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**Datasheet for the decision
of 27 November 2023**

Case Number: T 0654/22 - 3.2.07

Application Number: 14186025.4

Publication Number: 2845819

IPC: B65D21/02, B65D77/20,
B65D81/20, B65B51/10

Language of the proceedings: EN

Title of invention:

SEALABLE CONTAINER AND PROCESSES FOR MAKING A SEALABLE
CONTAINER AND A SEALED CONTAINER

Patent Proprietor:

Linpac Packaging Limited

Opponent:

Quinn Packaging Limited

Headword:

Relevant legal provisions:

EPC Art. 56

RPBA 2020 Art. 12(6)

Keyword:

Inventive step - (yes)

Late-filed evidence - should have been submitted in first-
instance proceedings (yes)

Grounds for opposition - fresh ground for opposition (yes)

Decisions cited:

G 0004/95, G 0009/91, G 0010/91

Catchword:



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Case Number: T 0654/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 27 November 2023

Appellant: Quinn Packaging Limited
(Opponent) Scotchtown
County Cavan Ballyconnell (IE)

Representative: Murgitroyd & Company
Murgitroyd House
165-169 Scotland Street
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Respondent: Linpac Packaging Limited
(Patent Proprietor) Wakefield Road
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Representative: Hoffmann Eitle
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 13 January 2022
rejecting the opposition filed against European
patent No. 2845819 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Patton
Members: V. Bevilacqua
E. Mille

Summary of Facts and Submissions

- I. An appeal was filed by the opponent (appellant) against the decision of the opposition division to reject its opposition against European patent No. 2 845 819.
- II. The opposition division found that none of the grounds for opposition prejudiced the maintenance of the patent as granted and that, *inter alia*, starting from document **GB 2471028 A (E4** in the following), and taking the knowledge of the skilled person into account, the subject-matter of claim 1 was inventive (Article 100(a) EPC with Article 56 EPC, section II.15 of the appealed decision).
- III. The following additional documents were submitted with the statement setting out the grounds of appeal:
- E13: Expert report, M. Strachan, 7 December 2018
E14: CA 2 349 515 A1
E15: Quinn Packaging Ltd vs Linpac Packaging Ltd & R.Faerch Plast A/S, [2019] EWHC 2119 (IPEC), 31 July 2019
- IV. In preparation for the oral proceedings, the board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020 to which the appellant replied with its submissions of 24 October 2023 and the respondent (the patent proprietor) replied with its submissions of 27 October 2023 and 21 November 2023.
- V. Oral proceedings before the board took place on 27 November 2023. At the conclusion of the proceedings, the decision was announced. Further details of the

proceedings can be found in the minutes.

VI. The final requests of the parties were as follows.

The appellant requested that:

- the decision under appeal be set aside
- the patent be revoked in its entirety

The respondent requested that:

- the appeal be dismissed and the patent be maintained as granted
- alternatively, the decision under appeal be set aside and the patent be maintained in amended form according to the set of claims of one of auxiliary requests 1 to 11 filed with the letter dated 1 September 2021 and re-filed with the reply to the statement setting out the grounds of appeal

VII. Claim 1 of the main request reads as follows:

"A container comprising a base and a continuous side wall extending substantially perpendicular to the base with a peripheral flange formed along the upper, in use, edge of the continuous side wall, thereby forming a tray, wherein the base and the continuous side wall consist essentially of polyethylene terephthalate (PET) wherein a layer of adhesive is located on an upper, in use, surface of the peripheral flange and said layer of adhesive does not extend onto the vertical, in use, surfaces of the continuous side wall and does not extend onto the base wherein the container further comprises a lidding film which may be sealed to the peripheral flange to create a sealed space between the base, continuous side wall and lidding film; and wherein the lidding film is a multi-layer film comprising a seal layer and the seal layer comprises

polypropylene (PP) and/or PE; the container further comprises at least one denesting recess located in a denesting area, wherein the denesting area is relieved relative to the upper surface of the flange and extends partially or completely along the inner periphery of the flange, so that when the layer of adhesive is applied to the tray, the upper surface of the relieved denesting area is not coated."

The wording of claim 1 of the auxiliary requests is irrelevant to the decision.

VIII. The parties' arguments relevant to the decision are discussed in detailed in the reasons below.

Reasons for the Decision

1. Admittance of documents E13 to E15

1.1 The appellant submitted documents E13 and E15 to provide evidence of the knowledge of a skilled person (statement of grounds, fourth page, second paragraph).

These documents, in particular paragraphs 83 to 95 of E13 and paragraphs 58 to 63 of E15, allegedly demonstrated the "mental furniture" of the skilled person.

These documents were submitted to show that the opposition division had wrongly dismissed the objection of lack of inventive step starting from E4.

Documents 13 to D15 could not have been filed earlier because it was only after having read the written

grounds of the appealed decision that it became evident that the fact that the opposition division greatly underestimated the knowledge of the skilled person was the reason for its wrong findings on inventive step.

E13 and E15 are documents from national proceedings on a family member (E4) of the patent in suit. These documents show the importance given by this national court to the knowledge of the skilled person when deciding on inventive step.

E14 was also submitted to provide evidence on the knowledge of the person skilled in the technical field of the patent in suit.

- 1.2 The respondent objected to the admission of these documents, arguing that they should have been filed before the opposition division and that their content does not represent the common general knowledge.
- 1.3 None of documents E13, E14 and E15 is admitted into appeal proceedings for the following reasons.
 - 1.3.1 The argument of the appellant that these documents show the common general knowledge at the filing date of the patent in suit is not convincing.

When a claim of common general knowledge is disputed, as in this case, it must be substantiated with evidence (see Case Law of the Boards of Appeal, 10th Edition, 2022, CLB in the following, I.C.2.8.5).

Allegations of common general knowledge are normally to be substantiated with information obtainable from a textbook or monograph.

In the case at hand, however, the appellant did not submit evidence from such recognised sources of common general knowledge. E13 is a written expert declaration, E14 is a patent and E15 is a court decision.

None of these documents can be considered to show the common general knowledge at the filing date of the patent in suit for the following reasons.

E13, while being potentially informative on specific knowledge and resources for producing containers, cannot definitively prove the broader availability of this knowledge in the technical field of the patent in suit.

Paragraphs 83 to 95 of this document, to which the appellant refers, clearly reflect the knowledge of the author of this declaration rather than common general knowledge of a skilled person because this person displays an intimate understanding of a given production process. The level of detail, particularly the mention of consequences like machine stoppages and the disruption in high throughput processes, clearly hints at knowledge that goes beyond general principles and delves into the specifics of a certain plant or production line.

E15 is a court decision, which is a legal document written by a judge whose expertise lies in the realm of law, not in the technical field of the patent in suit, and which addresses the circumstances of a particular court case.

Court decisions, being legal judgments, are not a recognised source for establishing or reflecting

industry standards or best practices in technical fields.

Skilled persons do not normally rely on court decisions. Instead, they rely on textbooks or monographs (CLB, I.C.2.8.5).

E14 is a patent document and, in accordance with the established case law (CLB, I.C.2.8.2), patent documents are generally not considered part of the common general knowledge.

As a consequence, documents E14 to E15 cannot be considered to represent common general knowledge.

- 1.3.2 Under Article 12(6), second sentence, RPBA 2020, a Board must not admit evidence which should have been submitted in the proceedings under appeal unless the circumstances of the case justify its admittance.

As correctly argued by the respondent, all relevant evidence in support of the appellant's allegation of common general knowledge should have been filed before the opposition division to allow the opposition division to have the chance to take it into consideration in the appealed decision before the board made any review of this decision in a judicial manner on appeal.

This is because an inventive-step attack based on E4 and the knowledge of a skilled person had been submitted in the notice of opposition (pages 5 to 6).

This attack was dealt with in the patent proprietor's reply (point IV.1), dismissed in sections 7.1.1 to 7.1.3 of the preliminary opinion of the opposition

division dated 12 March 2021 and discussed again during the oral proceedings.

Documents E13 to E15 should therefore have been submitted in opposition proceedings because the relevance of the knowledge of the skilled person for assessing inventive step was already under discussion before the opposition division.

1.4 Based on the above considerations, the board decides not to admit documents E13 to E15 into appeal proceedings.

2. Accompanying person

2.1 The testimony of Mr T. McCaffrey, an employee of the appellant, on E13 was offered in the statement of grounds of appeal (page 8, third paragraph).

In its letter dated 24 October 2023 (page 2, section "paragraph 2"), the appellant indicated that Mr T. McCaffrey would attend oral proceedings with the purpose of:

"simply providing the Board with the ability to engage with Mr McCaffrey to assess the credibility of the counter argument of what we have always stated is the common general knowledge of the person of ordinary skill, he is representative of the person skilled in the art and his 'mental furniture' is valid in the assessment of what is common general knowledge, and indeed how that person of ordinary skill would assess E13-E15 referenced above."

2.2 The respondent objected to this (see section 2.3 of its letter dated 21 November 2023).

2.3 The board notes that Mr T. McCaffrey is not authorised pursuant to Article 133(3) EPC to represent his employer in the appeal proceedings because no signed authorisation by his employer has been submitted.

Consequently, the board could not treat him as a representative of his employer but rather as an accompanying person within the meaning of the decision G 4/95.

In line with decision G 4/95 (see point (3)(a) of the Order, see also CLB, III.V.5), oral submissions cannot be made by an accompanying person as a matter of right but only with the permission and at the discretion of the EPO.

As, however, during oral proceedings, no situation occurred in which the board deemed itself incapable of making a decision on a matter without technical assistance from Mr T. McCaffrey, in particular because documents E13 to E15 were not admitted for procedural reasons (see point 1.3.2 above), he was asked no questions.

Furthermore, the appellant did not present any request for Mr McCaffrey to talk during the oral proceedings.

3. Fresh objection of lack of sufficiency of disclosure

3.1 In its letter dated 24 October 2023, the appellant raised, for the first time, an objection of lack of sufficiency of disclosure against the patent as

granted.

When presenting this objection during oral proceedings, the appellant acknowledged that the ground for opposition under Article 100(b) EPC had never been raised before.

- 3.2 In line with the case law (CLB, V.A.3.2.3 h)), the admission of a fresh ground for opposition in appeal proceedings is subject to more restrictive criteria compared to in opposition proceedings. Fresh grounds for opposition may not be introduced at the appeal stage unless the patentee agrees. This principle is established in decisions G 9/91 and G 10/91 of the Enlarged Board of Appeal.
- 3.3 As in the current case the respondent has not consented to the introduction into the proceedings of the ground for opposition under Article 100(b) EPC, it is not admitted into the appeal proceedings, and the present decision does not deal with this new objection in substance.
4. E4 - content of the disclosure - differences
- 4.1 The opposition division identified the following distinguishing features of claim 1 of the main request over the container disclosed in E4:

"at least one denesting recess located in a denesting area, wherein the denesting area is relieved relative to the upper surface of the flange and extends partially or completely along the inner periphery of the flange, so that when the layer of adhesive is applied to the tray, the upper surface of the relieved denesting area is not coated."

4.2 In its letter dated 24 October 2023, the appellant raised, for the first time, an objection of lack of novelty against the patent as granted based upon document E4, arguing that the above-mentioned feature, allegedly distinguishing the claimed subject-matter from E4, was also disclosed in E4.

4.2.1 The appellant argued that E4 discloses "at least one denesting recess located in a denesting area".

According to the appellant, this feature was not correctly interpreted in the appealed decision.

This feature is disclosed in E4 because a skilled person would immediately recognise that the recesses shown in Figure 3 of E4 are suitable for denesting.

4.2.2 According to the appellant, due to the broad way in which the claim is formulated, each of these recesses can also be seen as defining a denesting area in which the recess is "located" in the sense of being "coterminous" with that area.

If that recess is coterminous with a denesting area, meaning that the recess and the area have the same boundaries, this denesting area (the upper surface of the recess shown in Figure 3 of E4) is relieved relative to the upper surface of the flange.

E4 then also discloses that this recessed denesting area extends partially along the inner periphery of the flange.

The feature that when the layer of adhesive (in black in Figure 3) is applied to the tray, the upper surface

of these relieved denesting areas, coterminous with the recess, is not coated is also clearly visible in Figure 3 of E4.

E4 therefore discloses all features of claim 1.

4.3 The board is not convinced by the above arguments for the following reasons.

4.3.1 In accordance with the case law (CLB, I.C.4.6), features shown solely in a drawing form part of the state of the art if and when a person skilled in that art is able, in the absence of any other description, to derive a technical teaching from them.

In the current case, looking at the structure of the recesses shown in Figure 3 of E4, a skilled reader would not have been able to infer that such recesses are suitable for denesting.

This is because, as convincingly argued by the respondent during oral proceedings, there is not enough information in E4, taken as a whole (the description of E4 being completely silent on this), to conclude that the recesses shown in Figure 3 of this document are "denesting recesses".

