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**Datasheet for the decision
of 28 August 2018**

Case Number: T 1684/14 - 3.2.07

Application Number: 10003258.0

Publication Number: 2213584

IPC: B65D47/08

Language of the proceedings: EN

Title of invention:

A tamper-evident closure

Patent Proprietor:

Obrist Closures Switzerland GmbH

Opponent:

BERICAP SARL

Headword:

Relevant legal provisions:

EPC Art. 76(1), 123(2)

RPBA Art. 12(1)(a), 12(1)(b), 12(2), 13(1), 13(3)

Keyword:

Amendments - added subject-matter (yes)
Late-filed request - request clearly allowable (no) -
amendments after arrangement of oral proceedings - admitted
(no)

Decisions cited:

Catchword:



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Case Number: T 1684/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 28 August 2018

Appellant: BERICAP SARL
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 June 2014 concerning maintenance of the
European Patent No. 2213584 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
J. J. de Acha González

Summary of Facts and Submissions

- I. The appellant (opponent) filed an appeal against the interlocutory decision of the opposition division maintaining European patent No. 2 213 584 in amended form.
- II. The appellant requested in the written proceedings

that the impugned decision be set aside and
that the patent be revoked.
- III. The respondent (patent proprietor), while replacing their request directed to a dismissal of the appeal, requested in the written proceedings that, when setting aside the decision under appeal, the patent be maintained in amended form on the basis of the set of claims filed as "Main Request Claims" with letter dated 17 August 2018.
- IV. Oral proceedings were held on 28 August 2018, during which a new main request, replacing the "Main Request Claims" of 17 August 2018, was submitted by the respondent and the factual and legal situation was discussed with the parties. To prepare it, the Board had previously communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA. For further details of the course of the oral proceedings, reference is made to the minutes thereof.

At the end of oral proceedings,
the appellant

confirmed their written request, and

the respondent submitted as their **only** request

that, when setting aside the decision under appeal, the patent be maintained in amended form on the basis the new main request submitted during the oral proceedings.

The present decision was pronounced at the end of the oral proceedings.

V. Claim 1 reads as follows:

"1. A tamper-evident closure (10, 110) comprising a closure body and a tamper-evident member (30, 130) frangibly connected to the closure body, the closure body having a base (20, 120) and a lid (25, 125), the lid (25, 125) connected to the base (20, 120) by a hinge (26), wherein the lid (25, 125) comprises a top plate (25a, 125a) and a side skirt (25b, 125b) that depends from a periphery of the top plate (25a, 125a), the tamper-evident member (30, 130) is frangibly connected to the lid (25, 125), wherein upon first opening of the lid (25, 125) the tamper-evident member (30, 130) is released from the closure body; the tamper-evident closure (10, 110) comprising a window (27, 127) in which the tamper-evident member (30, 130) is visible prior to first opening of the tamper-evident closure (10, 110) and the closure body defining a pocket or void (31, 150), wherein upon first opening of the tamper-evident closure (10, 110) the tamper-evident member (30, 130) falls out of the window (27, 127) at least partly into the pocket or void (31, 150) and becomes at least partly hidden from view, whereby to indicate the tamper-evident closure (10, 110) has been opened at least once; and the base (20, 120) is provided with the pocket or void (31, 150),

characterised in that

the window is formed at a lower end of the side skirt and the tamper evident member (30, 130) is a tab formed in the window (27, 127) at the lower end of the side skirt (25b) of the lid (25, 125) and frangibly connected to the window (27, 127) by at least one bridge (132)."

VI. Insofar as relevant to the present decision, the appellant argued substantially as follows.

The characterising portion of claim 1 still did not comply with the requirements of Article 123(2) EPC as already objected to in the statement setting out the grounds of appeal. The appellant's line or argument is dealt with in detail in the Reasons.

As a consequence of that, and taking into account the late filing thereof, the request submitted during oral proceedings was not to be admitted.

VII. Insofar as relevant to the present decision, the respondent argued substantially as follows.

The amendments submitted during oral proceedings were admissible because they were carried out in reaction to the objections raised by the appellant during the discussion on the claims submitted with letter dated 17 August 2018, and clearly overcame them.

These amendments, when considered by a skilled person, had a basis in paragraphs [19], [29] and [38] of the originally filed description (reference was made here to EP 2 213 584 A1).

Reasons for the Decision

1. Decisive for the decision on the case at hand is the issue of admittance into the proceedings of the only request submitted by the respondent in defending the patent in suit pursuant to Article 13(1) and (3) RPBA. This request was submitted during the oral proceedings as the last in a sequence of requests proceeded by the respondent during the written proceedings, first, with the reply to the appellant's statement setting out the grounds of appeal, and then with the reply to the Board's communication pursuant to Article 15(1) RPBA.

2. The admission into the proceedings of a request filed during oral proceedings before the Board is subject to its discretionary power in accordance with Articles 13(1) and (3) RPBA.

Article 13(1) RPBA, dealing with amendments to a party's case after having submitted its grounds of appeal or its reply (Article 12(1)(a) and (b), (2) RPBA), stipulates that the discretion shall be exercised taking into account *inter alia* the current state of the proceedings and the need for procedural economy. These criteria are also applicable to amendments sought to be made after oral proceedings have been arranged, for which Article 13(3) RPBA adds further criteria.

According to the case law of the boards of appeal (cf. Case Law of the Boards of Appeal, 8th edition 2016, IV.E.4.4 *et seq.*) for the admission of new requests at a very late stage of the proceedings, *i.e.* shortly before or on the day of oral proceedings, it is an important issue whether the claim amendment is

directed to subject-matter which *prima facie* is not allowable. In general terms, claims are considered clearly allowable if the competent board can quickly ascertain that they do not give rise to new objections and overcome **all** outstanding objections under the EPC and their patentability could be assessed without giving rise to any difficulty or delay. In addition, there must be sound reasons for filing a request at a late stage in the proceedings, as may be the case where amendments are occasioned by developments during the proceedings or where the request addresses still outstanding objections.

3. The characterising portion of claim 1 provides that the window is formed **at** a lower end of the side skirt.
4. The appellant contests admissibility under Article 13(1) and 13 (3) RPBA for *prima facie* lack of compliance with the requirements of Article 123(2) EPC of the subject-matter of claim 1.

This objection arises because the originally filed documents only relate to embodiments in which the window is formed (as a cut-out, see figures 1 and 10) **in** the lower end of the side skirt.

5. The respondent argues that a window formed **at** a lower end of the side skirt is also formed **therein**.

The Board disagrees and considers that this formulation only stipulates that the window is adjacent to a lower end of the side skirt, without specifying that it is formed therein.

This is because the preposition "in" expresses the position of something that is enclosed or surrounded by

something else, whereby "at" is broader, as it generally expresses the position of something that is adjacent to something else.

As a consequence of that, the Board concurs with the appellant arguing that claim 1 extends to embodiments in which the window, still being located at (*i.e.* adjacent to) the lower end of the side skirt, is formed in the base.

6. The respondent further argues that the contentious features have a basis in paragraphs [19], [29] and [38] of the original description, and that in the eyes of a skilled reader the originally disclosed feature that the window is formed as a cut-out at the lower end of the side skirt is not essential, and can be omitted.

The Board disagrees.

Claim 1 is directed towards a closure in which the window is formed at a lower end of the side skirt and the tamper evident member is a tab formed in the window at the lower end of the side skirt of the lid and frangibly connected to the window by at least one bridge.

This combination of features is not disclosed in paragraph [19], which does not relate to any particular embodiment and merely states that "the closure may comprise a window in which or through which the tamper-evident member is visible prior to first opening the window".

Paragraph [29], by stating that the window is formed as a cut-out at the base of the lid skirt also discloses that the window is formed there**in** and is not simply

adjacent thereto. This is because this passage describes the embodiment depicted in figures 1-3 where the window is formed as a cut-out **in** the lower end of the skirt.

This combination of features is also not disclosed in paragraph [38], in spite of the fact that this paragraph states that the tabs are formed in windows **at** the lower end of the skirt. This is because this passage relates, and explicitly refers, to the embodiment depicted in figure 10, and figure 10 clearly shows that the windows are formed **in** the lower end of the skirt.

There is also no other passage indicated by the respondent, and none has been identified by the Board, based on which the feature that the window is formed in the lower end of the side skirt of the lid can be considered non-essential and dispensed therefrom.

Hence, the Board concludes that claim 1, by encompassing embodiments in which the window is formed in the base, contains at least one unallowable extension (Article 123 (2) EPC).

7. The respondent also argues that the amendments submitted during oral proceedings were admissible because they were carried out in reaction to the objections first raised by the appellant during the discussion at oral proceedings.

The Board disagrees, as unallowable extensions linked to the position of the window were already identified in paragraph [9] of the statement setting out the grounds of appeal.

8. As apparent from the above discussion on added subject-matter, the request of the respondent is unsuitable from the outset to overcome all outstanding objections.

The Board therefore decides not to admit it pursuant to Articles 13 (1) and 13 (3) RPBA.

9. In the absence of an admissible and allowable request from the respondent there is no basis for maintaining the patent in suit.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated