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**Datasheet for the decision
of 12 February 2020**

Case Number: T 1203/16 - 3.2.07

Application Number: 09752342.7

Publication Number: 2376347

IPC: B65D79/00

Language of the proceedings: EN

Title of invention:

METHOD OF ASSEMBLING AN EASY OPEN CAN END

Patent Proprietor:

Crown Packaging Technology, Inc.

Opponent:

Ardagh MP Group Netherlands B.V.

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 83

RPBA Art. 12(4), 13(1), 13(3), 15(1)

RPBA 2020 Art. 13(1), 15(6), 24, 25

Keyword:

Novelty - (yes)

Inventive step - (yes)

Sufficiency of disclosure - (yes)

Late-filed argument - admitted (no)

Late-filed evidence - admitted (no)

Decisions cited:

G 0003/14, T 1797/09, T 2227/15, T 0634/16

Catchword:



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Case Number: T 1203/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 12 February 2020

Appellant: Crown Packaging Technology, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 March 2016 concerning maintenance of the
European Patent No. 2376347 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Pieracci
K. Poalas

Summary of Facts and Submissions

I. Both the opponent and the patent proprietor lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division to maintain the European patent No. 2 376 347 in amended form.

II. The opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step) and on Article 100(b) EPC (insufficiency of disclosure). The opposition division considered the ground for opposition under Article 100(a) EPC (lack of novelty) to be prejudicial to the maintenance of the patent as granted and of the patent as amended according to the first auxiliary request, while the patent as amended according to the second auxiliary request was considered to fulfill the requirements of the EPC.

III. The patent proprietor requested as a main request

that the decision under appeal be set aside and that the patent be maintained as granted.

As far as the patent proprietor submitted a number of auxiliary requests, those are of no relevance for this decision.

IV. The opponent requested

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

V. In the present decision reference is made to the following document also considered in opposition proceedings:

B6: WO 2008/098761 A1

and to the following document:

B11: EP 2 252 522 A0/WO 2009/090171 A1

filed by the opponent after having received the Board's communication pursuant to Article 15(1) RPBA 2007.

VI. To prepare the oral proceedings scheduled upon both parties' requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2007. The Board indicated that the subject-matter of claim 1 of the patent as granted appeared to be new and inventive and that the claimed invention appeared to be sufficiently disclosed.

VII. With letter dated 18 December 2019 the opponent argued against the sufficiency of disclosure of the claimed invention and submitted a new line of attack against novelty and inventive step of the subject-matter of claim 1 of the patent as granted.

VIII. With letter dated 7 February 2020 the opponent submitted document B11 and argued against novelty of the subject-matter of claim 1 of the patent as granted on the basis of that document.

IX. Oral proceedings before the Board took place on 12 February 2020 at the end of which the decision was

announced and for further details of which reference is made to the minutes thereof.

X. The lines of arguments of the parties are dealt with in detail in the reasons for the decision.

XI. Independent claim 1 according to the main request, i.e. according to the patent as granted, reads as follows:

A method of forming a container (10) having enhanced openability, comprising:

providing a can body (4);

providing a can end (12) having an approximately planar panel (20), a pull tab (30) affixed to the panel, and a moveable portion (40) disposed beneath a handle (34) of the tab, the moveable portion (40) being in a first position extending upwardly toward the handle;

filling a comestible product into the can body at an elevated temperature;

seaming the can end (12) to the can body (14), and moving the moveable portion from the first position (P1) to a second position (P2) extending downwardly away from the handle, such that a gap is formed or enlarged between the moveable portion (40) and the handle (34), enhancing accessibility to a user's finger;

the moving being in response to internal negative pressure caused by cooling of the product within the can body;

characterised in that the moveable portion includes a downwardly inclined annular step (42), which is inclined downwardly at between 8 and 17 degrees.

Reasons for the Decision

1. The appeal proceedings are governed by the revised version of the Rules of Procedure which came into effect 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). The general applicability of the RPBA 2020 to the present proceedings includes Article 13(1) RPBA 2020, irrespective of the fact that the summons to oral proceedings was notified before 1 January 2020 (see T 2227/15 and T 634/16, none of them published in the OJ EPO).

2. Admittance of the amendments to the opponent's case

After receiving the communication of the Board pursuant to Article 15(1) RPBA 2007, the opponent presented with their letter dated 18 December 2019, see point 1.14 thereof, in a rather skimpy way an objection of insufficiency of disclosure linked to the determination of the temperature and pressure parameters which was seen as necessary to carry out the invention. This objection was then presented in more detail at the oral proceedings before the Board.

In the same letter the opponent raised a lack of novelty objection of the claimed subject-matter over the disclosure of figures 1, 2A and 2B of B6 in combination with the corresponding passages of the description and a lack of inventive step objection starting from the same passages of document B6, see point 2 thereof.

With letter dated 7 February 2020, five days before the oral proceedings, the opponent filed document B11 and argued correspondingly against novelty of the claimed subject-matter.

All the aforementioned objections have been raised for the first time by the opponent only after having been summoned to oral proceedings and, as admitted at the oral proceedings, allegedly as a reaction to the preliminary opinion of the Board pursuant to Article 15(1) RPBA 2007.

No appropriate justification for such amendments to their case at such a late stage of the proceedings has been provided by the opponent, who argued that the new lines of attack were relevant to assess the patentability of the opposed patent and to avoid maintaining a patent not fulfilling the necessary requirements of the EPC.

The Board notes that such a justification is not sufficient, as this would always be the case in opposition proceedings from the point of view of the opponent.

The Board concurs with the patent proprietor that these new lines of attack as well as document B11 could and should have been filed before, in particular with the opposition letter, since the claims objected to are those of the patent as granted.

Furthermore, the Board considers that to wait until receiving the preliminary opinion of the Board pursuant to Article 15(1) RPBA 2007 for submitting further evidence and further lines of attack is totally contrary to the very animating principle of the Rules

of Procedure, namely that in appeal the case of the parties should be complete at a very early stage.

The Board is thus of the opinion that the opponent's course of action is inappropriate since it has prevented the Board and the patent proprietor from timely dealing with the opponent's new objections and it is thus contrary to the principle of procedural economy.

Furthermore, should B11 be admitted into the proceedings, an adjournment of the oral proceedings appears to be necessary, contrary to Article 15(6) RPBA 2020, for allowing the patent proprietor to properly react to B11.

The Board decides therefore to exercise its discretion not to admit the opponent's new lines of attacks and document B11 into the proceedings pursuant to Article 12(4) RPBA 2007, Article 13(1) RPBA 2020 and Article 13(1) and (3) RPBA 2007.

3. Insufficiency of disclosure (Articles 100(b) and 83 EPC)
 - 3.1 The opponent argues that the invention is not sufficiently disclosed because claim 1 does not foresee the presence of a score line, so that it covers also embodiments without a score line, such that the container cannot be opened.

The opponent also argues that the claim defines that the moveable portion is beneath a handle 34 of the tab 30, but it does not define that the moveable portion extends exclusively under the handle. Claim 1 therefore also covers the embodiment of the moveable portion

encompassing the rivet and the nose of the tab, so that the rivet would be insufficiently supported to enable to exert sufficient force on the score line, without a teaching being provided of how the enhanced operability can be achieved in this case.

The opponent further argues that claim 1 foresees that "...the moveable portion includes a downwardly inclined annular step..." without specifying where the annular step is located. The opponent maintains that the effect of bolstering the can end to prevent the moveable portion from flipping is not realized for all locations at which the annular step maybe arranged according to claim 1 whereby the invention is insufficiently disclosed.

The opponent furthermore argues that the position of the annular step is also linked to the technical effect of improving accessibility to the user's finger, which is relevant for enhancing openability. Such a technical effect is explicitly mentioned in the claim and since the person skilled in the art is not taught where to locate the annular step to achieve such effect, the invention is not sufficiently disclosed.

The opponent notes that according to paragraph [0031] of the patent specification the angle of the annular step is present in the down position P2 of the moveable portion and the angle of the annular step is relative to the horizontal. These limitations are however not present in claim 1, so that many other configurations are covered by the claim thereby the skilled person is confronted with an undue burden to determine the scope of the claim in light of all possible interpretations of the angle range with respect to the up or down position of the moveable portion surrounding the step

at a distance, while the angle of the annular step is to be determined in relation to the horizontal.

The opponent also argues that the claim covers the possibility that the step is in line with the orientation of the moveable portion and integral with it, so that the patent does not sufficiently disclose what a step is.

The opponent objects that since the part of the movable portion that surrounds the step is already downwardly inclined, the angle of the step to the horizontal is impossible to achieve, with the result the skilled person is not able to carry out the invention over the whole breadth of the claim.

The opponent contests that the claim does not exclude that the claimed angle range exhibits itself in the up position of the moveable portion and that the area within the periphery of the moveable portion can be greater than the area covered by the annular step which is explicitly the subject-matter of claim 3, which is however not effective for providing the effect of bolstering the moveable portion against toggling/flipping.

- 3.2 The Board concurs with the patent proprietor that these objections are rather clarity objections which go beyond the scope of the current opposition appeal proceedings.

It is the established jurisprudence of the Boards of Appeal that an objection of lack of sufficient disclosure presupposes that there are serious doubts substantiated by verifiable facts. The burden of proof is upon the opponent to establish, on the balance of

probabilities that a skilled reader of the patent, using the common general knowledge, would be unable to carry out the invention (see the Case Law of the Boards of Appeal, 9th edition 2019, II.C.9).

The Board is of the opinion that the opponent has not discharged their burden of proof, since they have not shown that the invention cannot be reproduced without undue burden. In particular the opponent has not shown that the person skilled in the art cannot put into practice the method of forming a container having enhanced openability according to claim 1 in view of the detailed example given in the description of the patent and of the common general knowledge (see the section "Detailed description of illustrative embodiments" starting from paragraph [0019] and related figures).

Furthermore the following is noted.

The argument that insufficiency arises due to the absence in the claim of a score line cannot be followed since this objection is considered by the Board to be an objection of lack of essential feature which falls under the requirement of Article 84 EPC and is not an issue in the sense of Article 100(b) EPC. The person skilled in the art is in fact aware that an easy open end for metal can has a score line (see for example paragraph [0002] of the patent specification as well as the specific examples) and is thus in the position of applying the method of claim 1 so that the can exerts all the required functionalities, i.e. it can be opened.

The Board considers that the fact that claim 1 covers embodiments in which the moveable portion encompasses

the rivet and the nose of the tab is not relevant, since this would be seen by the person skilled in the art as a variant clearly outside of the scope of practical application of the claimed subject-matter and thus not affecting the sufficiency of disclosure of the claimed invention (see also the Case Law of the Boards of Appeal, *supra*, II.C.8.1, first paragraph, penultimate sentence).

The argument of the opponent in relation to the location of the inclined step within the movable portion is not relevant for the requirement of sufficiency of disclosure, since it relates to the achievement of the technical effect of preventing the movable part from flipping which is however not part of the claimed subject-matter.

The Board notes that the fact that a technical effect, which is not claimed, is not achieved by all the embodiments falling under the wording the claim might be an issue when discussing inventive step but not when discussing sufficiency of disclosure.

The Board considers that, even if the further argument of the opponent were to be followed, that the annular step provides the technical effect of improving the accessibility to a user's finger, which is mentioned in the claim, this would not imply that the invention is not sufficiently disclosed, since the opponent has still not shown that the person skilled in the art is not in the position of carrying out the method according to claim 1 taking into account the teaching of the patent and the common general knowledge.

The fact that in the claim it is not defined how the angle of the inclined annular step is to be determined,

could possibly be an issue of clarity under Article 84 EPC, which is not relevant in the current proceedings (see decision G 3/14, OJ EPO 2015, A102), and not of sufficiency of disclosure, since, as acknowledged by the opponent, the patent, in particular paragraph [0031], provides the necessary information for the determination of the claimed angle's range.

The argument that the inclined annular step can be part of the movable portion and in line with it and cannot thus be distinguished from the rest of the movable portion, cannot be followed. If the inclined annular step cannot be identified, than that embodiment is not falling under the claim and is thus not relevant for the issue of sufficiency of disclosure.

The opponent's argument that the angle of the step might not be achievable is an assertion which remains unsubstantiated.

The fact that embodiments which allegedly do not allow to achieve the intended technical effect (the "bolstering effect", see point 52 of the opponent's statement setting out the grounds of appeal referring to paragraph [0036] of the patent), such as that the angle range is achieved in the up position or that the area within the periphery of the moveable portion is greater than the area of the moveable step, are not excluded by the claim, does not affect the sufficiency of disclosure of the invention, since the achievement of that technical effect is not part of the claimed subject-matter.

The argument that the person skilled in the art is confronted with an undue burden to determine the scope of claim 1, even if it were to be followed, does not

imply that the invention is not sufficiently disclosed for it to be carried out by the person skilled in the art.

The Board therefore concludes that the objections raised by the opponent do not put into doubt the conclusion of the opposition division that the claimed invention is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

4. Novelty of the subject-matter of claim 1 of the patent as granted (Articles 100(a) and 54 EPC)
- 4.1 The patent proprietor argues in particular that no annular step is shown in figure 6A, 6B and 6C of B6, even when taking figure 6D into consideration.
- 4.2 The opponent contests the arguments of the patent proprietor. The opponent argues that the term "annular step" has to be interpreted according to the description. According to paragraph [0030] of the description the step has a linear cross section, but may also have a curved cross-section, and therefore the cross-sectional shape of the step is not relevant, as linear and curved steps perform in the same manner.

The opponent also submits that the can ends of figures 6A, 6B and 6C comprise a flip panel with a linear annular ring with a downward inclination α_1 of $6^\circ \pm 4^\circ$. Furthermore, the can end of figure 6B comprises a second step, named flip panel transition, having a step drop h_4 of 0.5 ± 0.3 mm, which has a greater downward inclination than the flip panel area.

The opponent derives from the above that the can ends of figures 6A, 6B and 6C of B6 exhibit the same

functions as the annular steps of the patent and that therefore B6 in the form of the embodiments of figures 6A, 6B and 6C directly and unambiguously discloses inclined annular steps in the sense of the patent.

The opponent also argued at the oral proceedings that figure 6D, showing a view of the can ends of figures 6A to 6C from above, shows a line in correspondence of R1 and thus implies the presence of a discontinuity, whereby indicating that an annular step is present in the can end of figures 6A to 6C.

4.3 The Board cannot concur with the opponent and the opposition division and essentially follows the argument of the patent proprietor with respect to the feature of the annular step for the following reasons.

In point 5.2 of the reasons for the decision of the opposition division, the relevant passage indicated as ad iii) reads:

"...The step shown in fig. 6A-6C extends generally from the inner limit at $R1/r1$ (inner limit) to an outer limit defined at $R2/r2$ in fig. 6A, at $R4/r4$ in fig. 6B and at $R6/r6$ in fig. 6C. Hence, the step has a clear and well defined inner and outer limitation. Whether the curvature $r4$ and $r1$ can be considered a "sharp curvature" does not seem to be of relevance, as claim 1 of the contested patent does not require such a feature...".

The Board cannot find the inner limit defining the "inclined step" as indicated by the opposition division in figures 6A to 6C. It is true that a central part is identified in figures 6A to 6C by the radius R1, however a discontinuity in the shape of the can end

indicating the so-called "inner limit" of a step is not apparent.

The second step mentioned by the opponent in relation to figure 6B can also not be identified in that figure. The Board considers that a greater downward inclination of the region where the step drop h_4 is indicated can also not be directly and unambiguously derived from the schematic representation provided by figure 6B.

The Board notes that the vertical distance of the can end from the horizontal line identifying the radius R_2 in figures 6A-6C decreases continuously from right to left, and the central part identified by R_1 is curved, as it also appears from the indication provided by the radius r_0 . The structure of the can end reported in figures 6A to 6C appears therefore to be of the kind of a slanted structure as argued by the patent proprietor and an inclined annular step is not to be directly and unambiguously derivable from these figures.

The Board shares further the view of the patent proprietor that the line at R_1 in figure 6D does not allow to derive directly and unambiguously that a step is present in the can end of figures 6A, 6B and 6C, in particular since these figures present a clear teaching on their own, depicting a slanted structure from which the person skilled in the art would not derive the presence of any step even in the broadest reading of the term.

The argument of the opponent, that the can ends of B6 exhibit the same functions as the annular step of the patent and as a consequence directly and unambiguously disclose the claimed inclined annular step, cannot be followed, since even assuming that the same effect is

achieved, this effect can be well obtained by different means and is not a proof of the presence of an inclined annular step.

The Board is thus of the opinion that an inclined step as claimed in claim 1 is not directly and unambiguously derivable from the embodiments of figures 6A, 6B and 6C of B6 even when taking figure 6D into account.

The subject-matter of claim 1 is therefore considered to be new at least for this reason.

5. Inventive step of the subject-matter of claim 1 of the patent as granted (Articles 100(a) and 56 EPC)

5.1 The opponent argues that the structure, dimensions and the location relative to the movable portion of the annular step for the tests mentioned in paragraph [0036] of the patent are not disclosed, as well as the tests conditions. Accordingly there is no evidence that all can ends prepared with the method of claim 1 exhibit the alleged resistance to toggling back into the convex up position. The opponent therefore contests that the alleged resistance to toggling back into the up position is achieved over the whole breadth of claim 1.

The opponent derives from the above that the subject-matter of claim 1 does not involve an inventive step either for lack of experimental substantiation for the claim scope and/or the same problem has been solved by the can ends of B6.

5.2 The Board disagrees for the following reasons.

The Board is of the opinion that the technical effect of better withstanding impacts and/or high-altitude transportation without the moveable portion toggling back into the up position, which is mentioned in paragraph [0036] of the patent specification, is plausibly attained by a can obtained by a method according to claim 1 due to the fact that the moveable portion has a downwardly inclined annular step, as it is shown by the test results of Table 1 of the patent specification. Moreover, according to claim 1 the annular step is inclined downwardly at between 8 and 17 degrees.

That the technical effect is not obtained over the whole scope of claim 1, as argued by the opponent, is an assertion which remains unsubstantiated. Under the present circumstances, the Board sees no reason to assume that the technical effect discussed above is not obtained within the whole scope of the claim and considers that there are no reasons to put in doubt the correctness of the results provided in Table 1 of the patent specification. Proof or convincing arguments of the contrary have not been submitted by the opponent.

It is noted that even if it was to be demonstrated that the purported technical effect is not achieved in the whole ambit of the claim, this would not automatically imply that the subject-matter of the claim is not inventive but rather that the objective technical problem to be solved has to be reformulated.

The argument that also the can ends according to B6 solve the same problem as the patent in suit and that therefore the subject-matter of claim 1 is not

inventive, cannot be followed since solving the same problem with different means does not imply that the subject-matter of the claim of the patent in suit is obvious.

The Board therefore considers that the opponent has not discharged themselves from the burden of proving that the claimed solution is not credibly solving the technical problem posed or of at least providing evidence casting doubt on the solution of the problem posed, which as such appears to be plausible at least (see also the Case Law of the Boards of Appeal, *supra*, III.G.5.1.1, third last paragraph with reference to T 1797/09, not published in OJ EPO).

6. As a consequence, the Board, in reviewing the decision under appeal on the basis of the parties' mutual submissions in the appeal proceedings, has come to the conclusion
- that the patent proprietor has convincingly shown the incorrectness of the decision under appeal and its underlining reasons in respect of the lack of novelty of the subject-matter of claim 1 of the patent as granted;
 - that the opponent has not convincingly demonstrated the validity of the grounds for opposition according to Article 100(a) and (b) EPC and that the claimed subject-matter according to the patent as granted does not meet the requirements of Articles 54, 56 and 83 EPC.

Thus, the impugned decision cannot be upheld and the patent can be maintained as granted, as requested by the patent proprietor with its main request.

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