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**Datasheet for the decision
of 22 October 2019**

Case Number: T 1090/18 - 3.2.07

Application Number: 07703226.6

Publication Number: 1984265

IPC: B65D17/00

Language of the proceedings: EN

Title of invention:

CAN END FOR A CAN AND SUCH CAN

Patent Proprietor:

Impress Group B.V.

Opponents:

Künkler, Tobias
CROWN Packaging UK PLC

Headword:

Relevant legal provisions:

EPC Art. 113(1), 123(2)
RPBA Art. 13(1), 15(3)

Keyword:

Right to be heard - opposition procedure - change of
composition of the opposition division
Amendments - added subject-matter (yes)
Late-filed auxiliary request - admitted (no)

Decisions cited:

R 0001/08, T 1704/06, T 0435/07, T 1652/08, T 1378/11,
T 1906/17, T 2588/17

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 1090/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 22 October 2019

Appellant:
(Patent Proprietor)

Impress Group B.V.
Zutphenseweg 51051
7418 AH Deventer (NL)

Representative:

Verdijck, Gerardus
Arnold & Siedsma
Bezuidenhoutseweg 57
2594 AC The Hague (NL)

Respondent:
(Opponent 1)

Künkler, Tobias
Mülbergerstrasse 61
73728 Esslingen (DE)

Representative:

Viering, Jentschura & Partner mbB
Patent- und Rechtsanwälte
Grillparzerstraße 14
81675 München (DE)

Respondent:
(Opponent 2)

CROWN Packaging UK PLC
Downsview Road, Wantage
Oxfordshire, OX12 9BP (GB)

Representative:

Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 2 March 2018
revoking European patent No. 1984265 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman K. Poalas
Members: A. Pieracci
 R. Cramer

Summary of Facts and Submissions

- I. 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 revoke European patent No. 1 984 265.
- II. The opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and of inventive step), Article 100(b) EPC (insufficiency of disclosure) and on Article 100(c) EPC (added subject-matter).
The opposition division considered Article 100(c) EPC to be prejudicial to the maintenance of the patent as granted and as amended during the opposition proceedings and revoked the patent.
- III. With the statement setting out the grounds of appeal the appellant (patent proprietor) requested:

that the decision under appeal be set aside and the case be remitted to the opposition division,
or alternatively,
that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the sets of claims filed as main request, as auxiliary requests I to VII, MR' or as I' to IV', all filed together with the statement of grounds of appeal.
- IV. With the reply to the statement setting out the grounds of appeal, respondent 2 (opponent 2) requested

that the appeal be dismissed,
in the alternative, that the case be remitted to the opposition division for consideration of the

grounds of opposition under Article 100(a) and (b) EPC.

- V. In order to prepare the oral proceedings scheduled upon both parties' requests, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2007. The Board indicated that the subject-matter of claim 1 according to the main request and to all the auxiliary requests on file appeared to present subject-matter which extends beyond the content of the application as originally filed.
- VI. With a letter dated 21 August 2019 the appellant submitted further arguments as well as photos and videos to clarify the object of the invention.
- VII. With a letter dated 27 September 2019 respondent 2 contested the admittance of the evidence filed by the appellant with letter dated 21 August 2019.
- VIII. With a letter dated 29 August 2019 respondent 1 (opponent 1) indicated that he was not planning to attend the oral proceedings.
- IX. With a letter dated 14 October 2019 the appellant filed a new set of claims as auxiliary request VIII.
- X. With a letter dated 18 October 2019 respondent 2 contested the admittance of auxiliary request VIII into the proceedings.
- XI. Oral proceedings before the Board took place on 22 October 2019. Respondent 1 was not present as announced.

The requests of the parties at the end of the oral proceedings were the same as at the beginning of the appeal proceedings apart from the additional request of the appellant to admit auxiliary request VIII and the additional request of the respondent 2 not to admit it.

The order of the decision was given at the end of the oral proceedings.

XII. The lines of arguments of the parties are substantially as follows and they are dealt with in detail in the reasons for the decision.

According to the appellant the case should be remitted to the opposition division according to Article 11 RPBA 2007 due to a fundamental deficiency in the first instance proceedings. It argues further that its main request and its auxiliary requests on file comply with the requirement of Article 123(2) EPC.

Respondent 2 argues that the case should not be directly remitted to the opposition division and that not only the feature "flat central panel" and "metallic can" do not comply with the requirement of Article 123(2) EPC, as decided by the opposition division, but also the features "straight panel wall" and "single countersink radius".

XIII. Claim 1 of the main request, corresponding to the fourth auxiliary request in opposition proceedings, reads:

"Metallic can end for a can, such as an easy opening can, comprising a flat central panel (2), a can end radius for connection to a body of the can; and a countersink connected via a transition wall to

the can end radius and via a straight panel wall (4) and a panel radius (R_4) to the central panel (2), wherein a panel wall angle (A_2, P_2) is $2^\circ - 45^\circ$, the panel radius (R_4) is larger than 0.5 mm, a panel depth (H_2) is 1 mm - 7 mm, and a single counter sink radius (R_3) in the range of 0.5mm to less than 5 mm, wherein the countersink radius determines the internal curvature of the section between the panel wall (7) and the transition wall".

XIV. Each claim 1 of all the auxiliary requests comprises also the feature "straight panel wall" which is the decisive point of discussion for the outcome of the present case.

Reasons for the Decision

1. Absence of the respondent 1 - Right to be heard (Article 113(1) EPC)

Although the respondent 1 did not attend the oral proceedings, 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, by absenting itself from oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA 2007 cited in T 1704/06, not published in OJ EPO; see also the Case Law of the Boards of Appeal, 9th edition 2019, sections III.B. 2.7.3).

2. Direct remittal of the case to the opposition division
 - 2.1 The appellant requests remittal of the case to the opposition division arguing that its right to be heard

according to Article 113(1) EPC and the principle of legitimate expectations have been violated during the opposition proceedings.

The appellant argues that the different interpretation of the features of the claim given by the opposition division in the decision, in comparison with the preliminary opinion, was only communicated to him for the first time with the grounds of the decision, thus after the oral proceedings. This is confirmed by the fact that the minutes of the oral proceedings are silent with regard to the fact that a different interpretation of the claim features has been relied upon by the opposition division. As a result thereof its right to be heard has been violated. The appellant referred to T 0435/07 in this regard.

The appellant further argues that failure to notify the parties of the changes in the composition of the opposition division and the failure to apply established general principles has resulted in a loss of rights and has violated the principle of legitimate expectations of the appellant.

According to the appellant, the opposition division should have timely provided its view of the changed interpretation of the application in order to allow the submission of a substantive response.

The appellant argues that the opposition division has not applied the basic principle that a skilled person when considering a claim should rule out interpretations which are illogical and which do not make technical sense. The interpretation of the figures as applied in the oral proceedings is substantially erroneous and does not make technical sense. The

failure to apply established principles for interpretation has adversely affected the patent proprietor since it led to the inadmissibility of the requests filed at the oral proceedings and to the revocation of the patent.

- 2.2 Respondent 2 referring to T 1378/11 argues that if the reasons given in a decision correspond to an argument put forward by another party, the losing party can not have been taken by surprise. The features "metallic" and "flat central panel" on which the decision is based were objected to by the opponents from the beginning of the opposition proceedings. Points 2.1 to 2.3 of the minutes and the paragraph bridging pages 5 and 6 of the decision also indicate that the appellant was granted the right to be heard.

Respondent 2 also argues that the written opinion provided by an opposition division is provisional and that the appellant did not raise any objection with respect to the change of the composition of the opposition division neither at the start nor at any other point during the oral proceedings. That the change of composition of the opposition division does not constitute a breach of the right to be heard is also confirmed in T 1652/08.

Respondent 2 also disagrees that the wrong principles of interpretation have been used by the opposition division when evaluating the claims.

- 2.3 The Board is of the following opinion.

With respect to the right to be heard, the Board notes that "grounds or evidence" within the meaning of Article 113(1) EPC need not emanate from the deciding

body, but that the reasons given in the decision could well correspond to an argument put forward by the other party and the losing party is thus not taken by surprise unless the deciding body clearly indicated that it regarded those arguments as not convincing (see the Case Law of the Boards of Appeal, 9th edition, 2019, III.B.2.3.1, first paragraph, in particular with reference to T 1378/11).

It is true that the preliminary opinion of the opposition division with respect to the objected feature of the "flat panel" was favourable to the appellant (see point 2.2 of the opposition division's communication dated 10 December 2015). However, the opposition division clearly indicated that the opinion was preliminary (see point 2 of the above communication) and it should thus have been clear to the parties that such opinion could also be changed later in the course of the proceedings in view of further arguments brought forward in writing or orally by the respondents, or simply due to a different assessment of the case.

The feature of the "flat panel" was also discussed at the oral proceedings (see point 3 of the minutes). The appellant was given the opportunity to present its arguments orally and/or to file (further) auxiliary requests. Its right to be heard in this respect seems therefore to have been respected by the opposition division.

Decision T 0435/07, referred to by the appellant, appears not to be relevant for the present case, since it deals with a case in examination proceedings. In the present case it appears that the relevant arguments were known to the appellant before notification of the decision since they had been brought forward in written

form and orally by the respondents during the opposition proceedings.

With respect to the change of composition of the opposition division, the Board notes that the present case is similar to the case of T 1652/08, cited by respondent 2, and concurs with the assessment done therein that in principle the change of the composition of the opposition division after the summons to oral proceedings and before the oral proceedings does not lead to the conclusion that the patent proprietor was denied its right to be heard, if the new member has sufficient opportunity to familiarize himself with the case and has the opportunity to hear both parties at the oral proceedings. This appears to be the case here. No proof or convincing arguments to the contrary have been submitted by the appellant in this respect. Accordingly, the Board sees no reason for doubting that the new member had sufficient opportunity to familiarize himself with the case.

It is noted again that the opinion of the opposition division communicated to the parties prior to the oral proceedings was preliminary and that there is no apparent casual link between the change of composition of the division and the different way the opposition division assessed the case. A different assessment of the case also by the unchanged composition is possible and by itself not infringing the right to be heard of a party. Furthermore, the opposition division takes its final decision after having read the written submissions and after having heard the oral presentations of the parties. Otherwise there would be no point in holding oral proceedings.

Until the decision is taken the opinion of the members of the deciding body can change and the parties are not entitled to advance indication for all reasons for a decision in detail (see the Case Law of the Boards of Appeal, 9th edition, 2019, III.B.2.3.1, fourth paragraph, and V.B.4.3.5, in particular with reference to R 1/08).

The argument of the appellant that it should have been informed of a change of opinion of the opposition division to be able to react does not hold, as this would imply that the opposition division should inform the parties in advance of the decision that it is going to take. Of course the decision should be based on grounds and evidence on which the parties had the opportunity to react, but this appears to be the case here. Evidence or convincing arguments to the contrary have not been presented to the Board.

It is also noted that at the end of the oral proceedings the appellant was given the opportunity to file further requests, which it declined (see point 4 of the minutes of the oral proceedings).

The Board cannot follow the argument of the appellant that well established principles of claim interpretation have not been applied by the opposition division and that the application of wrong criteria, not making technical sense, have negatively affected the patent proprietor so that the case has to be remitted to the opposition division under Article 11 RPBA 2007.

Article 11 RPBA 2007 foresees the remittal of the case "if fundamental deficiencies are apparent in the first instance proceedings". The fact that the opposition division has not construed the claims and also has not

interpreted the teaching of the opposed patent as suggested by the appellant is not per se a "fundamental deficiency" which renders a remittal necessary without further assessment of the case. That the opposition division has followed the line of arguments of the respondents and that this has negatively affected the appellant is per se not a reason for a remittal under Article 11 RPBA 2007.

In view of the above the Board decides not to remit the case to the opposition division pursuant to Article 11 RPBA 2007.

3. Added subject-matter of claim 1 according to the main request (Article 123(2) EPC)
- 3.1 The main request in appeal proceedings corresponds to the fourth auxiliary request filed in opposition proceedings with letter dated 22 December 2017, said request being considered by the opposition division as not fulfilling the requirements of Article 123(2) EPC. The opposition division found that the presence of the features "metallic can" and "flat central panel" in claim 1 of said request was not allowable for the same reasons as given for claim 1 of the then main request (see the last paragraph of page 8 of the grounds of the impugned decision).

Respondent 2 in its reply to the grounds of appeal argues that, contrary to the finding of the opposition division, also the features of claim 1 concerning the "straight panel wall" and the "single countersink radius" introduce subject-matter which extends beyond the content of the application as filed.

Respondent 2 argues in particular that it cannot be directly and unambiguously derived from the application as originally filed that the panel wall is straight. This is disputed by the appellant, who argues that this feature can be derived from the figures of the patent in suit, in particular from figures 1 to 3.

3.2 The Board is of the following opinion.

As indicated by the Board in its communication pursuant to Article 15(1) RPBA 2007 the figures of the application as originally filed represent a three dimensional body in cross section and the wall connecting the countersink to the central panel is curved as it resembles the surface of a truncated cone (see for example figures 1 to 3 of the application as originally filed).

This is agreed upon by the parties at the oral proceedings.

The appellant argues that the person skilled in the art reading the claim would understand that the object of the claimed subject-matter is a beverage can, which is thus cylindrical, and that what is meant by claiming that the panel wall is straight is that the panel wall in cross section is represented by a straight line.

In case of doubt the person skilled in the art would consult the description and the drawings, for example figures 1 to 3, where it would derive this information.

The Board cannot follow the argument of the appellant for the following reasons. As indicated by respondent 2, it is neither apparent from the wording of claim 1

nor is it implicitly evident to the person skilled in the art that claim 1 refers exclusively to a **cylindrical beverage** can.

As argued by respondent 2 and not contested by the appellant, cans with a non-circular cross-section, such as rectangular cans, are generally known in the art. Thus the chain of arguments of the appellant cannot be followed by the Board from its outset.

Furthermore, independently from whether in the figures of the application as originally filed the panel wall in cross section is straight or not, there is no indication in the claim which would lead the skilled person to understand that, when referring to the "straight panel wall", the claim refers to the view of the curved panel wall in cross section.

The argument of the appellant, that the person skilled in the art would consult the description and interpret the claim accordingly, can also not be followed, since the feature "straight panel wall" on itself is clear and there is no need to recur to the description for any interpretation.

The Board therefore cannot follow the opinion of the appellant and considers that no basis can be found in the originally filed application for a panel wall of a can end as now claimed in claim 1, namely for a panel wall of a can end having any possible can end shape, i.e. not exclusively a cylindrical one, and a straight panel wall viewed from any possible direction, i.e. not exclusively in a cross-section view. The claimed subject-matter extends therefore beyond the content of the application as originally filed.

4. Added subject-matter of claim 1 according to the auxiliary requests I to VII, MR', and I' to IV' (Article 123(2) EPC)

The subject-matter of claim 1 of the auxiliary requests I to VII, MR', and I' to IV' also comprises the feature of the "straight panel wall" and is thus to be assessed in the same way as for the main request. This has not been contested by the appellant.

The Board therefore considers, in accordance with the finding under chapter 3 above, that also each one of claims 1 of auxiliary requests I to VII, MR', and I' to IV' contains subject-matter which extends beyond the content of the application as originally filed.

5. Admittance of auxiliary request VIII

- 5.1 The appellant filed auxiliary request VIII for the first time on 14 October 2019, i.e. one week before the oral proceedings. According to the appellant, see letter dated 14 October 2019, claim 1 of auxiliary request VIII is based on claim 1 of auxiliary request VII together with four additional features (features 1 to 4). Feature 1 allegedly addresses the objection of intermediate generalization raised under point 8.3.2 of the preliminary opinion and features 2 to 4 allegedly address the objection of intermediate generalization mentioned under point 8.2 of the preliminary opinion.

At the oral proceedings the appellant acknowledged that the amendments introduced in auxiliary request VIII actually address the same objections which had been already raised by the respondent 2 in the reply to the statement setting out the grounds of appeal.

The appellant argues that it considered it not efficient to react to the objections raised by respondent 2 in its reply to the statement setting out the grounds of appeal before having received a preliminary opinion by the Board.

Respondent 2 counterargues that the strategy of the appellant is not efficient for the Board and for the respondents and requests not to admit auxiliary request VIII into the proceedings as being late filed.

- 5.2 The Board considers that to deliberately wait for the preliminary opinion of the Board before reacting to an objection raised by the other party is contrary to the spirit of the Rules of Procedure of the Boards of Appeal, which make it clear that the case of the parties should be complete at an early 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 2007.

In the present case the Board considers it inappropriate that the appellant has waited for the communication pursuant to Article 15(1) RPBA 2007 before reacting to the objections raised by respondent 2 in its reply to the statement setting out the grounds of appeal, thereby impeding the Board and the respondents from dealing with the new auxiliary requests in a timely manner (see also T 2588/17, point 6.3 of the reasons for the decision and T 1906/17, point 3.2 of the reasons for the decision).

The Board considers such a course of action as being contrary to the procedural economy and thus decides to exercise its discretion to not admit auxiliary request VIII into the proceedings pursuant to Article 13(1) RPBA 2007.

6. The request of the respondent 2 to remit the case to the opposition division for consideration of the grounds of opposition under Article 100(a) and (b) EPC does not need to be addressed due to the Board's conclusion that the main request and auxiliary requests I to VII, MR', and I' to IV' do not comply with the requirements of Article 123(2) EPC and that auxiliary request VIII is not admitted into the proceedings.
7. Because none of the sets of claims relied upon by the appellant is allowable or admitted into the proceedings, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated