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**Datasheet for the decision
of 1 October 2020**

Case Number: T 1635/15 - 3.2.07

Application Number: 01954369.3

Publication Number: 1332969

IPC: B65B61/24, B65B9/10, B65D5/40,
B65D5/74, B65D5/06, B65B9/20

Language of the proceedings: EN

Title of invention:

METHOD OF MANUFACTURING PAPER PACKAGING CONTAINER, PAPER
PACKAGING CONTAINER AND WEB-SHAPED PACKAGING MATERIAL

Patent Proprietor:

Tetra Laval Holdings & Finance S.A.

Former Opponent:

SIG Technology AG

Headword:

Relevant legal provisions:

EPC Art. 56, 113(1), 116(1)
RPBA 2020 Art. 12(2), 12(8), 24, 25
RPBA Art. 12(4), 13

Keyword:

Inventive step - (yes)

Decisions cited:

G 0001/03, T 0146/07, T 1756/11

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1635/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 1 October 2020

Appellant: Tetra Laval Holdings & Finance S.A.
(Patent Proprietor) Avenue Général-Guisan 70
1009 Pully (CH)

Representative: Beck Greener LLP
Fulwood House
12 Fulwood Place
London WC1V 6HR (GB)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 June 2015 concerning maintenance of the
European Patent No. 1332969 in amended form.

Composition of the Board:

Chairman I. Beckedorf
Members: K. Poalas
A. Cano Palmero

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division maintaining European patent No. 1 332 969 in amended form.
- II. Opposition had been filed against independent claim 2 and dependent claim 3 of the patent as granted based on the grounds of opposition according to Articles 100(a) (lack of novelty and lack of inventive step) and 100(c) EPC (unallowable amendments).
- III. The following evidence has been submitted during the opposition proceedings:
- D1 : convolute of documents D1-1 to D1-6 and D1-1-A to D1-1-C filed in connection with the alleged public prior use "Fa. Leifeld and Lemke, 1999",
- D3 : DE 297 16 230 U1,
- D11 : XP-000824919,
- D14 : JP 11-91792.
- IV. In the impugned decision the opposition division found in respect with the main request (patent as granted) that the subject-matter of independent claim 2 does not involve an inventive step in view of the teaching of D3 in combination with the common general technical knowledge of the person skilled in the art or in combination with the teaching of D11.

- V. Third party observations were filed anonymously on 28 July 2016 and on 16 August 2016.
- VI. With its communication dated 18 August 2016 the Board informed the parties that it intends to disregard these observations as they have been filed anonymously, in line with the case law on this issue (see e.g. G 1/03, OJ EPO 2004, 413, Summary of facts and submissions Nr VI(3); T 146/07, Reasons for the Decision Nr 5; T 1756/11, Reasons for the Decision Nr 2.2).
- VII. At the end of the oral proceedings which took place on 23 January 2020 before the Board the then parties' final requests were in essence the following:

The appellant, while confirming the withdrawal of all other initial requests, requested

that the decision under appeal be set aside,
and
that the patent be maintained as granted (main request)
or, in the alternative,
that the patent be maintained in amended form on the basis of the set of claims submitted during the opposition proceedings with letter dated 16 April 2015 as auxiliary request 1.

The opponent (respondent)

that the appeal be dismissed.

After the debate on the grounds for opposition according to Articles 100(a) and (c) EPC (lack of inventive step and added subject-matter) and on auxiliary request 1, the proceedings were continued in

writing because the ground for opposition according to Articles 100(a) and 54 EPC (novelty) needed to be further examined in respect of the public availability of a novelty destroying prior use alleged by the former opponent and contested by the appellant.

For further details on the course of the oral proceedings, in particular the matters discussed with the parties and the procedural directions given by the chairman at the end of the oral proceedings, reference is made to the minutes thereof.

- VIII. With its submission dated 3 March 2020 the appellant confirmed the aforementioned requests.
- IX. With its decision on the taking of evidence dated 28 May 2020, the Board summoned the parties to oral proceedings in order to hear a witness on an alleged prior use in accordance with the corresponding opponent's request.
- X. With its letter dated 5 August 2020 the opponent withdrew its opposition.
- XI. The line of arguments of the appellant in respect with its main request is followed by the Board and is dealt with in detail in the reasons for the decision.
- XII. Claim 2 of the patent as granted (main request) reads as follows:

"A paper packaging container (19) made of web-shaped packaging material (1) and filled with a content, comprising a longitudinal seal (5) and a transversal seal (6) of said tube packaging material in a traverse direction, being shaped to have a top, side walls and a

bottom, said top being formed as shed roof shape (A) and said side walls comprising side panels (3b) with side wall faces, characterized in that the shed roof shape (A) has flaps (8) which are folded in an axis of slanted top ridge lines onto said side wall faces of said side panels (3b)."

Reasons for the Decision

1. *Procedural aspects*

1.1 The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA 2020 instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Article 25(2) and (3) RPBA 2020).

1.2 The case is ready for decision which is taken in written proceedings without holding second oral proceedings in accordance with Article 12(8) RPBA 2020 and with Articles 113 and 116 EPC.

1.3 The principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and the party's submissions are fully taken into account.

1.4 The appellant's request for oral proceedings pursuant to Article 116(1) EPC is auxiliary to its main request that the decision under appeal be set aside and the

patent be maintained as granted. Thus, since the appellant's main request is followed by the Board, the aforementioned auxiliary request remains procedurally inactive.

- 1.5 Hence, the oral proceedings arranged for 30 October 2020 are cancelled.

- 1.6 Since the opponent withdrew the opposition, they ceased to be a party to the appeal proceedings and all their requests, including the hearing of a witness, became obsolete. The appellant on the other hand remained the sole party to the present proceedings and their final requests (see points VII. and VIII. above) are the only valid remaining requests in the present appeal proceedings (see Case Law of the Boards of Appeal, 9th edition 2019, III.Q.3.3, with further references).

- 1.7 As a further consequence of the withdrawal of the opposition, the scope of the appeal proceedings is limited to a substantive review of the opposition division's decision pursuant to Article 12(2) RPBA 2020. Hence, the appeal of the patent proprietor as the only remaining party to appeal proceedings can be allowed on the basis of the main request, if the grounds for opposition do not prejudice the maintenance of the granted patent. If appropriate, the Board's examination may include the examination of arguments and evidence submitted by the former respondent prior to the withdrawal of the opposition (see Case Law of the Boards of Appeal, *supra*, III.Q.3.3, with further references). However, in the present case this is essentially limited to what was discussed with the parties at the oral proceedings before the Board.

2. *Claim 2 of the main request (patent as granted) -
Inventive step; Articles 100(a) and 56 EPC*

*D3 in combination with the common general technical
knowledge of the person skilled in the art or in
combination with the teaching of D11*

2.1 As stated under point IV above, the opposition division found in the impugned decision in respect with the main request that the subject-matter of independent claim 2 does not involve an inventive step over the teaching of D3 in combination with the common general technical knowledge of the person skilled in the art or in combination with the teaching of D11.

2.2 The question at stake is therefore the correctness of said opposition division's finding in the impugned decision.

2.3 The Board follows the opposition division's line of argument as far as it considers that D3 represents the closest prior art and that the paper packaging container according to claim 2 differs from the one disclosed in D3 in that the flaps of the shed-roof are folded in an axis of slanted top ridge lines **onto the side wall faces of the side panels** (see point 16.1 impugned decision).

2.4 The opposition division considered in the impugned decision (see point 16.3) that the problem to be solved can be seen in the provision of additional space for the closure of said container, or alternatively, in the provision of an aesthetically pleasing top surface for said container.

- 2.5 The Board notes in this respect that D3 does not address any of the above-mentioned problems, but instead relates to the development of a sealing arrangement (laminate/seal configuration to which such a spout can be attached) that makes mass production more economical and prevents uncontrolled pouring out of the liquid or possible contamination of the content of the packaging (see page 3, first complete paragraph). Thus, D3 does not mention the above-mentioned problems but instead relates to the development of a new and improved spout and sealing mechanism (see page 3, second complete paragraph and claim 1) for attaching to a container "of the generic type".
- 2.6 The opposition division's comment under point 17.4 of the impugned decision that D3 at least implicitly considers the problem of providing a larger space for a comparatively large spout is purely speculative and finds no basis in the teaching of D3. Whilst it would be the case that a slanted surface would have a larger total surface area than a corresponding non-slanted top, it does not necessarily follow that its purpose or effect is the provision of a larger space for a comparatively large spout.
- 2.7 This notwithstanding, D3 discusses neither the arrangement of the flaps in D3 or any associated effects thereof, nor the purpose of the slanted upper surface or any associated effects thereof or any issues associated with the size of the spout (*i.e.* there is no reason to consider that a larger spout is required) or with the provision of an aesthetically pleasing surface.

2.8 Thus, these technical problems ("provision of a larger space for a comparatively large spout" or "provision of an aesthetically pleasing surface") which have been defined by the opposition division (see point 16.3 of the impugned decision) are unrelated to the actual disclosure of D3, but their solution is allegedly obvious in the light of the common general technical knowledge of the person skilled in the art or of the disclosure of D11.

2.9 D3 is the only example in the cited prior art of a shed-roof package with flaps. D3 shows however, without any discussion on that issue at all, that these flaps are folded onto the top panel. The skilled person would think that this had been done for a reason (e.g. to reinforce the top for vertical stacking, or to allow close side-by-side stacking of the packages to maximise pallet efficiency - folding the flaps onto the top panel means that they occupy otherwise empty space around the closure). The skilled person would not depart from the teaching of D3 and fold the flaps onto the side walls instead without any motivation in the prior art to do so.

2.10 The opposition division argues further under point 16.4 of the impugned decision that for the generic package with outwardly extending flaps (*i.e.* not gable tops), there are essentially only two well-known alternatives with generally well-known advantages and disadvantages for "disposing" of a flap by folding it onto an adjacent wall and that the skilled person would consider to fold the flaps known from D3 onto the side walls instead of onto the top wall, for example if such folding is considered advantageous for aesthetical reasons, without any use of inventive skill or input from documents.

2.11 The Board cannot follow this argument for the following reasons. As stated under points 2.5 to 2.9 above, the problems of providing a larger space for a comparatively large spout or of an aesthetically pleasing surface can only be derived with the benefit of hindsight, *i.e.* in an unallowable manner, and therefore they cannot provide any motivation to the skilled person for departing from the teaching of D3 and for folding the flaps onto the side wall faces of the side walls. Furthermore, the opposition division did not present any supportive facts or evidence for the argument that the folding of the flaps of a shed-roof container onto the side wall faces of the side walls belongs to the general technical knowledge of the person skilled in the art.

Therefore, the Board considers the above-mentioned argument which was not supported with any kind of facts or evidence as an unsubstantiated allegation which is not to be taken into consideration by the assessment of inventive step.

2.12 Furthermore, the opposition division argued that the skilled person, seeking to increase the freely available space of the top surface of the container known from D3, would take into consideration the teaching of D11. D11, being directed to the problem of increasing the available space on the top panel of conventional packets and showing a conventional container with the upper flaps folded onto the side wall faces of the side walls, would lead the skilled person to the subject-matter of claim 2 without the involvement of an inventive activity.

- 2.13 The Board does not agree for the following reasons.
- 2.14 D11 teaches the skilled person seeking to increase the available space on the top panel of a conventional container in order to accommodate a larger opening device the use of a flat-top container having a flat upper surface with an outwardly curved front edge and flaps folded on the side wall faces of the side panels.
- 2.15 The Board notes that even if, for the sake of argument, it would be accepted that the skilled person starting from the container known from D3 and seeking to solve the first problem mentioned under point 2.4 above, namely the provision of additional space for the closure of the container, would follow the teaching of D11 and would then use a flat upper surface with an outwardly curving edge and flaps folded on the side wall faces of the side panels, arriving thereby at a specific **flat top** container, which does not fall under the wording of claim 2. No evidence was presented in the impugned decision as to why the skilled person starting from D3 and taking into consideration the teaching of D11 would selectively single out from the whole disclosure of D11 only the outwardly folding of the flaps.
- 2.16 For the above-mentioned reasons the combination of the teaching of D3 with the general technical knowledge of the person skilled in the art or with the teaching of D11 may not deprive the subject-matter of claim 2 from inventive step.

3. Further considerations

The arguments and evidence relied upon by the former respondent prior to the withdrawal of the opposition do

not prejudice the maintenance of the patent as granted for the following reasons:

- 3.1 *Added subject-matter of claim 2 of the patent as granted; Articles 100(c) and 123(2) EPC*
- 3.1.1 After having discussed the issue of added subject-matter of claim 2 of the patent as granted with the then parties to the appeal proceedings during the oral proceedings on 23 January 2020, the Board follows the appellant's line of argument
 - that it is clear from the "Advantage" section of the originally filed application that the good mechanical properties of the container of the invention are the result of the container's configuration and not of the method of forming the container, and further
 - that references in the product claim 2 as originally filed to method features which do not clearly reflect in the product are of no consequence, and that only method features of this kind have been removed in claim 2 of the patent as granted compared with claim 2 as originally filed.
- 3.1.2 Thus, the Board concludes that claim 2 of the patent as granted does not involve subject-matter which extends beyond the content of the application as originally filed and that the ground for opposition according to Article 100(c) EPC does not hold against the patent as granted.
- 3.2 *Novelty of the subject-matter of claim 2 of the patent as granted over the disclosure of documents D1-1 to D1-6 and D1-1-A to D1-1-C (alleged public prior use "Fa. Leifeld and Lemke, 1999")*

- 3.2.1 As far as it concerns the novelty attack against claim 2 of the patent as granted over the disclosure of documents D1-1 to D1-6 and D1-1-A to D1-1-C (alleged public prior use "Fa. Leifeld and Lemke, 1999"), the Board concludes as follows:
- 3.2.2 Document D1-6 explicitly mentions confidentiality and it cannot therefore be considered as forming part of the prior art.
- 3.2.3 Documents D1-1 to D1-5 do not enable the reader to conclude with certainty that said letters were actually received by the addressees, nor that there were no tacit confidentiality agreement involved. Further, it seems that there is no clear link between said letters and any annexed drawings thereto of relevance to the present case (see communication of the opposition division dated 16 January 2014, point 4).
- 3.2.4 The Board concludes therefore
- that it was not demonstrated by the former respondent that documents D1-1 to D1-5 were not sent under secrecy and that they were actually received by the respective companies, and
 - that also documents D1-1-A, D1-1-B and D1-1-C cannot evidence the public availability of document D1-1.
- 3.2.5 Accordingly, the alleged public availability of the prior use "Fa. Leifeld and Lemke, 1999" cannot be considered as being proven and it cannot therefore deprive the subject-matter of claim 2 of being novel.
- 3.3 *Inventive step of the subject-matter of claim 2 of the patent as granted over the teaching of D14 in combination with the common general technical knowledge of the person skilled in the art or in combination with*

the teaching of D11

3.3.1 Given that D14 discloses a packaging container with inwardly folded panels but with no shed-roof flaps and in view of the fact that D3 discloses a paper packaging container with shed-roof flaps, the Board considers that the disclosure of D14 does not comes closer to subject-matter of claim 2 of the patent as granted than the disclosure of D3, which is considered as the closest prior art, see also point 2.3 above.

3.3.2 Since the Board found that the combination of the teaching of D3, said last representing the closest prior art, with the general technical knowledge of the person skilled in the art or with the teaching of D11 does not deprive the subject-matter of claim 2 of the patent from inventive step, see point 2.16 above, then also the combination of the teaching of D14, said last representing a more remote prior art, with the general technical knowledge of the person skilled in the art or with the teaching of D11 cannot deprive the subject-matter of claim 2 of the patent as granted from inventive step.

4. Conclusions

Thus, the Board finds that the decision under appeal is to be set aside and that the patent is to be maintained as granted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated