- 4.1.19 According to appellant I, the interpretation that in claim 1 the connection portion is located "at or near a circumference" is incorrect since the term "circumferential" should be interpreted in the light of the whole contested patent. The term has been used consistently (twenty times) to mean an **annular** connection portion such as in paragraph 42 and in claim 6 of the application as originally filed. This also fits in with the specific type of container assembly the contested patent is concerned with, as described in D13, said document being cited in paragraph 2 of the application as originally filed.

4.1.20 The board cannot share this view for the reasons given under points 4.1.16 to 4.1.17 above. As also put forward by appellant II, there appears to be no reason why the term "circumferential" used in claim 1 should be limited to only the meaning given in the description, as long as other possible meanings are not excluded and are considered by the skilled person to be technically feasible.

5. Second auxiliary request

5.1 Amendments

5.1.1 With respect to claim 1 of the first auxiliary request, claim 1 of the second auxiliary request further comprises the following features:

- the circumferential connection portion defines "an opening therethrough"; and

- the lid is "for closing said opening" (see point V above).

5.1.2 The board shares appellant II's view put forward at the oral proceedings that the added features do not overcome the objection pursuant to Article 123(2) EPC discussed under point 4 above for the first auxiliary request with respect to the term "circumferential".

5.1.3 The term "circumferential" does not in fact necessarily imply that the connection portion is annular and goes completely around the container opening. Embodiments are also encompassed for which the connection portion is partly circumferential with respect to the container opening, whereby in that case the lid part does not completely close the opening of the container. The

added features then merely specify that this partly circumferential connection portion comprises an opening, said (second) opening being closed by the lid. As a result, claim 1 of the second auxiliary request encompasses embodiments of the container assembly comprising two openings (one not closed by the lid part and one in the connection portion closed by the lid), which are not provided for in and not derivable from the application as originally filed, contrary to Article 123(2) EPC.

5.1.4 According to appellant I, the added features enable the term "circumferential" to be clarified as meaning annular. Appellant II's interpretation with two openings would not be realistic in view of the patent specification taken as a whole.

5.1.5 The board cannot share appellant I's view for the reasons given under point 5.1.3 above. There is no reason to limit the technical meaning of claim 1 to the description of the contested patent, as long as technically feasible (originally undisclosed) embodiments also fall within the scope of said claim.

6. Third auxiliary request

6.1 The third auxiliary request was filed during the oral proceedings before the board. Its admission into the proceedings has been contested by appellant II. However, since its claimed subject-matter does not raise any new complex issue that would require adjournment of the oral proceedings to deal with it, the board sees no reason not to admit it into the proceedings (Articles 13(1) and (3) RPBA).

6.2 Claim 3 - clarity

6.2.1 The subject-matter of claim 3, although based on claims 3 and 4 of the patent as granted, is not present as such in the claims of the patent as granted, since claim 4 depends on claim 1 or 2, i.e. not on claim 3.

Therefore, contrary to appellant I's view, it may be examined whether the feature added to claim 3:

" , and comprise a circumferential cam provided on the lid extending near the outer circumference of said lid"

introduces non-compliance with respect to Article 84 EPC (G 3/14, published in OJ EPO 2015, 102).

6.2.2 The board shares appellant II's view that due to the expression " , and comprise" it is not excluded that the cam is provided on the bottom of the container **and** the lid. In addition, the wording of claim 3 also does not exclude that the cam is provided on the lid (only). Consequently, the amendments introduced in claim 3 of the third auxiliary request do not clearly specify on which part of the assembly the cam is to be provided, thereby contravening the requirements of Article 84 EPC (see appellant II's statement setting out the grounds, points 2.2 and 6.5).

7. Fourth auxiliary request

7.1 Admissibility

The fourth auxiliary request was filed during the oral proceedings before the board. Its admission into the proceedings has not been contested by appellant II and, since its claimed subject-matter does not raise any new



complex issue that would require oral proceedings to be adjourned to deal with it, the board sees no reason not to admit it into the proceedings (Articles 13(1) and (3) RPBA).

## 7.2 Amendments

7.2.1 With respect to claim 1 of the main request, claim 1 of the fourth auxiliary request further comprises the following features (see point V above):

- the cam provided on the lid being "circumferential"; and
- said cam "extending near the outer circumference of said lid and being provided with interruptions".

7.2.2 Claim 1 of the fourth auxiliary request is based on claims 1, 4 and 5 of the patent as granted (claims 1, 2, 3, 6 and 7 of the application as originally filed).

7.2.3 Claim 3, which is based on claim 3 of the patent as granted (claims 1 to 7 of the application as originally filed), has been made dependent on claim 1.

