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**Datasheet for the decision  
of 21 June 2018**

**Case Number:** T 1365/14 - 3.2.08

**Application Number:** 04785233.0

**Publication Number:** 1667803

**IPC:** B21D51/44

**Language of the proceedings:** EN

**Title of invention:**

CAN SHELL FOR A CAN END

**Patent Proprietors:**

Container Development, Ltd.  
BALL CORPORATION

**Opponent:**

Furlong, Christopher

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2), 104(1)  
RPBA Art. 12(4), 13(1), 13(3), 16(1)

**Keyword:**

Amendments - allowable (no) - added subject-matter (yes)  
Late-filed request - request not examined by the opposition  
division - submitted during oral proceedings - request clearly  
allowable (no)  
Apportionment of costs - not equitable

**Decisions cited:**

**Catchword:**



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

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Case Number: T 1365/14 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 21 June 2018**

**Appellant:** Container Development, Ltd.  
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**Appellant:** BALL CORPORATION  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 14 April 2014  
revoking European patent No. 1667803 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairwoman**            P. Acton  
**Members:**            M. Foulger  
                             Y. Podbielski

## **Summary of Facts and Submissions**

- I. With the decision dated 14 April 2014, the opposition division revoked European patent no. 1 667 803. They found that the then valid main request and auxiliary requests 1-9 contravened Article 123(2) EPC and the tenth auxiliary request contravened Article 123(3) EPC.
- II. The appellants (patent proprietors) filed an appeal against this decision.
- III. Oral proceedings took place before the Board on 21 June 2018.
- IV. The appellants requested that:  
the decision under appeal be set aside and a patent be maintained on the basis of the main request or, in the alternative, auxiliary request 1 filed during the oral proceedings or one of auxiliary requests 2 or 3 filed with letter dated 23 October 2017.

The respondent (opponent) requested that:

- the appeal be held inadmissible;
- none of the appellants' claim requests be admitted into the proceedings;
- the appeal be dismissed;
- costs be apportioned.

- V. a) Claim 1 of the main request (which corresponds to claim 1 as granted) reads:

"A sheet metal can shell (210) having a vertical center axis (11) and a curled peripheral crown (242) adapted to be double-seamed to an end portion of a formed sheet metal can body (50), said shell (210) comprising a circular center panel (212) connected to an inner wall

(217) of a countersink (218), said countersink (218) having an outer wall (224) and a generally U-shaped cross-sectional configuration, and a chuckwall (234, 232) extending from said outer wall (224) of said countersink (218) to an inner wall (238) of said crown (242),

**characterized in that**

said circular center panel (212) is connected to the inner wall (217) of the countersink (218) by an inclined panel wall (216), said inclined panel wall (216) having inner and outer surfaces each being straight in axial cross-section and extending to a vertical wall portion at an angle (A6) between 30° and 60° relative to said center axis (11)."

b) Claim 1 of the first auxiliary request reads:

"A sheet metal can shell (210) having a vertical center axis (11) and a curled peripheral crown (242) adapted to be double-seamed to an end portion of a formed sheet metal can body (50), said shell (210) comprising a circular center panel (212) connected to an inner wall (217) of a countersink (218), said countersink (218) having an outer wall (224) and a generally U-shaped cross-sectional configuration formed by a first radius (R9) and a second radius (R11) extending to said outer wall (224) of said countersink, the second radius (R11) being relatively small compared to the first radius (R9), and a chuckwall (234, 232) extending from said outer wall (224) of said countersink (218) to an inner wall (238) of said crown (242),

**characterized in that**

said circular center panel (212) is connected to the inner wall (217) of the countersink (218) by an inclined panel wall (216), said inclined panel wall (216) having inner and outer surfaces each being

straight in axial cross-section and extending to said first radius (R9) via a vertical wall portion at an angle (A6) between 30° and 60° relative to said center axis (11)."

c) Claim 1 of the second auxiliary request reads:

"A sheet metal can shell (210) having a vertical center axis (11) and a curled peripheral crown (242) adapted to be double-seamed to an end portion of a formed sheet metal can body (50), said shell (210) comprising a circular center panel (212) connected to an inner wall (217) of an annular countersink (218), said countersink (218) having an outer wall (224) and a generally U-shaped cross-sectional configuration, and an annular chuckwall (234, 232) extending from said outer wall (224) of said countersink (218) to an inner wall (238) of said crown (242),

**characterized in that**

said circular center panel (212) is connected to the inner wall (217) of the countersink (218) by an annular inclined panel wall (216), said inclined panel wall (216) having inner and outer surfaces each being straight in axial cross-section and extending to a vertical wall portion at an angle (A6) between 30° and 60° relative to said center axis (11)."

d) Claim 1 of the third auxiliary request reads:

"A sheet metal can shell (210) having a vertical center axis (11) and a curled peripheral crown (242) adapted to be double-seamed to an end portion of a formed sheet metal can body (50), said shell (210) comprising a circular center panel (212) connected to an inner wall (217) of an annular countersink (218), said countersink (218) having an outer wall (224) and a generally U-

shaped cross-sectional configuration formed by a first radius (R9) and a second, relatively small radius (R11) extending to said outer wall (224) of said countersink, and an annular chuckwall (234, 232) extending from said outer wall (224) of said countersink (218) to an inner wall (238) of said crown (242),

**characterized in that**

said circular center panel (212) is connected to the inner wall (217) of the countersink (218) by an annular inclined panel wall (216), said inclined panel wall (216) having inner and outer surfaces each being straight in axial cross-section and extending to said first radius (R9) via a vertical wall portion at an angle (A6) between 30° and 60° relative to said center axis (11)."

(Additions over claim 1 as granted underlined)

VI. The appellants argued essentially the following:

a) Admissibility of the appeal

The appeal was admissible because reasons were given in the statement setting out the grounds of appeal, why the decision under appeal was incorrect, in particular the reasons, why a "vertical wall portion" was originally disclosed, were discussed. Thus, the requirements of Rule 99(2) EPC were met.

b) Admissibility of the requests

i) Main request

This request should be admitted because it was a *bone fide* attempt to streamline the appeal proceedings. The substance of the decision under appeal also applied to



this request so that it was not a new case. The respondent had already taken position on claim 1 of this request in the notice of opposition so there was no reason why they could not deal with it.

The request should be admitted into the proceedings.

ii) First auxiliary request

This request was filed to overcome objections that had arisen during the oral proceedings before the Board and should therefore be admitted.

iii) Second auxiliary request

This request corresponded to auxiliary request VII filed with the statement of grounds of appeal and had been presented in response to objections raised by the respondent during opposition proceedings. It should therefore be admitted.

iv) Third auxiliary request

Claim 1 of this request was both linguistically and technically clear. The skilled person would immediately recognise that what is meant is that R9 should be smaller than R11. Thus this request was not *prima facie* unallowable.

c) Added subject-matter - second auxiliary request

The feature of a "vertical wall" was disclosed both in fig. 13 and in para. [0041] - [0045].

In fig. 13, there was a vertical wall between the inclined wall 216 and the inclined inner wall 217. This

was shown by the fact that neither a radius dimension nor an angle dimension was associated with this portion. In cases where the wall was not vertical there was either an angle shown, e.g. angle A6 for wall 216, or a radius was shown, e.g. radius R9 for wall 217. Thus, from the disclosure of fig. 13 the wall was vertical.

Para. [0041] - [0048] of the application gave dimensions for the can shell illustrated in fig. 13. These dimensions led inevitably, when plotted using a CAD program, which was illustrated in the statement setting out the grounds of appeal, to the conclusion that the wall portion was indeed vertical.

The discrepancy between the values of  $D6/2 - W1$  - (thickness of can shell) on the one hand and  $D9/2 + W4$  on the other was merely 0.0007" which was well within any rounding errors.

Furthermore, W1 and R9 had the same value. As a result the curve defined by R9 met the wall portion at 180°. The wall must therefore be at 90° as the wall must form a tangent to the radius. This resulted in this wall portion being vertical.

The subject-matter of claim 1 did not therefore extend beyond that of the application as originally filed.

d) Apportionment of costs

The requests filed were to expedite the proceedings and were in reaction to arguments advanced by the respondent either in appeal or in opposition proceedings. There had therefore been no abuse of the proceedings which would justify an apportionment of

costs.

VII. The respondent argued essentially the following:

a) Admissibility of the appeal

None of the requests on which the decision was based were defended in the statement setting out the grounds of appeal. This meant that the Board was faced with a completely new case in appeal. Therefore the appeal as a whole was inadmissible.

b) Admissibility of the requests

i) Main request

The appellants could clearly have presented this request before the opposition division but did not do so. Moreover, the claim sets of the different requests had been filed in a manner which presented the respondent with a continuously moving target.

ii) First auxiliary request

The wording of the amendment was not literally to be found in the application as originally filed. This raised new issues under Articles 84 and 123(2) EPC which the respondent could not be expected to deal with without adjournment of the oral proceedings.

iii) Second auxiliary request

This request was also not one of those decided upon by the opposition division. It could, and should, have been filed in the proceedings before the opposition division, but the appellants had not done so. It was

therefore not to be admitted into the proceedings.

iv) Third auxiliary request

This request was *prima facie* unclear because of the expression "relatively small". It was not defined in relation to what the second radius should be relatively small to. Thus, this request was unallowable and should not be admitted into the proceedings.

c) Added subject-matter - second auxiliary request

The feature of a "vertical wall" was not disclosed in the application as originally filed.

It was not possible to derive this feature either from fig. 13 or from para. [0041] to [0048] of the application.

The absence of a radius or angle dimension did not allow any conclusion to be drawn about whether the wall portion was vertical or not. For example wall 238 was shown as being inclined but without any radius or angle dimensioning.

Furthermore, there were discrepancies in the dimensions cited by the appellants. These discrepancies meant that the presence of a vertical wall portion could not be unambiguously derived from the application as filed.

Regarding the equation  $R9 = W1$  cited by the appellants, the line defining the left hand side of the dimension  $W1$  was broken at the point that the radius  $R9$  crossed it. There was no disclosure that the radius  $R9$  actually had its centre-point on this line. It was to be noted that the radii  $R12$  and  $R10$  crossed dimension lines

which were likewise broken but the centre-points of these radii did not fall on these dimension lines. Thus, the "vertical wall" portion could in reality be merely an inflection point.

Moreover, even assuming that a vertical wall could be derived from the disclosure of para. [0041] - [0048], this would only hold true for a can end with all the dimensions listed in para. [0043]. In particular, varying the value of angle A6 over the claimed range of 30° to 60° would lead to different conclusions as to whether a vertical portion existed in the original disclosure. Thus, without the other dimensions listed in para. [0043], in particular A6 = 45°, there was an unallowable intermediate generalisation.

The subject-matter of claim 1 was not directly and unambiguously disclosed in the application as originally filed, contrary to Article 123(2) EPC.

d) Apportionment of costs

The appellants had continually filed new requests thus presenting the respondent with a moving target. Such a behaviour amounted to an abuse of the proceedings which justified an apportionment of costs.

## **Reasons for the Decision**

1. Admissibility of the appeal

The appeal was filed within the time limits prescribed by Article 108 EPC. The appellants are clearly adversely affected by the decision under appeal (Article 107 EPC). Moreover, the statement setting out

the grounds of appeal indicates the reasons for setting aside the impugned decision (Rule 99(2) EPC). In particular, the statement specifies clearly why the appellants consider that a vertical wall portion was disclosed in the application as filed, see para. 2.2. Thus, even though the requests filed with the statement setting out the grounds of appeal are different from those defended before the opposition division, the statement setting out the grounds of appeal deals with the issues raised by the opposition division in their decision as required by Rule 99(2) EPC.

Hence, the appeal is admissible.

## 2. Admissibility of the appellants' requests

### 2.1 Main request

The main request comprises claim 1 of the patent as granted. The appellants could have reasonably defended this claim in proceedings before the opposition division but did not do so. Nor is it evident how this request overcomes the reasons for the decision.

The Board therefore makes use of its discretion under Article 12(4) RPBA and does not admit this request into the proceedings.

### 2.2 First auxiliary request

This was presented during the oral proceedings before the Board. The feature, whereby the generally U-shaped cross-sectional configuration is "formed by a first radius (R9) and a second radius (R11) extending to said outer wall of said countersink, the second radius (R11) being relatively small compared to the first radius

(R9)", has been introduced into claim 1. The literal wording of the amendment to claim 1 is not to be found in the application as filed. Moreover, the term "relatively small" implies a certain scope which is not further specified. The amended claim thus raises new issues under Articles 84 and 123(2) EPC which would have required an adjournment of the oral proceedings; it is therefore not admitted into the proceedings (Article 13(1) and (3) RPBA).

### 2.3 Second auxiliary request

This request had been filed with the statement setting out the grounds of appeal and appears to be a reaction to objections raised by the respondent during opposition proceedings. The Board therefore admitted this request into the proceedings.

### 2.4 Third auxiliary request

Claim 1 of this request specifies that "a generally U-shaped cross-sectional configuration [is] formed by a first radius (R9) and a second, relatively small radius (R11) extending to said outer wall of said countersink". The term "relatively small" is a relative term and it is unclear to which other parameter the second radius R11 should be small relative to. This request is consequently *prima facie* unallowable and is not admitted into the proceedings (Article 13(1) RPBA).

## 3. Added subject-matter - second auxiliary request

3.1 It is common ground that the wording "a vertical wall portion" is not literally to be found in the text of the application as filed.

The appellants argue that this feature is derivable either from fig. 13 taken alone or from the text of the description.

- 3.2 Taking the first of these, from fig. 13 it may be seen that there is a wall portion extending from the inclined panel wall 216 to the inclined inner wall 217 of the countersink 218. This wall portion is not shown as an angle (cf angle A6 for the inclined panel wall) nor is it shown as a radius (cf wall 217 which has a radius R9). This is not disputed.

From the fact that nothing is shown to the contrary, the appellants attempt to draw the conclusion that the wall portion must be vertical. The Board does not find this argument persuasive. The mere absence of information cannot allow a positive conclusion to be drawn. Moreover, inner wall 238 is described in para. [0042] as extending at an angle of less than  $16^\circ$ . This wall is also not provided with a angular dimensions. Hence, the Board considers that the absence of an angular dimension is not a clear and unambiguous disclosure.

- 3.3 Moving on to the second point, the appellants argue that when the dimensions given in paragraph [0043] are drawn then one inevitably arrives at this vertical wall portion.

However, there is an inconsistency in these figures because, if the wall portion were indeed vertical, then  $D6/2 - W1 - \text{wall thickness}$  should equal  $D9/2 + W4$ . This is not the case because the result for the first sum is 0.8993" (see p. 10 of the statement of grounds) whereas for the second sum a result of 0.9" is obtained (see annex of letter dated 23 October 2017). The difference



of 0.0007" is certainly very small but is nevertheless significant when compared to the length of the "vertical wall", calculated by the appellants as 0.0086" (see statement setting out the grounds of appeal p.13). This discrepancy may well be due to the approximate nature of the dimensions given in para. [0043] or it may be that the wall is in fact inclined. Given that there are two possible explanations for the discrepancy in the values of para. [0043], the Board considers that these values do not provide an unambiguous disclosure of a vertical wall.

3.4 With respect to the argument regarding the relation R9 and W1, even following the appellants' reasoning, this would be true only for a value of 45° for angle A6. The same would not follow for the complete claimed range of values of A6, i.e. between 30° and 60°. For example a steeper angle of A6, say 30°, starting from the same point would result in wall 216 joining directly with wall 217 - without any intermediate wall portion. Thus, a "vertical wall", supposing it to be present, was only disclosed in combination with A6 = 45° and the other specific values listed in para. [0043]. Hence, the generalisation in claim 1, whereby A6 is within the range 30° to 60°, extends beyond the subject-matter of the application as filed.

3.5 Thus, the feature of a "vertical wall portion" is not directly and unambiguously derivable from the application as originally filed. Claim 1 does not meet the requirements of Article 123(2) EPC.

4. Apportionment of costs

In opposition appeal proceedings each party shall bear the costs it has incurred unless a different

apportionment of costs is ordered by the Board (Article 104(1) EPC and Article 16(1) RPBA).

The filing of new requests is a normal way for the patent proprietor to defend their patent. It is correct that the appellants has filed various claim sets. However, the central issue in dispute has always remained that of the "vertical wall" discussed above. The Board does not consider that the filing of these requests was an abuse of the proceedings which would justify an apportionment of costs.

Hence, an apportionment of costs is not equitable. In consequence the Board refuses the request for apportionment of costs.

**Order**

**For these reasons it is decided that:**

1. The request for apportionment of costs is refused.
2. The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated