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**Datasheet for the decision
of 9 December 2019**

Case Number: T 0263/15 - 3.2.07

Application Number: 07804082.1

Publication Number: 2057076

IPC: B65D5/20, B65D5/42, B65D5/56

Language of the proceedings: EN

Title of invention:
METHOD OF PREPARING WEB MATERIAL FOR PRODUCTION OF RECEPTACLES
FOR FOOD OR OTHER PRODUCTS

Patent Proprietor:
Rapid Action Packaging Limited

Opponent:
Colpac limited

Headword:

Relevant legal provisions:
EPC Art. 123(3)
RPBA Art. 13(1), 15(1)

Keyword:

Amendments - broadening of claim (yes)

Late-filed auxiliary requests - amendments after arrangement
of oral proceedings - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 0263/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 9 December 2019

Appellant: Colpac limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 December 2014 concerning maintenance of the
European Patent No. 2057076 in amended form.**

Composition of the Board:

Chairwoman A. Beckman
Members: V. Bevilacqua
R. Cramer

Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal against the decision of the opposition division maintaining the European patent No. 2 057 076 in amended form.

II. In the statement setting out the grounds of appeal the appellant requested

that the appealed decision be set aside and that the patent be revoked.

In the reply to the statement setting out the grounds of appeal the respondent requested

that the appeal be dismissed and that the patent be maintained in the version as upheld by the opposition division (main request) and that three quarters of the appeal costs incurred by the respondent be apportioned to the appellant.

III. By communication pursuant to Article 15(1) RPBA dated 9 August 2019 the Board provided the parties with its preliminary opinion on the above requests.

When responding with letter dated 9 October 2019 to this preliminary opinion, the respondent stated not to pursue further the request for apportionment of costs and submitted auxiliary requests 1 and 2.

Oral proceedings were held on 9 December 2019, during which the respondent submitted a new set of claims as auxiliary request III. For further details of the course of the oral proceedings, reference is made to the minutes thereof.

At the end of the oral proceedings the final requests of the parties were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed and that the patent be maintained in the version as upheld by the opposition division (main request), or alternatively that the decision under appeal be set aside and that the patent be maintained on the basis of one of the sets of claims filed as auxiliary requests 1 and 2 with letter of 9 October 2019, or on the basis of the set of claims filed as auxiliary request III during the oral proceedings.

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

- IV. Claim 1 of the **main request** reads as follows (in bold the features added with respect to claim 1 as granted; emphasis added by the Board):

"A method of preparing a web of flexible material for production of receptacles for packaging, the method comprising the steps of feeding a web (38) of flexible material past a succession of stations in which operations are carried out on the web including defining blanks for receptacles having walls and tabs by creating fold lines (13, 24, 25, 26, 29, 30) in the web, and then laminating a film (39) of heat-sealable plastics materials to a face of the web of the flexible material to provide a heat-sealable surface for bonding tabs (17, 17; 19; 19) of each blank together to form seams between adjacent walls whereby the blanks, when severed from the web, can be erected to form

receptacles having openings to receive items to be packaged, the fold lines being created by at least partially cutting or scoring through the web of flexible material prior to lamination of the film of heat sealable plastics material to the web, the blank further including **a lid hinged to one wall of the blank on one side of the opening into the receptacle formed by the blank and the edges of the walls around the rest of the opening having flanges (22b) which are out-turned in the finished receptacle and to which the lid can be heat-sealed to close the receptacle through the film laminated to the surface of the blank,** the out-turned flanges (22b) extending along sides of the opening into the receptacle formed by **the** blank to which the lid can be heat sealed through the film laminated to the surface of the blank to close the receptacle;

wherein lines of cut are preformed in the blank to define notches (60) between adjacent flanges which are bridged by the film (62) of heat-sealable plastics laminated to the web to assist in forming an hermetic seal for the receptacle between **the lid and** the flanges."

Claim 1 of **auxiliary request 1** differs from claim 1 of the main request only in that the last phrase thereof has been amended as follows (in bold the features added and in strike-through the features deleted with respect to claim 1 of the main request; emphasis added by the Board):

"... wherein lines of cut are preformed in the blank to define notches (60) between adjacent flanges which are bridged by the film (62) of heat-sealable plastics laminated to the web to assist in forming an hermetic

seal for the receptacle between ~~the lid and~~ the flanges."

Claim 1 of **auxiliary request 2** corresponds to the combination of granted claims 1 and 2 and reads as follows:

"A method of preparing a web of flexible material for production of receptacles for packaging, the method comprising the steps of feeding a web (38) of flexible material past a succession of stations in which operations are carried out on the web including defining blanks for receptacles having walls and tabs by creating fold lines (13, 24, 25, 26, 29, 30) in the web, and the laminating a film (39) of heat sealable plastics material to a face of the web of the flexible material to provide a heat-sealable surface for bonding tabs (17,17; 19; 19) of each blank together to form seams between adjacent walls whereby the blanks, when severed from the web, can be erected to form receptacles having openings to receive items to be packaged, the fold lines being created by at least partially cutting or scoring through the web of flexible material prior to lamination of the film of heat sealable plastics material to the web, the blank further including out-turned flanges (226) extending along sides of the opening into the receptacle formed by blank to which a lid can be heat-sealed through the film laminated to the surface of the blank to close the receptacle; wherein lines of cut are preformed in the blank to define notches (60) between adjacent flanges which are bridged by the film (62) of heat-sealable plastics laminated to the web to assist in forming an hermetic seal for the receptacle between the flanges; characterised in that the blank includes a lid (20)

hinged to one wall (11) of the blank on one side of the opening into the receptacle and lines of cut are pre-formed in the web providing the blank to provide notches (61) between the lid and the flanges adjacent the lid which lines of cut are bridged by the film (63) of heat-sealable plastics material laminated to the web (32) to assist in forming a hermetic seal for the receptacle between the lid and the flanges."

Claim 1 of **auxiliary requests III** differs from claim 1 of the main request only in that the last phrase thereof has been amended as follows (in bold the features added with respect to claim 1 of the main request; emphasis added by the Board):

"... wherein lines of cut are preformed in the blank to define notches (60) between adjacent flanges which are bridged by the film (62) of heat- sealable plastics laminated to the web to assist in forming an hermetic seal for the receptacle between **the flanges and between** the lid and the flanges."

V. Insofar as relevant for the present decision the appellant argued substantially as follows.

Claim 1 of the main request contravened the requirements of Article 123(3) EPC because it extended to embodiments in which no hermetic seal between the flanges was possible.

Auxiliary requests 1, 2 and III were late filed reactions to an objection which was already raised in the statement setting out the grounds of appeal.

These amendments also raised new issues of added subject-matter, and were therefore not to be admitted.

VI. Insofar as relevant for the present decision the respondent argued substantially as follows.

On the proper interpretation thereof, which was the one adopted by the opposition division, claim 1 of the main request did not extend to embodiments which were not already within the scope of protection of granted claim 1.

Claims should be construed with a mind willing to understand and taking the knowledge of a skilled person into account.

Auxiliary requests 1 and 2 were admissible reactions to a new interpretation of granted claim 1 adopted in the preliminary opinion of the Board.

It was also not possible to submit auxiliary request III earlier in the proceedings because this request represented a *bona fide* attempt to overcome not only the objections raised by the appellant against the main request, but also those raised, during oral proceedings, against auxiliary requests 1 and 2.

VII. All these arguments will be dealt with in detail in the Reasons for the Decision.

Reasons for the Decision

1. Granted claim 1 - Interpretation
 - 1.1 The appellant puts forward that as granted claim 1 mentions forming a seal "**between the flanges**", it requires that the flanges have to be suitable for being sealed to each other through the film of heat sealable plastics.
 - 1.2 The respondent contests the above interpretation of granted claim 1 and replies that, as acknowledged in the appealed decision, a skilled reader would have understood from claim 1 as granted that nothing else than the suitability for sealing the flanges to a lid was foreseen.

This was because a skilled person with a mind willing to understand would have recognized from the description (reference was made to paragraphs [0046] and [0047] of the patent in suit) that a good sealing was aimed at, in order to increase shelf life of the products contained in the closed receptacle.

As explained in paragraphs [0046] to [0047] of the patent in suit and as shown in figure 12, the film bridging the flanges (in the notch areas) was for assisting in forming an hermetic seal for the receptacle by hermetically sealing the flanges to the lid.

As a consequence of the above, the method recited in granted claim 1, where an "hermetic seal for the

package" was explicitly mentioned, necessarily resulted in a hermetically sealed receptacle to be hermetically closed with a lid.

Interpretations of the last phrase of granted claim 1 in which only the flanges could be sealed to each other were at odds with the remaining features of the claim and with the description, because sealing the flanges to each other, without lid, would not have resulted in an hermetic receptacle.

Such interpretations were therefore not correct and to be disregarded.

The respondent concludes that the expression "between the flanges", when used in granted claim 1, was to be seen as a reference to the location of the seal and did not define the two components which were sealed to one another.

1.3 The Board disagrees with the respondent's view.

As established in the jurisprudence (see Case Law of the Boards of Appeal 9th Edition 2019, II.A.6.1), when reading a broadly formulated claim only technically illogical interpretations should be excluded.

The Board sees no reason to consider that the rather restrictive interpretation of granted claim 1 proposed by the respondent would be the one chosen by a skilled reader.

A skilled person, reading about seals that are defined as being formed between two flanges, understands that these flanges are sealed to one another.

This interpretation is not at odds with the remaining features of the claim, because there appears to be no reason to consider that granted claim 1 is limited to methods of preparing a web of flexible material for production of **hermetically sealed** receptacles for packaging.

The Board also sees no reason to consider that granted claim 1 stipulates that an **hermetic seal** for the receptacle is only formed when a lid is sealed to the flanges.

The expression "between the flanges" as used in the last feature of granted claim 1 does therefore not only specify the location of **an hermetic seal for the receptacle** but **also** that adjacent flanges are suitable for being sealed to each other.

This interpretation is also not at odds with the aim of achieving good sealing and improving shelf life (see the letter of the respondent dated 9 October 2019, point 2.1) because there is no reason to think that an hermetic sealing between adjacent out-turned flanges would have negative effects on the air tightness of the receptacle and therefore on shelf life.

The Board therefore concurs with the appellant that granted claim 1, when correctly construed, comprises method steps resulting in forming (out-turned) flanges which are suitable for being sealed to each other by having an hermetic seal formed between them.

2. Claim 1 of the main request - Interpretation

2.1 The appellant puts forward that as claim 1 of the main request does not mention any seal between the flanges,

it also protects embodiments in which the out-turned flanges cannot be sealed to each other through the film of heat-sealable material.

This happens, so the appellant, when the film does not extend all the way to the vertex of the notch or when a film bridging the notch is cut in a subsequent operation to provide flaps of heat sealable material that can be folded back onto the flanges to assist in the formation of an hermetic seal for the receptacle (see the statement setting out the grounds for appeal, examples 1 and 2).

- 2.2 The respondent replies that this interpretation of claim 1 of the main request was not correct. A seal between the flanges was explicitly mentioned and therefore still foreseen in claim 1 of the main request. The added words "the lid and" only clarified the claim as they made explicit what was already implicitly claimed in the granted claim, namely that the film of heat sealable material bridging the flanges, and being therefore positioned between the flanges, assisted in hermetically sealing the receptacle by forming a seal between the lid and the flanges.

Embodiments such as those identified in the statement setting out the grounds of appeal (examples 1 and 2) were not within the scope of claim 1 of the main request because no hermetic seal for the receptacle was possible with them.

This was because pin holes were inevitably formed in the corners of the receptacle when the lid was heat-sealed to the flanges.

These embodiments were also of no practical significance (and therefore disregarded by a skilled person) because of the additional processing step required to cut and correctly position the heat sealable film.

2.3 The Board disagrees with the respondent.

Claim 1 of the main request does not mention a seal formed between the flanges, but a seal formed between the lid and the flanges.

Such a seal would prevent air passage between each flange and the lid.

The Board also sees no reason to follow the respondent's view that the expression "an hermetic seal for the receptacle" necessarily implies that air passages (called "pin hole P" by the respondent, see the letter dated 9 October 2019, points 2.1 and 2.2) between the flanges are also blocked, because it would be the result of reading into claim 1 significant additional limitations which are not in the text thereof.

This is because, similarly to what has already been discussed for granted claim 1, the text of claim 1 of the main request is **not** restricted to preparing a web of flexible material for production of **hermetically sealed** receptacles for packaging, whereby said receptacles **become hermetically sealed as the result of the lid being sealed to the flanges.**

3. Extension of protection

As discussed above, granted claim 1 foresees that the flanges are suitable for being **mutually** hermetically sealed.

Claim 1 of the main request, on the other hand, encompasses embodiments in which the flanges are not suitable for being hermetically sealed to each other, because the film bridging the notches only assists in forming an hermetic seal between **the lid and each flange separately**.

As a consequence of the above, the Board concludes that claim 1 of the main request contravenes the requirements of Article 123(3) EPC.

4. Auxiliary requests 1 and 2 - Admissibility

4.1 The respondent filed auxiliary requests 1 and 2 with letter dated 9 October 2019 after the communication of the Board pursuant to Article 15(1) RPBA, and argued (see point 3. of its letter) that this was done

"... in response to a matter in which the preliminary opinion of the Board raises a new interpretation of the claim as granted...".

This new interpretation was based on the statement under point 1.1 of the communication of the Board that granted claim 1 foresees that "... the adjacent flanges of the blank are suitable for being hermetically sealed to each other ...".

4.2 The appellant puts forward that auxiliary requests 1 and 2 were not a timely response to an objection raised in the statement setting out the grounds of appeal.

In addition, these amendments also raised new issues of added subject-matter to be discussed and were therefore not to be admitted.

4.3 The Board is of the following opinion.

A seal "between the flanges" was considered in the statement setting out the grounds of appeal as a seal in which the flanges are sealed to each other.

This is evident, in particular, from the last paragraph on the fourth page thereof, stating : "... helping to seal them together ...".

The Board, therefore, merely followed in its preliminary opinion the interpretation of granted claim 1 as proposed by the appellant.

The Board has therefore not raised any new objection with its communication pursuant to Article 15(1) RPBA but has merely concurred with the objection raised by the appellant in its statement setting out the grounds of appeal.

To deliberately wait for the preliminary opinion of the Board before reacting to an objection raised by the other party is contrary to the objective of the Rules of Procedure of the Boards of Appeal, which make it clear that the case of the parties should be complete at the initial stage of the proceedings.

The admittance of any amendments to a party's case, in particular after oral proceedings have been arranged, is in fact subject to the Board's discretion within the meaning of Article 13 RPBA.

In the present case, the Board considers it inappropriate that the respondent has waited for the communication pursuant to Article 15(1) RPBA before reacting to an objection raised in the statement setting out the grounds of appeal, thereby impeding the Board and the appellant from dealing with the new auxiliary requests in a timely manner.

The Board considers such a course of action as being contrary to the economy of procedure and thus decides to exercise its discretion to not admit auxiliary requests 1 and 2 into the proceedings pursuant to Article 13(1) RPBA.

5. Auxiliary request III - Admissibility

5.1 The respondent submitted auxiliary request III during oral proceedings before the Board, and argued that this was a *bona fide* attempt to overcome not only the objection raised by the appellant against the main request, but also those raised, during oral proceedings, against auxiliary requests 1 and 2.

It was therefore not possible to submit auxiliary request III at an earlier stage in the proceedings.

5.2 The Board considers that the objections raised against auxiliary requests 1 and 2 during the admissibility discussion thereof do not in themselves justify the submission of a further auxiliary request.

Following the principle according to which the respondent should be prevented from seeking unjustified procedural advantages in disregard of procedural economy and to the disadvantage of the appellant, the Board does not see any ground for not considering that the reasons for not admitting auxiliary requests 1 and 2 listed above should not apply to auxiliary request III, *mutatis mutandis*, which has been filed even later.

The Board, therefore, decides not to admit auxiliary request III into the appeal proceedings.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairwoman:



G. Nachtigall

A. Beckman

Decision electronically authenticated