7.2.4 Claim 13 has been amended to clarify that the lid part explicitly comprises the features of the lid part of the container assembly of the preceding claims.

7.3 Appellant II has not raised any objections pursuant to Article 84, 123(2) or (3) EPC, and the board has no reason to see things differently.

7.4 Rule 80 EPC

7.4.1 Appellant II has argued that the requirements of Rule 80 EPC would not be fulfilled since there would be no reason for the amendments made to claim 3.

7.4.2 The board cannot share appellant II's view for the reason put forward by appellant I, i.e. that the amendments overcome the objection of lack of clarity which was held valid against claim 3 of the third auxiliary request in the course of the oral proceedings. They are therefore clearly occasioned by a ground for opposition, such that the requirements of Rule 80 EPC are fulfilled.

7.5 Claim 1 - novelty

7.5.1 Appellant II has contested that the subject-matter of claim 1 of the fourth auxiliary request is novel over D4.

7.5.2 The lack of novelty objection based on D6 submitted in appellant II's letter dated 2 December 2016, pages 4 and 5, "Fourth auxiliary request", was explicitly not maintained at the oral proceedings.

7.5.3 Document D4 discloses a container assembly comprising a container part 200 and a lid part 100, said lid part 100 comprising a connection portion for connection to said container part 200 and a lid 150 being pivotably connected to said connection portion via the snap hinge mechanism part 130, and the side of said connection portion remote from said lid and the side of the lid remote from the connection portion are provided with first complementary stacking means ("stacking ribs" 121, 122), said complementary stacking means comprising

a cam 121 provided on the lid on the side remote from said connection portion (abstract; figures).

- 7.5.4 The board concurs with the impugned decision, point II.4.2, page 4, second paragraph, that the lid and the connection portion in D4 are **suitable for** being stacked on one another via the ribs 121, 122, i.e. providing complementary stacking means as claimed (see figure 6a). The skilled person will directly and unambiguously derive that the ribs of the lid part 121 and those of the connection portion 122 are similar so that the configuration of figure 6a would be the same with ribs 121 and 122 on one another. The portion 128 shown in figures 5 and 6 cannot prevent such stacking (shorter in length rib 121 stacked on top of longer in length rib 122, and vice versa) since its height is greater than that of the ribs 121, 122.
- 7.5.5 The board shares appellant II's view that a connection portion as disclosed in D4 is not excluded from claim 1. The expression "remote from" used in claim 1 also encompasses the configuration of D4 where the stacking means are on the same side of the lid part, contrary to appellant I's view.
- 7.5.6 The board shares appellant I's view that the cam 121 in D4 is **continuous** without interruptions. In this respect, the board cannot find fault with the finding of the impugned decision, point II.6.2. Should the cam 121 be seen as circumferential to the lid 150 in D4, there would then be at most a single interruption. In order to have interruptions (plural), at least two cam portions should be provided. Since this is not the case in D4, novelty is acknowledged.

7.5.7 Consequently, the subject-matter of claim 1 of the fourth auxiliary request is novel (Article 54(1) EPC).

7.6 Claim 1 - inventive step

7.6.1 Appellant II has contested that the subject-matter of claim 1 of the fourth auxiliary request involves inventive step on the basis of:

- the combination of the teachings of D14 and D12; and
- the combination of the teachings of D6 and D12,

whereby the latter combination constitutes a new line of argument raised for the first time with letter dated 2 December 2016, pages 4 and 5, "Fourth auxiliary request".

Admissibility of a new line of argument

7.6.2 With its letter dated 2 December 2016, appellant II raised for the first time an objection of lack of inventive step on the basis of the combination of the teachings of D6 and D12. Hence its admission into the proceedings is subject to the discretionary power of the board pursuant to Article 13(1) and (3) RPBA.

7.6.3 According to appellant II, the new line of argument was justified in view of the late filing of appellant I's auxiliary requests with letter dated 16 November 2016, including the third auxiliary request, only one month before the oral proceedings. The new line of argument is based on documents (D6 and D12) which had been filed with the notice of opposition. For these reasons the new line of argument should be admitted into the appeal proceedings.

7.6.4 The board cannot see, however, how the amendments introduced in the claims of the auxiliary requests

filed with the letter dated 16 November 2016 could justify such a late-filed new line of argument. In fact, the former (withdrawn) third auxiliary request corresponds to the set of claims of the patent as upheld by the opposition division; so this new line of argument could have been presented in the opposition proceedings (see principles under point 1.2.2 above which apply *mutatis mutandis*) and, in any case, at the latest with appellant II's statement setting out the grounds of appeal. Claim 1 of the fourth auxiliary request now at stake is merely based on claim 1 of said former third auxiliary request with the disputed term "circumferential" deleted. Hence, the fourth auxiliary request cannot justify the new line of argument either.

7.6.5 In fact, the new line of argument introduces a new complex issue to be discussed for the first time at a late stage in the proceedings, for which adjournment of the oral proceedings would be necessary in order for appellant I to be in a position to react properly, possibly by filing new requests.

7.6.6 As a consequence, the new line of argument based on the combination of documents D6 and D12 against the claimed subject-matter of the fourth auxiliary request is not admitted into the proceedings (Article 13(1) RPBA).

Combination of the teachings of D14 and D12

7.6.7 The Board shares the appellants' view that the embodiment shown in figures 15 to 17 of D14 forms plausible closest prior art since it lies in the same technical field as that of the container assembly according to claim 1 of the fourth auxiliary request.

- 7.6.8 As put forward by appellant II, the only distinguishing feature of claim 1 of the fourth auxiliary request vis-à-vis the closest prior art is that the circumferential cam is provided with **interruptions** (see point 3.2 above for discussion of the disclosure of D14).
- 7.6.9 For appellant II, the technical effect associated with the distinguishing feature is a reduction in the material used, such that the problem to be solved can be seen in the reduction of the material costs of the container assembly of D14. This problem of reducing material costs is an ever-present issue the skilled person has been faced with in this technical field when developing container assemblies, as also derivable from D12, column 1, lines 46 to 52. D12, which is in the same technical field as D14, discloses a container assembly comprising a circumferential cam ("intermittent nesting ring" 28) extending near the outer circumference of the lid ("overcap" 10) which is provided with interruptions (see for instance figures 5, 8 to 10). Still according to appellant II, the skilled person would have no technical difficulties with applying the interruptions of the intermittent nesting ring 28 of D12 to the container assembly of D14. He would provide interruptions in the circumferential rib on which the cam 31 is provided in accordance with figure 17 of D14. By doing so, he would arrive at the subject-matter of claim 1 of the fourth auxiliary request without exercising inventive activity.
- 7.6.10 The board cannot share this view of appellant II view for the following reasons: The skilled person, should he be faced with the above-mentioned problem defined by Appellant II, said problem not being the objective technical problem specified in the contested patent of

enabling the cleaning of the top of the lid and the whipping away of debris (paragraphs 14 and 24), would find no hint or incentive in the teaching of D12 for applying the interruptions envisaged for the lightweight overcap for a cylindrical container known from D12 to the specific lid construction of the container assembly known from D14. There are in fact many ways for the skilled person to reduce the amount of material used in the container assembly of D14. Appellant II did not demonstrate that the skilled person in expectation of the advantages achieved (i.e. in the light of the problem addressed) would have done so because of pointers in the prior art. Further, the skilled person would be prevented from providing the outer circumference of the lid known from D14 with interruptions since he would realise that the function of the rib on which the cam 31 is provided would no longer be guaranteed.

7.6.11 As a consequence, the subject-matter of claim 1 of the fourth auxiliary request involves an inventive step (Article 56 EPC).

7.7 Claim 13

7.7.1 Claim 13 of the fourth auxiliary request has been amended over claim 15 of the patent as granted in order to make clear that the features of the claimed lid part are those of the lid part **"of the"** container assembly specified in the preceding claims.

7.7.2 Appellant II referred to documents D3, D6 and D7 as evidence that container lids with a hinged portion integrally formed from a plastic polymer material by injection moulding are known. The board follows appellant II in that respect. On the other hand, given

that the lid part of claim 13 comprises the features of the lid part of the container assembly of claim 1, the board considers that the subject-matter of claim 13 of the fourth auxiliary request is also novel and inventive for the same reasons as mentioned above in respect of claim 1 of the fourth auxiliary request.

#### 7.8 Description

At the oral proceedings appellant I filed a description adapted to the fourth auxiliary request. Appellant II has raised some doubts with respect to paragraphs 9 and 10 in particular, but has raised no explicit objection against said paragraphs. The board does not share appellant II's doubts and cannot see any reason for raising *ex officio* any objection against said paragraphs either.



## 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 in amended form with the following documents:
  - claims 1 to 13 of the fourth auxiliary request submitted at the oral proceedings;
  - description, columns 1 to 4, filed at the oral proceedings and columns 5 to 8 of the patent specification;
  - figures 1 to 8 of the patent specification.
3. The request of appellant I for apportionment of costs is refused.
4. The appeal of appellant II is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated