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**Datasheet for the decision
of 5 September 2023**

Case Number: T 0803/22 - 3.2.07

Application Number: 11811387.7

Publication Number: 2655208

IPC: B65D51/24

Language of the proceedings: EN

Title of invention:
INFANT FORMULA CONTAINER

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
N.V. NUTRICIA

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 83
RPBA 2020 Art. 12(2), 12(4), 12(6), 13(2)

Keyword:

Novelty - main request (yes)

Inventive step - main request (yes)

Sufficiency of disclosure - main request (yes)

Late-filed evidence - admitted (no)

Decisions cited:

T 1329/11, T 0338/10

Catchword:



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Case Number: T 0803/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 5 September 2023

Appellant:

(Opponent)

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Respondent:

(Patent Proprietor)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 January 2022 concerning maintenance of the
European Patent No. 2655208 in amended form.**

Composition of the Board:

Chairman

G. Patton

Members:

S. Watson

A. Jimenez

Summary of Facts and Submissions

- I. An appeal was filed by the opponent (appellant) against the decision of the opposition division maintaining European patent No. 2 655 208 in amended form according to the main request.
- II. In preparation for oral proceedings, the board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020, which took into account the appellant's grounds of appeal and submissions of 10 January 2023 as well as the patent proprietor's reply to the appeal.
- III. The patent proprietor (respondent) responded to the board's preliminary opinion with submissions of 26 July 2023. The appellant made no further submissions on the substance of the appeal.
- IV. Oral proceedings before the board took place on 5 September 2023.
- V. At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.
- VI. The final requests of the parties are as follows.

For the appellant:

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

For the respondent:

- that the appeal be dismissed (main request); or

- if the decision under appeal is set aside that the patent be maintained in amended form on the basis of one of the sets of claims according to auxiliary request 1 or 2, filed on 11 June 2019 and re-filed with the reply to the appeal.

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

VIII. The following documents are referred to in this decision:

- D3: WO 2005/075314 A2
- O1: US 2010/0308065 A1
- O2: WO 95/32126 A1
- O6: FR 2 747 107 A1
- O7: US 4,736,870
- O9: Excerpt from Lee, N. "Practical guide to blow Moulding", 2006, page 10
- O10: Excerpt from Boljanovic, V. "Sheet metal forming processes and die design", 2004, pages 69 and 70
- O11: Internet article "Packaging potential", *Food Chain*
- O13: US 2016/0001915 A1.

IX. Independent claim 1 of the main request reads as follows:

"A container (100) comprising:
a body having a bottom and a side wall defining a reservoir (101);
a collar (102) attached to a top end of said body;
a removable seal (103) attached at the top end of said body to seal the reservoir (101);
and,

a lid (104) hingedly engaged with said collar (102), said lid (104) having an underside and configured to provide space and a docking station (106) on the underside for holding a measuring device (107) in the form of a scoop;
a leveling bar (108) at the top of the reservoir (101);
wherein said collar (102) comprises said removable seal (103) that seals the content held in said reservoir (101);
characterized in that the side wall is a cylindrical sleeve attached at one end to the bottom and at the other end to the collar (102)."

- X. Claim 2 of the main request reads as follows:
"The container of claim 1, wherein a semi-transparent to transparent tamper strip is disposed on said side wall to allow a user to see into the reservoir (101) and thus visibly indicates the volume or condition of the contents in the container (100) to the user."
- XI. In view of the decision taken it is not necessary to reproduce the auxiliary requests here.

Reasons for the Decision

1. *Main request - claim 2- Article 83 EPC*
- 1.1 The appellant contested the findings of the opposition division that claim 2 of the main request was disclosed in a manner sufficiently clear and complete across the range of the claim for it to be carried out by a person skilled in the art.

The appellant argued that there were no examples of the feature of claim 2 given in the contested patent, so the burden of proof lay with the respondent to show that the claimed invention could be carried out. In particular, the appellant argued that the assertion of the opposition division "that a skilled person, applying common general knowledge, would know how to incorporate such a strip of semi-transparent or transparent material on the wall of the container" (see decision under appeal, page 6, final sentence) was unsubstantiated. The appellant did not dispute that the claimed invention could be carried out for a blow-moulded plastic container, but argued that for a metal side wall the claim lacked adequate support.

- 1.2 In general, the burden of proof of insufficiency lies with the opponent who must establish on the balance of probabilities that a skilled person reading the patent and using common general knowledge, would be unable to carry out the invention. A successful objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts (Case Law of the Boards of Appeal (CLB), 10th edition 2022, III.G.5.1.2 c)).

The burden of proof can be shifted to the patent proprietor if the presumption of sufficiency is rebutted. The weight of submissions required depends on the strength of the presumption. Although in some decisions of the Boards of Appeal, the lack of a single worked example together with convincing arguments of the opponent has been sufficient to shift the burden of proof, this is highly case-dependent.

There is no absolute requirement for worked examples to be provided in a patent specification in order to meet

the requirements of Article 83 EPC, as long as it is possible to reproduce the claim using the original application documents without any inventive effort over and above the ordinary skills of a practitioner (CLB, *supra*, II.C.5.1 and II.C.5.3).

1.3 The board does not see any shift in the burden of proof in the present case as the appellant has not made any arguments which would raise serious doubts that the feature of claim 2 could not be carried out.

1.3.1 The appellant has made only the general allegation in its statement of grounds of appeal that the skilled person could not carry out the invention across the whole range claimed, stating that there is no support for providing a strip of semi-transparent or transparent material in a container with a metal side wall.

1.3.2 As reasoned by the opposition division, paragraph [0014] of the patent specification sets out that the tamper strip is incorporated in the side wall of the container and allows a user to check the quality and volume of the product in the container.

1.3.3 The statement of the appellant that there is not adequate support in the description is not sufficient to reverse the burden of proof as the appellant has not given any arguments why the skilled person would be unable to provide a transparent or semi-transparent strip in a metal container which allows a user to see into the reservoir.

1.3.4 The cases underlying the two decisions relied on by the appellant are not analogous to the present case. Both decisions relate to whether a claimed effect, rather

than a concrete product, has been sufficiently disclosed.

In T 1329/11, the board considered whether, in the absence of a specific example, it was plausible that the risk of cardiovascular complications of a particular patient group could be diagnosed by measuring a specific peptide (reasons 3.4).

In T 338/10, the board considered whether it was credibly shown that an allergen could be used to treat an allergy caused by a second, different allergen (reasons 8).

- 1.3.5 In the present case, even if it were accepted that in the absence of a specific example there is only a weak presumption of sufficiency, the appellant has not provided any arguments or evidence that the skilled person would not be able to carry out the invention. In order to shift the burden of proof, it is not sufficient to merely state that a feature, i.e. a product feature in the present case, cannot be carried out, there must be some reasoning as to why the common general knowledge is insufficient.
- 1.3.6 The appellant argued that it was not possible to prove an absence of common general knowledge. However, the feature concerned is effectively the provision of a window of transparent or semi-transparent material in a metal side wall. The appellant has not given any reasons at all, other than to state that there is no example, why the skilled person is unable to provide such a feature.
- 1.4 The appellant raised a further argument for the first time in appeal proceedings at the oral proceedings

before the board, that the skilled person is unable to carry out the invention because the claim requires the tamper strip to be "on" the side wall and it is not possible to see into the reservoir if the semi-transparent to transparent tamper strip is placed on top of a metal side wall.

The board agrees with the respondent that the claim language requires that the tamper strip allows a user to see into the reservoir and visibly indicates the volume or condition of the contents to the user. Therefore the skilled person would understand that the tamper strip must be placed such that it can be looked through.

It is therefore unnecessary to consider the respondent's request not to admit the new argument into the appeal proceedings.

1.5 The appellant has therefore not convincingly shown that the opposition division was incorrect in finding that the claimed invention in claim 2 of the main request was sufficiently disclosed.

2. *Main request - claim 1 - Article 54 EPC - document 01*

2.1 The opposition division found that feature 1i of claim 1,

"the side wall is a cylindrical sleeve attached at one end to the bottom and at the other end to the collar (102)"

was not disclosed in document 01, as the container of 01 was a one-piece container, without separately formed

bottom and side wall parts, and the container did not have a cylindrical side wall.

- 2.2 The appellant argued that the opposition division's findings were incorrect due to its overly narrow construction of the terms "cylindrical" and "attached".

According to the appellant the term "cylindrical" as used in claim 1 of the main request did not require the cross-section of the sleeve to be constant and the term "attached" should be interpreted as "not unattached".

- 2.3 The Board, however, agrees with the opposition division that document O1 does not disclose the feature 1i.

- 2.3.1 According to established case law, it is a prerequisite for the acceptance of lack of novelty that the claimed subject-matter is directly and unambiguously disclosed in the prior art document, when read by the person skilled in the art (CLB, *supra*, I.C.4. and I.C.4.1, fourth and fifth paragraphs).

- 2.3.2 *"Side wall attached at one end to the bottom"*

In the present case, as reasoned by the opposition division, the feature "the side wall is a cylindrical sleeve attached at one end to the bottom" would be understood by the skilled person as meaning that the cylindrical sleeve and the bottom are separate components.

The appellant argues that this is a process feature which would not be distinguishable in the resulting product.

However, the skilled person in the field of packaging would unambiguously understand feature 1i as referring to a three-piece container construction, with separately formed side wall, bottom and closure components, irrespective of whether the feature is interpreted as "attached" or "not unattached".

The passages of document O1 cited by the appellant, disclose that the "container 2 has a base 21 from which an annular side wall 22 extends along a central vertical axis Z as far as an upper face" (O1, paragraph [0037]) and that the container 2 "is produced in one piece from blow molded plastic" (O1, paragraph [0040]). From paragraph [0037] it is not clear whether a one or two-piece body is disclosed, paragraph [0040] discloses a one-piece body.

Contrary to the argument made by the appellant, document O1 does not propose alternative constructions in paragraph [0040]. Although paragraph [0040] mentions that other materials may be used to produce the container, there is no direct and unambiguous disclosure regarding the specific construction of containers produced using these other materials.

The appellant's argument that a multilayer board version of container 2 of document O1 can only be made using a separate base and annular side wall, cannot be followed. The appellant has not shown that it is inherently impossible to produce a multilayer board version of container 2 in one piece. Although the skilled person's common general knowledge is taken into account when reading and understanding a disclosure, an implicit disclosure must be a clear and unambiguous consequence of what it explicitly mentioned, it is not

sufficient that something may be rendered obvious (CLB, *supra*, I.C.4.3, fourth and fifth paragraphs).

There is therefore no direct and unambiguous disclosure in document O1 of a two-piece construction of the body side wall and bottom.

2.3.3 "*Cylindrical sleeve*"

The appellant essentially argued that the opposition division was incorrect in finding that document O1 did not disclose a cylindrical sleeve for two reasons:

- (a) the slightly narrowed waist referred to in paragraph [0038] forms part of a non-limiting embodiment of O1, and
- (b) any variations in the cross-section are limited so that the side wall is still substantially cylindrical.

Regarding the first point, document O1 does not disclose any embodiments which do not include the feature of a waist for gripping and there is no mention that this feature is optional.

Therefore, the board considers that there is no direct and unambiguous disclosure of a container in document O1 without this feature.

Regarding the second point, although both parties, and the opposition division, agreed that a cylinder does not necessarily have a circular cross-section, there was disagreement whether document O1 disclosed a "cylindrical side wall", due to the waist feature of the container.

The opposition division reasoned that a cylindrical sleeve must have a substantially constant cross-section and substantially straight parallel sides, so that the container of O1 could not be considered to be a substantially cylindrical sleeve due to the variations in its cross-section forming the waist for gripping.

The appellant did not dispute the geometric definition of cylindrical but argued that the term in the claim was not limited to such a strict definition and that some variation in shape is to be expected.

The board however follows the argument of the respondent that as "cylindrical" has a clear universal technical meaning, the feature is limited to that meaning.

The board therefore agrees with the opposition division that a cylindrical sleeve must have a substantially constant cross-section, the waist portion of the side wall in the container of O1 goes beyond what the skilled person would understand as being cylindrical as the waist section must have a sufficiently different cross-section to allow for gripping.

2.4 The appellant therefore did not convincingly demonstrate that the decision was incorrect in its finding that the subject-matter of claim 1 was novel with respect to the disclosure of document O1.

2.5 *Admittance into appeal proceedings - document O13*

2.5.1 The respondent filed document O13 with its submissions of 26 July 2023, after the summons to oral proceedings had been notified. According to Article 13(2) RPBA 2020 any amendment to a party's appeal case made after the

notification of a summons to oral proceedings shall not, in principle, be taken into account unless there are exceptional circumstances, which have been justified by cogent reasons.

The respondent argued that the filing of document O13 was a response to the board's preliminary opinion which questioned the common general knowledge relating to cylindrical.

The board sees no exceptional circumstances in the present case. The board's preliminary opinion raised no new issues. The question whether document O1 disclosed a cylindrical sleeve, or not, always formed part of the appeal proceedings (see appellant's statement of grounds of appeal, page 3) and also formed part of the opposition proceedings (see minutes of the oral proceedings before the opposition division, points 5 to 12).

Document O13 is a patent document and the use of the term "cylindrical" in a single patent document cannot be considered as evidence of common general knowledge.

Document O13 was therefore not taken into account in the appeal proceedings (Article 13(2) RPBA 2020).

3. *Main request - claim 1 - inventive step*
(Article 56 EPC)
- 3.1 The opposition division found that the subject-matter of claim 1 of the main request was not obvious.
- 3.2 The appellant contested this finding and argued that the subject-matter of claim 1 was obvious over the combination of the teaching of document O1 with the

common general knowledge as exemplified by documents 06, D3 or 02; the combination of the teaching of 01 and 07; or the combination of the teaching of 07 and 01.

3.3 *Admittance into the appeal proceedings - documents 09 and 010*

The respondent filed documents 09 and 010 during the opposition proceedings as evidence of common general knowledge. Neither document was addressed by the opposition division in its decision.

The appellant did not contest the common general knowledge set out in documents 09 and 010.

Therefore the board, considering that documents 09 and 010 filed during the opposition proceedings are not used in appeal proceedings to raise any new issues but represent a mere development of points already discussed during the opposition proceedings, saw no reason not to consider these documents in the appeal proceedings.

3.4 *Admittance into the appeal proceedings - document 011*

3.4.1 Document 011 was filed by the appellant with its statement of grounds of appeal. The respondent requested that the document not be admitted into the appeal proceedings.

3.4.2 According to Article 12(6), second sentence, RPBA 2020, a board shall not admit requests, facts, objections or evidence which should have been submitted in the proceedings which led to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

- 3.4.3 Document O11 was filed by the appellant to indicate that the package of document D3 was ubiquitous and as evidence of the common general knowledge that there was no prejudice against multilayer board containers without waists.

The appellant argued that O11 was presented to show that multilayer board containers as in document D3 were actually cylindrical. According to the appellant, the photograph on page 3 of O11 showed the container of document D3.

- 3.4.4 The board notes that a magazine article relating to a specific product's commercial success does not appear to demonstrate common general knowledge.

In fact, as argued by the respondent, there is nothing in document O11 linking it to the patent application of document D3. The container in the photograph on page 3 of O11 does not have finger grips and is produced by a different company than the applicant in D3.

O11 shows a specific multilayer board container and therefore cannot show that multilayer board containers are necessarily cylindrical.

Document O11 is thus not considered to represent common general knowledge.

- 3.4.5 The subject-matter of claim 1 of the main request corresponds to the subject-matter of claims 1 and 2 of the patent as granted, so that any evidence relating to objections to these claims could and should have been filed within the opposition period, or at the latest in the opposition proceedings to be taken into account for

the decision to be reviewed in appeal proceedings according to Article 12(2) RPBA 2020.

- 3.4.6 The board therefore does not admit document O11 into the appeal proceedings (Article 12(6), second sentence, RPBA 2020).
- 3.5 *O1 in combination with common general knowledge as shown in document O6, D3 or O2*
- 3.5.1 The opposition division found that the distinguishing feature of the subject-matter of claim 1 of the main request with respect to the disclosure of document O1 was feature 1i (see point 2.3 above).
- 3.5.2 The opposition division did not define an objective problem to be solved by the distinguishing feature but reasoned that, irrespective of the problem to be solved, the claimed invention was not obvious when starting from document O1. This document clearly taught that the container should have a waist section so that the skilled person lacked an incentive to go against the clear teaching of O1 and look for an alternative construction that would deprive the container of a waist section.
- 3.5.3 The appellant put forward the argument that the objective technical problem had to be considered as being to implement the package disclosed in O1 in metal or multilayer board, according to paragraph [0040] of O1, by using an alternative container.
- 3.5.4 The respondent, on the other hand, considered the objective technical problem to be to provide a container with a wall having a constant thickness.

According to the respondent, the skilled person was aware from their common general knowledge, as evidenced by document O9, that the blow moulding process used in O1 could lead to uneven wall thicknesses. Both parts of feature 1i solved this problem by using a simple container side wall shape which could be produced from sheet material and then attached to a base.

- 3.5.5 The board agrees with the respondent that starting from the container of document O1, the objective technical problem is to be considered as to provide a container having a uniform wall thickness. Contrary to the appellant's arguments, the board sees a synergy between the features of the cylindrical shape of the side wall and the two-piece container body construction, in ensuring a constant wall thickness.
- 3.6 The appellant argued that forming a container body from two pieces, namely a cylindrical sleeve side wall and a base, was very well known in the art, as exemplified by documents O6, D3 or O2. The skilled person would use any of these known containers with the closure system of document O1 without the use of inventive activity.
 - 3.6.1 In the decision under appeal, the opposition division did not contest that the skilled person could have combined the closure system of document O1 with these generally-known containers. However, the opposition division reasoned that the skilled person would not have made such a combination as there was no incentive to go against the clear teaching of document O1, that the container should have a waist section for gripping.
 - 3.6.2 The appellant argued that the waist section of the container body was not mentioned anywhere in the claims

of document O1 and was clearly neither essential nor mandatory for the invention of document O1.

- 3.6.3 It is well-established case law that the boards apply the "could-would" approach to determining whether a claimed invention is obvious. This means that when considering whether an invention is obvious or not, it has to be considered not whether or not the skilled person, in the expectation of solving the technical problem posed, could have modified the teaching in the closest prior art, but rather whether they would have been prompted to modify the closest prior art in that manner (see CLB, *supra*, I.D.5).
- 3.6.4 The board agrees with the respondent and the findings of the opposition division, that in the absence of any motivation to change the shape of the container of document O1, the skilled person would not replace it with a cylindrical container, in order to provide a container body of uniform thickness, without the use of hindsight.
- 3.6.5 Document O1 shows only one embodiment of the container itself. In this embodiment the container has a waist for gripping.

Paragraph [0040], cited by the appellant, indicates that although the container can be produced in one piece from blow moulded plastic, it can also be produced from other materials, in particular metal or multilayer board. This paragraph gives no hint that when using a different material, the general shape of the container should or could then also be changed.

There is therefore no indication in document O1 that any other container form should be used with the

closure system disclosed in O1. This does not mean that the container form in document O1 is mandatory and could never be altered, but rather that in the absence of any prompting from O1 or from the further prior art, the skilled person has no motivation to alter this form.

- 3.6.6 Documents D3, O2 and O6 do not provide any motivation to combine the closure system of O1 with a generally known two-piece cylindrical body container.

Therefore, even though the skilled person is aware of other common container shapes, such as two-piece cylindrical body containers, there is no reason, in the absence of any hint to do so, why they would replace the container body of document O1 with such a container.

- 3.7 The appellant has therefore not convincingly demonstrated that the opposition division was incorrect in finding that the subject-matter of claim 1 of the main request was not obvious over a combination of document O1 with the common general knowledge exemplified by O6, D3 or O2.

4. *Admittance into the appeal proceedings of document O7 and associated inventive step objections*

- 4.1 Document O7 was not admitted by the opposition division as it was deemed late-filed and not prima facie relevant.

- 4.2 It is undisputed that document O7 was filed after the opposition period set out in Article 99(1) EPC.

Document O7 was submitted as a reaction to the filing of the, later withdrawn, auxiliary requests 3 and 4. It was referred to with respect to the main request for the first time at the oral proceedings before the opposition division.

The main request was filed with the respondent's reply to the notice of opposition and claim 1 of the main request corresponds to the subject-matter of claims 1 and 2 of the patent as granted. The use of document O7 in an objection against the main request at the oral proceedings is therefore not considered to be a timely reaction to a newly raised issue.

The opposition division therefore had discretion under Article 114(2) EPC regarding whether to consider document O7 with respect to the main request.

- 4.3 It is not the function of a board to review all the facts and circumstances of the case as if it were the opposition division and decide whether or not it would have exercised its discretion similarly.

A board should only overrule the way in which an opposition division has exercised its discretion in a particular case, if it concludes that the opposition division has done so according to the wrong principles, or in an unreasonable way, or without taking into account the right principles (see CLB, *supra*, IV.C.4.5.2).

- 4.3.1 The opposition division considered the document's *prima facie* relevance, which is acknowledged as a decisive criterion for admitting late-filed evidence (see CLB, *supra*, IV.C.4.5.3).

4.4 The appellant argued that the opposition division had based its decision on an incorrect understanding of O7, as the document did in fact disclose a multilayer board container, contrary to the opposition division's reasoning in the decision under appeal.

Further, the material composition of the container in document O7 had not been discussed in the opposition proceedings.

4.4.1 However, the opposition division did not justify its decision not to admit O7 by reasoning that it did not include a multilayer board.

The opposition division reasoned, that even if O7 were considered, because it disclosed a further example of a container with straight parallel walls, the subject-matter of claim 1 would not be obvious over a combination of O1 and O7 for the same reasons as for the combination of O1 with the containers of O2, D3 or O6.

Therefore regardless of whether the opposition division erred or not in its finding that O7 did not disclose a multilayer board container, the opposition division did not make its decision on that basis.

4.5 As the opposition division used the right principles in a reasonable manner, the board sees no error in the use of discretion and thus does not admit document O7 into the appeal proceedings (Article 12(6), first sentence, RPBA 2020).

4.6 As document O7 is not admitted, the objections raised based on this document are also not admitted.

5. *Admittance of objection to the description*

5.1 At the oral proceedings before the board the appellant objected to the description of the main request and requested that it be amended by deleting the whole of paragraph [0018] and "a unitary member" in paragraph [0012].

5.2 The respondent requested that the objection to the description not be admitted in the appeal proceedings.

5.3 This request was made for the first time in appeal proceedings at the oral proceedings, i.e. after notification of the summons to oral proceedings. In this respect the board emphasises that the set of claims of the main request at stake for the adaptation of the description corresponds to the one maintained by the opposition division. Such an objection against the description does not appear in the minutes of the oral proceedings before the opposition division, see points 37 to 39, nor in the decision under appeal. The appellant did not raise this objection in either its statement of grounds or its letter of 10 January 2023, nor was the absence of this objection in the decision under appeal or a possible error in the minutes mentioned in the appellant's written submissions. The consideration of its admittance therefore falls under Article 13(2) EPC.

5.4 The appellant did not bring forward any arguments relating to exceptional circumstances, justifying the admittance of the objection at such a late stage of the proceedings, and the board cannot see any. Therefore, pursuant to Article 13(2) EPC, the new objection was not admitted into the appeal proceedings.

6. As none of the objections admissibly raised and maintained by the appellant prejudice the maintenance of the patent in the amended form found by the opposition division to fulfil the requirements of the EPC, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated