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**Datasheet for the decision
of 20 April 2023**

Case Number: T 1477/21 - 3.2.07

Application Number: 15188822.9

Publication Number: 3006370

IPC: B65D77/20, B65D81/28,
B65D85/34, B65D65/46

Language of the proceedings: EN

Title of invention:
SEALED FIBROUS CONTAINER

Patent Proprietor:
Evesham Specialist Packaging Limited

Opponent:
Huhtamaki Molded Fiber Technology B.V.

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - added subject-matter (yes)

Decisions cited:
G 0002/10, T 0002/81, T 1170/02



Beschwerdekammern

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Case Number: T 1477/21 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 20 April 2023

Appellant: Evesham Specialist Packaging Limited
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Appellant: Huhtamaki Molded Fiber Technology B.V.
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Representative: Verdijck, Gerardus
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 July 2021 concerning maintenance of the
European Patent No. 3006370 in amended form.**

Composition of the Board:

Chairman R. Cramer
Members: V. Bevilacqua
S. Watson

Summary of Facts and Submissions

- I. Appeals were filed by the opponent and by the patent proprietor against the decision of the opposition division to maintain European patent No. 3 006 370 in amended form according to the then auxiliary request 6.
- II. The opposition division, referring to document EP 3 006 370 A2 (application as published, identified as O1 in the following), found that the the ground for opposition according to Article 100(c) EPC held against the patent as granted and that the then auxiliary requests 1 to 5 and 10 were not allowable under Article 123(2) EPC.
- III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case to the parties in a communication pursuant to Article 15(1) RPBA 2020 of 7 October 2022.
- IV. Oral proceedings before the Board took place on 20 April 2023.
At the end of oral proceedings the patent proprietor withdrew its appeal.
The final requests of the parties were as follows.
- The opponent requested that the decision under appeal be set aside and that the patent be revoked.
- The patent proprietor requested dismissal of the opponent's appeal or, when setting aside the decision under appeal, maintenance of the patent in amended form according to one of the sets of claims of auxiliary requests 13 to 15 filed with its statement of grounds of appeal.

At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.

- V. Claim 1 as maintained according to the appealed decision (**auxiliary request 12**, corresponding to auxiliary request 6 in opposition) reads as follows (the features added with respect to originally filed claim 1 are in bold, those features on which the present decision is based are additionally underlined):

"A container (2) having an opening (6) sealed with a polymeric film (8), wherein the container (2) is formed from a pulpable, fibrous material, and wherein less than about 50 % of the surface area of the polymeric film (8) is in contact with the container (2), **the container (2) having a rim about the opening (6), wherein the rim comprises a flange (4) extending outwards from, and about, the perimeter of the opening (6), the seal (3) formed between the polymer film (8) and the flange (4), wherein the seal (3) formed between the polymeric film (8) and the flange (4) is the only point of contact between the polymeric film (8) and the container (2), wherein the polymeric film (8) is bonded to fibres of the container (2),**

wherein the polymeric film (8) has a thickness of from 5 μm to 30 μm ,

characterized in that the container (2) is moulded from a composition comprising a fibrous pulp and an additive for varying the moisture and/or water resistance of the container (2)."

Claim 1 of **auxiliary request 13** corresponds to claim 1 of auxiliary request 12.

Claim 1 of **auxiliary request 14** corresponds to claim 1 of auxiliary request 12, with the following features added at the end of the characterizing portion thereof:

"wherein the additive for varying the moisture and/or water resistance of the container (2) is wax."

Claim 1 of **auxiliary request 15** corresponds to claim 1 of auxiliary request 14, with the following features added at the end of the characterizing portion thereof:

"wherein the body of the container (2) comprises at least 90 wt. % fibrous material and from 0.1 to 10 wt. % wax."

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

Reasons for the Decision

1. *Extension of subject-matter - Article 123(2) EPC - auxiliary requests 12-15.*

1.1 Claim 1 of each of auxiliary requests 12 to 15 comprises, when compared with claim 1 as originally filed, the additional feature that

"the polymeric film (8) has a thickness of from 5 μm to 30 μm " (see point V above).

The opposition division noted (appealed decision, section 18.4.2) that paragraph [0010] of document O1 disclosed a broad range of 5 μm to 1 mm and also a narrower range of 50 μm to 80 μm .

The opposition division, referring to the *ratio decidendi* of T 2/81 (OJ EPO 1982, 394), found that the claimed range from 5 μm to 30 μm was also originally disclosed in this paragraph.

Based on the above, the opposition division acknowledged the compliance of claim 1 of auxiliary request 12 with the requirements of Article 123(2) EPC.

1.2 The opponent contested the correctness of the above conclusions (statement of grounds, point IV), arguing that there were substantial differences between the circumstances of the present case and those decided upon in T 2/81.

1.3 The Board agrees with the opponent.

- 1.3.1 The amended range considered allowable in T 2/81 resulted from the combination of the lower limit (0.05 ppm) of a smaller range with the higher limit of the general range (10 ppm), giving a new range which included the smaller range (see T 2/81, point 3. of the reasons).

The case at issue in T 2/81 however relates to a situation in which only one general range (1 ppb to 10 ppm) and only one preferred range (0.05 to 5 ppm) which is contained therein, are disclosed in the same sentence ("from 1 ppb to 10 ppm, preferably from 0.05 to 5 ppm", see point 3 of the reasons) in such a way that a skilled person would consider that these two ranges are unequivocally correlated to each other, and that the smaller range is a preferred range.

- 1.3.2 There are two major differences with the present situation (opponent's statement of grounds of appeal, point IV).

In the present case the claimed range, resulting from the amendment, has the lower limit of the general range (5 μm to 3 mm, see paragraph [0010]) and, as its upper limit, the lower limit of a smaller range of 30 to 80 μm (see again paragraph [0010]) with the result that the smaller range is now excluded.

The other, even more important, difference is that in the present case no clear and unequivocal correlation between the broader range and the smaller range can be derived from paragraph [0010] of O1.

There is no hint in O1 that such a relationship between these two particular ranges exists.

This correlation was however the basis upon which the competent Board decided in T 2/81 to allow the amendment.

Paragraph [0010] of O1 merely mentions one general range and nine smaller ranges contained therein, as well as a plurality of open-ended ranges.

1.3.3 As a consequence of the above the Board concludes that the opponent convincingly demonstrated that the *ratio decidendi* of T 2/81 has not been correctly applied in section 18.4.2 of the appealed decision.

1.4 The opponent then argued that claim 1 of each of auxiliary requests 12 to 15 contravened the requirements of Article 123(2) EPC because there was no basis in the originally filed documents for a thickness range having the value 30 μm as an upper limit.

This value is only disclosed as a possible lower limit in O1, and there is nothing in the originally filed documents which would lead a skilled person to identify the claimed range, which ends at 30 μm , as being disclosed.

According to the opponent, each range mentioned in paragraph [0010] of O1 is to be considered as a distinct embodiment.

1.5 The patent proprietor disagreed, as follows.

1.5.1 From the perspective of the skilled person, the range of 5 μm to 30 μm , added with respect to claim 1 as originally filed, only reduces an originally disclosed range (5 μm to 1 mm), selecting a new upper end point

which is of the same order of magnitude of the lower end point.

As paragraph [0010] of O1 unambiguously teaches that any thickness from 5 μm up to 3 mm can be selected, and unambiguously mentions, multiple times, a thickness of 30 μm , the claimed range clearly does not present the skilled person with any new technical information.

A skilled person would immediately understand, from paragraph [0010], that all values mentioned therein could be selected because they would consider the technical disclosure of paragraph [0010] as a whole, seeing that there is a technical correlation between the broader ranges and the smaller ranges disclosed therein.

The objection of the opponent, on the contrary, overlooked this technical correlation and artificially split the unitary teaching into a multitude of separated ranges, each range being a distinct embodiment.

The objection of the opponent was therefore to be rejected, being at odds with the so-called "gold standard" defined in G 2/10.

- 1.5.2 The patent proprietor cited decision T 1170/02 in support of its argument. In that decision a new range was allowed which was formed by taking the lower limits of two ranges disclosed in the same paragraph of the original description, as in the present case. T 1170/02 confirmed that the approach of the opponent was not correct, and that the technical disclosure of paragraph [0010] should be taken as a whole.

1.6 The Board disagrees with the patent proprietor.

1.6.1 The objection of the opponent does not appear to be in contradiction with the application of the gold standard defined in G 2/10 but is rather based thereon.

This is because the opponent convincingly argued that paragraph [0010] of O1 only contained a list of thickness ranges disclosed as separate embodiments, but did not provide any additional technical information allowing a skilled reader to establish a relationship, or even a ranking of preference, between them.

There is therefore no technical information, derivable from paragraph [0010] of O1, which would have led a skilled person to identify the claimed range, ending at 30 μm , as being originally disclosed.

It is therefore not apparent to the Board how a skilled reader could consider, following the patent proprietor, that the claimed range corresponds to technical information which was originally disclosed, simply because the **upper limit** thereof (30 μm) is consistently mentioned in O1 as the **lower limit** of multiple ranges.

The argument of the patent proprietor referring to the gold standard (letter of 4 April 2022, section E) is also not convincing because, if followed, the outcome would be that any pair of values comprised within the broadest range disclosed in paragraph [0010] of O1 (5 μm to 3 mm) may be arbitrarily employed as the upper and lower limits of a claimed range, without contravening the requirements of Article 123(2) EPC (see the letter of the opponent dated 31 March 2022, point III).

1.6.2 Claim 1 of auxiliary request 12 is also not allowable when the *ratio decidendi* of T 1170/02 is taken into consideration, for the following reasons (statement of grounds of appeal of the opponent, pages 10 and 11).

In T 1170/02 the allowed range followed from the lower limits of two consecutively presented ranges, thereby excluding the smaller, preferred range. The amendment was allowed because the skilled person would, in view of data related to examples presented in the originally filed documents, have seriously considered working beyond the lower limit of the preferred range.

Contrary to the particular circumstances in T 1170/02, there are no data in the originally filed documents in the present case on the basis of which the skilled person would seriously contemplate working below 30 μm , disclosed as the lower limit of the ninth preferred range, because no specific examples of the claimed container are provided.

1.6.3 The Board therefore concurs with the opponent that in claim 1 of auxiliary request 12 one of the many possible lower limits mentioned in paragraph [0010] of the original description was arbitrarily combined as an upper limit with the lower limit of the broader range mentioned therein, thereby creating a new range, which was not originally disclosed.

As a consequence of the above, claim 1 of auxiliary request 12 does not comply with the requirements of Article 123(2) EPC.

As the claimed range of thickness in claim 1 of each of auxiliary requests 13 to 15 has been amended to "5 μm to 30 μm ", the same conclusion applies to these

auxiliary requests which thus cannot be allowed either because of a lack of compliance with the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



S. Lichtenvort

R. Cramer

Decision electronically authenticated