This is because denesting recesses are features designed to facilitate the separation of individual trays when they are stacked on top of each other.

Denesting features prevent that the trays stick together, making them easier to separate.

To be suitable for this intended use (denesting), the recesses normally reduce the contact area between stacked trays.

These recesses must be therefore adequately positioned, shaped and sized to ensure that they effectively create the above-mentioned separation in a nested configuration.

Figure 3 of document E4 depicts only a single tray seen from above in a schematic manner; not two or more trays in a nested configuration. Figure 3 of E4 does not give any information on how and whether the recesses shown would fit together - by some kind of symmetry or similar heights - when trays are stacked on top of each other to ensure denesting. As argued by the respondent, information is missing from Figure 3 of E4 on, *inter alia*, the angles and thicknesses of the side walls, and even the shape of the lowest corner of the tray, that would allow assessing whether and how such a depicted tray would stack on top of a similar tray.

Figure 3 does not therefore demonstrate whether the tray recesses embody any feature that renders them suitable for denesting.

Consequently, document E4 does not unambiguously disclose denesting recesses.

- 4.3.2 The recesses shown in Figure 3 of E4 are located in a denesting area. However, the appellant's argument that this figure discloses that the denesting area is relieved relative to the upper surface of the flange is not convincing.

This is because the appellant's interpretation according to which "located" should be understood as "coterminous" is not accepted by the board.

Accepting this interpretation would result in, as convincingly argued by the respondent, the unclear definition of a recess in a denesting area which is not recessed relative to that area.

This definition leaves a skilled person in doubt as to the meaning because the term "recess" refers, in common language, to an indentation, cavity or space set back or enclosed within a reference surface.

The skilled person would therefore discard this interpretation and assume the one in the appealed decision according to which Figure 3 of E4 discloses areas within which these recesses are located (see the crescent-shaped pale areas inside of the black line in the corners of the container), which extend partially along the inner periphery of the flange and are not coated with adhesive (which is indicated in black in this figure).

There is, however, no disclosure in E4 that these areas are relieved relative to the upper surface of the flange, as is claimed in the patent. This is even acknowledged by the appellant on page 15 of its statement of grounds.

The opposition division therefore correctly identified the distinguishing features of the subject-matter of claim 1 of the main request over the container disclosed in E4.

4.3.3 Due to the above assessment of the presence of distinguishing features over E4, it is not necessary, in the present decision, to address any other issue on the fresh novelty objection of the appellant, including the admissibility issues raised by the respondent.

5. Discussion of inventive step

5.1 Based upon the above-identified distinguishing features, the problem to be solved was formulated, in the appealed decision, as *"to avoid trays with an adhesive applied onto an upper surface of the flange from sticking together when stacked"* (II.15.1).

5.2 The appellant contests the above formulation, arguing, during oral proceedings, that using denesting features (such as "denesting recess" and "denesting area") is an "arbitrary choice" and cannot be regarded an inventive solution to the problem of "denesting containers".

The appellant also argued that the remaining distinguishing features also do not contribute to inventive step because the problem they solve had been solved in E4.

This is because Figure 3 of E4 clearly shows that the upper surface of the recesses is not coated with adhesive.

E4 therefore already taught that, when the layer of adhesive is applied to the flange of the tray, to avoid that the upper surface of a particular area extending along the inner periphery is coated, this area has to be relieved.

As an alternative approach, the appellant formulated the following problem to be solved: how to find an alternative way of producing the container shown in Figure 3 of E4 in which there are areas extending along the inner periphery of the flange which are not coated with adhesive.

This problem, according to the appellant, had to be solved within the constraints set by E4, which discloses a mass production method (see Figure 5) in which a plurality of trays are formed at one time at one forming station and are then moved along to the next station, and taking into account the knowledge of a skilled person.

The description of E4 mentions that the layer of adhesive may be applied by a roller (page 4, lines 19-21) or, alternatively, by spray coating, a hot melt gun or a printing technique.

A skilled person would, however, immediately see that using a roller, as taught in the example on page 8 of E4, is the only possible solution for mass production because of the efficiency issues which arise when using the other techniques.

A skilled person would then also appreciate that, when using a roller, protecting the areas not to be coated with a mask would be neither practical nor economical because of the build-up of glue on the mask and the additional process steps required (applying the mask and removing it).

A skilled person would therefore realise that the only option for solving the above-formulated problem is to provide the area which is to be kept free of adhesive

below the level of the surface of the flange which is to receive adhesive.

In this way, they would arrive at the subject-matter of claim 1 without having to exercise any inventive skill.

The subject-matter of claim 1 is therefore not inventive, according to the appellant, because the lack of reasonable alternatives for solving the problem creates a one-way street situation.

5.3 The board disagrees.

Even assuming, *pro arguendo*, that the "denesting" feature could be discussed separately, as the appellant did, from the remaining distinguishing features of the claim, the board is still not convinced of the incorrectness of the findings of the appealed decision on inventive step for the following reasons.

5.3.1 The argument of the appellant that the remaining distinguishing features do not contribute to inventive step because the problem they solve had been solved in E4 is not convincing because it is not formulated on the basis of a correct application of the problem-solution approach.

This is because paragraph [0025] of the patent in suit mentions an effect directly and causally related to these features and, in line with the established case law (CLB, I.D.4.1), inventive step has to be discussed on the basis of the objective technical problem, which is to be derived from the effects of the technical features of the claimed invention.

5.3.2 In line with the established case law (CLB, I.D.4.2.1), the technical problem addressed by an invention has to be formulated so that it does not contain pointers to the solution or partially anticipate the solution since including part of a solution offered by an invention in the statement of the problem results in an *ex post facto* view of inventive step when the state of the art is assessed in terms of that problem.

The requirements of using a roller and "mass production" should therefore neither be mentioned in the problem to be solved nor taken into account when looking for a solution.

This is because the requirement of using a roller is not derivable from the distinguishing features. This is also because, as noted by the respondent, although using a roller is mentioned as one possible coating method (see contested patent, page 3, lines 24-29), there is no disclosure that the embodiment of Figure 3 of E4 is coated using a roller, and there even appear to be technical reasons which speak against using a roller for this embodiment (reply, section A.II.5) because printing techniques or a hot melt gun are better suited for selectively applying adhesive only on specific areas of a surface (see also section II.15.2.3 of the appealed decision).

Also, the constraints related to mass production to which the appellant refers should not be mentioned in the problem to be solved because, as again noted by the respondent, there is no disclosure that the embodiment of Figure 3 is produced by the method of Figure 5.

5.3.3 Based upon the effect mentioned in paragraph [0025], the problem to be solved by the distinguishing features

(excluding "denesting") should be formulated as how to achieve that, during the production of the tray of Figure 3 of E4, areas which extend partially along the inner periphery of the flange are not coated with adhesive.

- 5.3.4 To determine whether these features would have been obvious to the skilled person, the could-would approach should be applied (CLB. I.D.5).

The subject-matter of claim 1 is not inventive, according to the appellant, because the lack of reasonable alternatives for solving the problem creates a one-way street situation in which a skilled person would first select a roller for the application of adhesive and then, to avoid coating areas which extend partially along the inner periphery of the flange, would relieve them.

The board is not convinced that when starting from E4 this is the only way to selectively apply adhesive while avoiding coating areas which extend partially along the inner periphery of the flange because another way of achieving this, also mentioned in the patent in suit, was to use a hot melt gun instead of a roller (reply to the statement of grounds, section A.II.5).

Hence, the further inventive-step objection raised by the appellant in its written submissions on the basis of an arbitrary choice between two allegedly equivalent possibilities, i.e.:

- a container having an adhesive-free zone offset from the surface of the flange on which the adhesive would have to be applied by a roller
- a container having an adhesive-free zone coplanar with the surface of the flange on which adhesive is

applied by spray coating, a hot melt gun or a printing technique is also not convincing since further techniques are available to the skilled person for producing the container according to the first possibility.

The board therefore agrees with the respondent, which argued that the common general knowledge of a skilled person does not prompt the skilled person to use a roller because other solutions to selectively apply adhesive only to some areas are immediately available.

In addition, as argued by the respondent, even if a roller were used, the skilled person, based only on their common general knowledge, would still not be in a one-way street situation leading towards relieving areas to avoid coating them because another solution to the problem to be solved (avoid coating these areas) is also available, namely to use a mask.

Based on the above, the board concludes that, starting from E4, the skilled person is not guided by their common general knowledge towards relieving the denesting areas as claimed.

Thus, the subject-matter of claim 1 of the main request is inventive starting from E4.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated