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**Datasheet for the decision
of 10 April 2025**

Case Number: T 0784/23 - 3.2.07

Application Number: 11704299.4

Publication Number: 2459459

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

Language of the proceedings: EN

Title of invention:

CONTAINER AND PROCESSES FOR MAKING A CONTAINER AND A SEALED
CONTAINER

Patent Proprietor:

LINPAC Packaging Limited

Opponents:

Cryovac, LLC
Quinn Packaging Limited

Headword:

Relevant legal provisions:

RPBA 2020 Art. 15(3), 13(2)
EPC R. 115(2), 80
EPC Art. 100(b), 100(c), 123(2), 84, 54, 56

Keyword:

Oral proceedings - held in absence of party
Grounds for opposition - insufficiency of disclosure (no) -
subject-matter extends beyond content of earlier application
(yes)
Amendment occasioned by ground for opposition - amendments
allowable under Rule 80 EPC (yes)
Claims - clarity - auxiliary request 2 (yes)
Novelty - auxiliary request 2 (yes)
Inventive step - auxiliary request 2 (yes)
Amendment after notification of Art. 15(1) RPBA communication
- cogent reasons (no) - exceptional circumstances (no) - taken
into account (no)

Decisions cited:

G 0003/14, T 0182/89, T 0019/90

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0784/23 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 10 April 2025

Appellant:

(Patent Proprietor)

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Representative:

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Appellant:

(Opponent 1)

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Appellant:

(Opponent 2)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
1 March 2023 concerning maintenance of the
European Patent No. 2459459 in amended form.**

Composition of the Board:

Chairwoman S. Watson

Members: A. Cano Palmero

 S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The patent proprietor and opponents 1 and 2 lodged appeals within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 2 459 459 in amended form on the basis of the then auxiliary request 11.
- II. Two oppositions were filed against the patent in its entirety on all grounds for opposition pursuant to Article 100(a) (novelty and inventive step), (b) (sufficiency of disclosure) and (c) EPC (added subject-matter).
- III. In order to prepare the oral proceedings scheduled upon the parties' requests, the board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA.
- IV. Opponents 1 and 2 replied in the substance to the board's communication with letters dated 6 March 2025 and 10 March 2025 respectively. Opponent 1 additionally announced that it would not attend the oral proceedings.
- V. Oral proceedings before the board took place on 10 April 2025 without the participation of opponent 1 in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

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

VI. The final requests of the parties are as follows:

for the patent proprietor

that the decision under appeal be set aside
and
that the patent be maintained as granted (main request),

or, in the alternative,
that the patent be maintained in amended form
according to one of the set of claims filed as
auxiliary requests 2, 0A, 1A, 1, 2A, 3, 4, 5A, 5,
6A, 6, 7A, 7 and 8 to 18, whereby auxiliary request
11 was filed with submissions of 22 May 2024 and
all other auxiliary requests were filed with the
patent proprietor's statement setting out the
grounds of appeal;

for opponents 1 and 2

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

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

VIII. Independent claim 1 according to the patent as granted (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,

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."

- IX. Independent claim 1 according to auxiliary request 2 (additions with respect to claim 1 of the patent as granted underlined by the board) reads as follows:

"A thermoformed clear 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,

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."

- X. Since the wording of the further auxiliary requests is not relevant for the present decision, there is no need to reproduce it here.

Reasons for the Decision

1. *Patent as granted (main request) - Sufficiency of disclosure, Articles 100(b) and 83 EPC*
- 1.1 Opponent 2 argued that, contrary to the opposition division's findings in point 22 of the reasons for the decision under appeal, the invention according to the independent claims 1, 15 and 21 as granted was not sufficiently disclosed. Indeed, the patent in suit gave no appropriate definition of the specific requirements needed for an adhesive to be able to provide a sealed arrangement between PET containers and a PP and/or PE layer that did not extend downwardly onto the vertical surfaces. It was clear from the description of the patent that not all adhesives fulfilled these requirements, but the independent claims covered all adhesives. Since the person skilled in the art was not able without undue burden to perform the invention over the whole area claimed, the invention according to the claims was insufficiently disclosed.
- 1.1.1 The board disagrees with opponent 2's arguments and rather concurs with the patent proprietor and with the opposition division that according to the jurisprudence of the Boards of Appeal, an objection of lack of disclosure presupposes that there are serious doubts substantiated by verifiable facts. **The burden of proof is upon the opponents** to establish on the balance of

probabilities that a person skilled in the art, using his common general knowledge, would be unable to carry out the invention (see the Case Law of the Boards of Appeal of the European Patent Office (CLB), 10th Edition, 2022, II.C.9, first two paragraphs, in particular in relation to T 19/90 and T 182/89).

The board does not find any verifiable facts in opponent 2's arguments that could substantiate serious doubts that the skilled person is unable to provide an appropriate adhesive according to the independent claims as granted. In addition, the board concurs with the opposition division that paragraphs [0010] and [0012] of the patent in suit give a clear indication to the skilled person of the required characteristics of such an adhesive and provides an example in paragraph [0044].

- 1.2 During the oral proceedings before the board, opponent 2 further argued that the patent in suit did not provide any specific and/or special technical instructions on how to apply the adhesive such that the the layer of adhesive did not extend onto the vertical surfaces of the continuous side wall and did not extend onto the base, as required by claim 1.
- 1.2.1 The board notes that this last objection constitutes an amendment to the appellant's appeal case which has been raised by opponent 2 for the first time after the notification of the board's communication under Article 15(1) RPBA. According to Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a board's communication shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

1.2.2 Opponent 2 argued that the arguments relating to lack of sufficiency presented for the first time during the oral proceedings before the board were based on the same formal objection that the invention could not be carried out by the skilled person; consequently they did not amount to a fresh objection but rather to a mere development of the previous arguments. The objection was still directed to the lack of information regarding the nature of the adhesive so that it would stay on the flange. In addition, the arguments presented were not complex and could be immediately examined by the board without delaying the proceedings. All this amounted to exceptional circumstances in the sense of Article 13(2) RPBA.

1.2.3 The board disagrees for the following reasons. In the present case, the board concurs with the patent proprietor that the late-filed objection directed to the application of the adhesive is a new objection, distinct from the previous objection which was directed only to the type of adhesive and therefore constitutes an amendment to the appellant's case in appeal proceedings.

As the amendment was filed after notification of the board's communication under Article 15(1) RPBA, its consideration in the appeal proceedings is subject, as explained above, to the existence of exceptional circumstances justified with cogent reasons under Article 13(2) RPBA.

Exceptional circumstances within the meaning of Article 13(2) RPBA generally concern new or unforeseen developments in the appeal proceedings themselves.

The alleged fact that the new objection was not complex and not detrimental to procedural economy cannot provide exceptional circumstances as it is only speculation on the part of opponent 2.

1.2.4 In the present case the new objection filed for the first time during the oral proceedings before the board was directed against the patent as granted. The board is convinced that the appellant not only could but most importantly should have made its complete case regarding sufficiency of disclosure already with its statement setting out the grounds of appeal, if not during opposition proceedings. Since the appellant has not convincingly justified with cogent reasons that there were exceptional circumstances for the amendment of its case, the new objection presented by opponent 2 during the oral proceedings before the board under Article 83 EPC is not considered in the appeal proceedings (Article 13(2) RPBA).

1.3 In sum, the board concludes that the opponents have not convincingly demonstrated that the ground for opposition pursuant to Article 100(b) EPC could prejudice the maintenance of the patent as granted.

2. *Patent as granted (main request) - Added subject-matter, Articles 100(c) and 123(2) EPC*

2.1 Omission of the feature "clear"

2.1.1 The opposition division found (see point 23.1 of the reasons for the decision under appeal) that omission of the feature "clear" in claim 1 as granted did not result in an unallowable extension of subject-matter. According to the opposition division, this feature was presented in the original description page 3, lines 1

to 2 as an optional feature and not inextricably linked to the other features of the container's base and continuous side wall. Furthermore, the subject-matter of original claim 3, that the material of the base and the continuous side wall of the container consisted of PET was disclosed in the original application without the feature of original claim 2 that the continuous side wall and base are "clear", for example on page 7, lines 21 to 22 and 29 to 30 of the description as originally filed.

- 2.1.2 The board disagrees and rather concurs with the opponents that the omission of the feature that the continuous side wall and base are "clear" in combination with the introduction of the features of original claim 3, that the base and the continuous side wall consist essentially of PET, results in an unallowable intermediate generalisation.

It is established jurisprudence that, when assessing the allowability of amendments under Article 123(2) EPC, the so-called "gold standard" is to be applied, namely to assess what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the original filing.

The board is convinced, in line with the opponents' views, that the skilled person can only derive from the original filing that the use of PET for the continuous wall and base is directed in the framework of the original application solely to providing plastic containers with "clear" walls and base (see description as originally filed, page 3, lines 2 to 5 and page 1, lines 12 to 15). The subject-matter of claim 1 as granted covers containers comprising a base and a

continuous side wall consisting "essentially" of PET, that could theoretically not be clear. In other words, claim 1 as granted covers *inter alia* containers with opaque, semi-opaque or coloured base and continuous sidewalls that are not derivable for the skilled person from the application as originally filed, thereby extending the subject-matter of the original application. This intermediate generalisation is also confirmed by the original claim structure, which requires that the features of original claim 3 (*i.e.* that the base and side wall consist of PET) are to be considered in combination with the features of original claim 2 (*i.e.* that the base and side wall are clear), as claim 3 was made dependent on claim 2 only.

- 2.1.3 In sum, the opponents have convincingly demonstrated that claim 1 as granted extends beyond the original disclosure, contrary to the requirements of Article 123(2) EPC. Therefore, the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted. The patent proprietor's main request is thus not allowable.

3. *Auxiliary request 2 - Interpretation of claim 1*

- 3.1 The opposition division found (see points 26 and 27 of the reasons for the decision under appeal) that according to the wording of claim 1, the expression "container" related not only to the tray part (*i.e.* to the base and to the continuous side walls) but also encompassed the lidding film. Both opponents agreed with this finding. Therefore claiming "a thermoformed clear container" implied that the lidding film was also clear and thermoformed.

- 3.1.1 The board disagrees and rather concurs with the patent proprietor that the skilled person, in view of the common general knowledge, would understand that the term "thermoformed" in claim 1 of auxiliary request 2 can only apply to the base and continuous side wall of the container and not to the lidding film. As correctly indicated by the patent proprietor, the skilled person is aware of the meaning of thermoformed, namely a manufacturing process where generally a plastic sheet is heated to a forming temperature and then typically mould-formed into a specific shape. While it is common ground that a film can be subject to a thermoforming process so that the skilled person would be aware of "thermoformable films" (see for example D3, paragraphs [0031] and [0032]), they would not understand the adjective "thermoformed" to have any meaning when applied to a lidding "film", in the context of the claim, which is understood to be a planar sheet or laminate without any specific moulded shape, or any requirement to have the same. In other words, a film which has been subject to a thermoforming process changes its nature and its initial characteristics and ceases to be a "film", so that a "thermoformed film" is a term lacking technical sense which the skilled reader would not consider.
- 3.1.2 The board also concurs with the patent proprietor that also the feature "clear" in "thermoformed clear" is to be considered in combination and therefore also only applies to the base and continuous side wall and not to the lidding film.
- 3.1.3 As confirmed by the patent proprietor during the oral proceedings before the board, the scope of protection sought by the subject-matter of claim 1 of auxiliary request 2 covers containers comprising a thermoformed

clear base and continuous side consisting essentially of PET and a lidding film being a multi-layer film which is not thermoformed and could be either clear or not clear. The board is of the view that this is also the skilled person's interpretation of claim 1 of auxiliary request 2.

3.1.4 Opponent 2 argued that in the case of a container comprising an opaque lidding film, as allegedly covered by the subject-matter of claim 1 of auxiliary request 2, the skilled person would no longer consider the container as a "clear" container, since the user would not be able to identify the content of the container from above.

3.1.5 The board disagrees and concurs with the patent proprietor that the skilled person would still consider a container as being "thermoformed and clear" as a whole even in the case that the container further comprises a not clear lidding film, in the same way that a clear glass bottle is considered clear irrespective of the closure.

4. *Auxiliary request 2 - Rule 80 EPC*

4.1 Opponent 1 argued that the amendment made to claim 1 of auxiliary request 2 with regard to "thermoformed clear container" did not add anything to a container made of PET and therefore is not suitable to overcome a ground for opposition.

4.2 The board disagrees and concurs with the patent proprietor that it is established jurisprudence of the Boards of Appeal that amendments to an independent claim comply with Rule 80 EPC as long as they can be regarded as a serious attempt to overcome a ground for

opposition (see CLB, *supra*, IV.C.5.1.2 a)). The question whether the amendments actually overcome any ground for opposition is irrelevant for its admittance under Rule 80 EPC. In the case at hand, the board is convinced that the introduction of the feature "thermoformed clear container" in independent claim 1 amounts to a serious attempt to overcome at least the ground for opposition under Article 100(c) EPC. In conclusion, the board finds that auxiliary request 2 meets the requirements of Rule 80 EPC.

5. *Auxiliary request 2 - Added subject-matter, Article 123(2) EPC*

5.1 As already discussed in point 3.1 above, the opponents concurred with the opposition division's finding that since the term "thermoformed clear" also applied to the lidding film and there was no original disclosure of either a thermoformed lidding film or a clear lidding film or both, the subject-matter of claim 1 of auxiliary request 2 extended beyond the original disclosure, contrary to the requirements of Article 123(2) EPC.

5.1.1 However, as concluded in point 3. above, the board is of the view that the term "thermoformed clear" is not to be understood to apply to the lidding film, so that the finding of the opposition division does not hold a revision under appeal.

5.2 The opponents further argued in the context of the main request and of the maintained version according to auxiliary request 11 that the omission of the feature "sealed container" resulted in an unallowable intermediate generalization. Indeed, the presence of a lidding film in combination with a container was

disclosed in claim 10 and on page 3, line 30 to page 4, line 6 of the application documents as originally filed, only in the context of a *sealed* container, whereas claim 1 according to the main request and auxiliary request 2 was directed to a *sealable* container.

5.2.1 The board disagrees. As correctly found by the opposition division in point 23.2 of the reasons for the decision under appeal, the original application not only disclosed the two main components of the claimed container namely the tray consisting of a base and a continuous side wall (original description page 2, lines 19 to 26) and a lidding film (original description page 3, line 30 to page 4 line 6) separately, but also in combination on page 8, lines 20 to 23. The board therefore concurs with the opposition division that the skilled person is not presented with new technical information so that the omission of the feature "sealed" container does not extend the subject-matter of the claim beyond the original disclosure.

5.3 Finally, opponent 2 argued in its reply to the patent proprietor's statement setting out the grounds of appeal that the omission in claim 1 of the main request and of auxiliary request 2 of the explicit requirement of original claim 1 for the container to be a sealable container resulted in an extension of subject-matter.

5.3.1 The board again disagrees and concurs with the finding of point 23.3 of the reasons for the decision under appeal that claim 1 as granted (and also of auxiliary request 2) defines that the lidding film may be sealed to the peripheral flange to create a sealed space between the base, continuous side wall and lidding

film, which implies that the claimed container is a sealable one.

5.4 In sum, the board is of the view that the claims according to auxiliary request 2 meet the requirements of Article 123(2) EPC.

6. *Auxiliary request 2 - Admittance of opponent 2's objection under Article 123(3) EPC, Article 13(2) RPBA*

6.1 During the oral proceedings before the board, opponent 2 raised an objection under Article 123(3) EPC, arguing that the subject-matter of claim 1 of auxiliary request 2 extended beyond the protection conferred by the patent. According to opponent 2, this objection could only be raised for the first time at this late stage of the proceedings as a direct response to the surprising preliminary opinion of the board, in particular in response to point 9.1.1 of the board's communication under Article 15(1) RPBA. In addition, opponent 2 also argued that since the opposition division found that auxiliary request 2 did not meet the requirements of Article 123(2) EPC, there was no need to raise the objection under Article 123(3) EPC during opposition proceedings.

6.2 The board is not persuaded by the reasons given by opponent 2. Indeed, the board notes that the preliminary opinion of the board in point 9.1.1 of the communication under Article 15(1) RPBA merely followed the patent proprietor's arguments provided in its statement setting out the grounds of appeal in points 5.2 and 6.2, so that it could not be seen as a surprising point. It follows that opponent 2 could and should have raised the objection under Article 123(3)

EPC as part of its appeal case at least with its reply to the appeal.

- 6.3 The objection under Article 123(3) EPC therefore amounts to an amendment of opponent 2's appeal case, the admittance of which is subject to the presence of cogent reasons justifying exceptional circumstances.

However as opponent 2 could and should have raised the objection under Article 123(3) EPC as part of its appeal case at least with its reply to the appeal, no exceptional circumstances are apparent. In sum, the objection under Article 123(3) EPC is not considered in the appeal proceedings under Article 13(2) RPBA.

7. *Auxiliary request 2 - Clarity, Article 84 EPC*

- 7.1 Opponent 1 argued that if the board came to the conclusion that the expression "thermoformed clear container" applied only to the base and side wall, the claim language "wherein the container further comprises a lidding film" introduced a new ambiguity that was not present in the claims as granted, and therefore contravened the requirements of Article 84 EPC.

- 7.1.1 The board disagrees. As already concluded in point 3. above, the board is convinced that the skilled person understands, in view of their common general knowledge, that the feature "thermoformed" cannot apply to the lidding film in the context of the claim. The alleged ambiguity that could be occasioned by a strict literal reading of the claim is ruled out by the skilled reader. The skilled reader thus understands in a clear manner the protection sought by the claim confirmed by the patent proprietor during the oral proceedings before the board, which namely includes a thermoformed

clear container comprising a base and a continuous sidewall and a lidding film (which does not need to be clear) which may be sealed to the peripheral flange of the upper edge of the continuous wall.

7.2 Opponent 2 further argued that the term "clear" was understood by the patent proprietor as encompassing various degrees of opacity. This term had no boundary in its definition, and therefore the skilled person could not delimit what is meant by "clear".

7.2.1 The board notes that the term "clear" referring to the base and continuous side wall was already present in claim 2 as granted. As such, the board is of the view that the alleged lack of clarity is not open to examination under Articles 101(3) and 84 EPC in accordance with the decision of the Enlarged Board of Appeal G 3/14.

7.3 In sum, the board concludes that the subject-matter of claim 1 of auxiliary request 2 meets the requirements of Article 84 EPC.

8. *Auxiliary request 2 - novelty, Article 54 EPC*

8.1 Document D1 (**WO 2009/121834 A1**) and D1' (**US 2011/0014404 A1**)

8.1.1 With respect to the subject-matter of claim 1 as granted, the opponents substantially concurred with the finding of the opposition division that document D1/D1' anticipated all features of the claim, including feature 1.5 that the "layer of adhesive does not extend onto the vertical, in use, surfaces of the continuous side wall and does not extend to the base" (see in

particular point 24.2.6 of the reasons for the decision under appeal).

In particular, D1 disclosed on page 16, lines 6 to 8 that the container was coated at the places to be sealed with the sealing foil, in particular at the rim, with a sealable layer of PE. If the lidding film was to be sealed on the flange, the adhesive was to be applied on the flange solely and not in the side wall or the base of the container, thereby anticipating feature 1.5.

- 8.1.2 The board disagrees. As correctly argued by the patent proprietor D1/D1' does not indicate anywhere that the sealable layer is coated solely or exclusively on the rim or bearing surface. D1/D1' teaches that the container is coated at the sites ("*Stellen*" in D1) to be sealed with the sealing foil. The board is of the view that such areas might well include the vertical walls. The statement that the sealing takes place "in particular on the rim" cannot be equated with a disclosure that such sealing takes place exclusively on the rim, but merely that the sealable layer is applied at least, but not solely, to the rim. In sum, it is not excluded in D1 that at least an upper portion of the side walls could also be a sealing area, so that feature 1.5 is not directly and unambiguously disclosed by D1.
- 8.1.3 Opponent 1 further argued that the reference to a "thermoformed clear container" was not suitable to establish novelty and inventive step without any further substantiation.
- 8.1.4 The board disagrees and rather concurs with the patent proprietor that D1/D1' is silent with respect to the

clarity of the containers, so that the added feature "thermoformed clear " is also to be seen as a distinguishing feature.

8.1.5 In summary, the board is of the view that the subject-matter of claim 1 of auxiliary request 2 is new over D1/D1'.

8.2 Document D3 (**US 2002/0092852 A1**)

8.2.1 Opponent 1 argued that document D3 anticipated the subject-matter of claim 1 as granted.

8.2.2 The board however concurs with the patent proprietor that the sealing sheet material cannot anticipate the lidding film as claimed. Indeed, the sealing sheet material of D3 is removably secured and is used in combination with a separate re-closable lid, which is not sealed to the container. In addition, for similar reasons as for D1/D1', the board does not see in D3 a direct and unambiguous disclosure of feature 1.5.

8.2.3 Opponent 1 also argued again that the reference to a "thermoformed clear container" was not suitable to establish novelty and inventive step without any further substantiation.

8.2.4 In the absence of any further indication with respect to the added features in claim 1 of auxiliary request 2, the board is of the view that the feature "thermoformed clear" container is not known from D3. in particular, D3 does not show a container with a thermoformed clear base and continuous side wall

8.2.5 For the above reasons, the board is of the view that the subject-matter of claim 1 of auxiliary request 2 is new over D3.

8.3 In summary the board concludes that the subject-matter of claim 1 according to auxiliary request 2 is new. This conclusion is also applicable to the subject-matter of independent claims 10 and 16 of auxiliary request 2, which was not further contested by the opponents.

9. *Auxiliary request 2 - inventive step, Article 56 EPC*

9.1 Opponent 1, in writing, made the following inventive step attacks against the subject-matter of claim 1 of the main request:

- in view of D1 alone or in combination with D3;
- in view of D2 (**EP 0 440 550 A1**) as closest prior art in combination with the teachings of either D1 or D3;
- and
- in view of D4 (**US 3,865,302 A1**) as closest prior art in combination with the teachings of either D1 or D3.

9.1.1 Opponent 1 further argued that the feature introduced into claim 1 of auxiliary request 2 "thermoformed clear container" was not suitable to establish inventive step without any further substantiation.

9.2 Opponent 2 argued during the oral proceedings before the board that the subject-matter of claim 1 of auxiliary request 2 was obvious starting from document D1/D1' or D3 as closest prior art alone, or in combination with the common general knowledge of the skilled person with regard to the issues related to recycling, as depicted for example by document D15

(Hopewell, J. et al (2009) "**Plastics recycling: challenges and opportunities**", **Philosophical Transactions of the Royal Society B: Biological Sciences**, 364, pp.2115-2126).

- 9.2.1 The board notes that, while the attack based on D1/D1' as closest prior art was presented by opponent 1 as part of its appeal case, the objection of lack of inventive step based on document D3 as closest prior art was presented for the first time at the oral proceedings before the board and constitutes an amendment to the appeal case of opponent 2, the admittance of which is subject to the existence of exceptional circumstances, justified with cogent reasons (Article 13(2) RPBA).
- 9.2.2 The situation for the admittance of the line of argument based on D3 as closest prior art is the same as the situation of the objection under Article 123(3) EPC of point 6. above. The board, for the same reasons, is of the view that this new line of attack could and should have been raised by opponent 2 as part of its appeal case at least with its reply to the appeal, so that no exceptional circumstances are apparent. In sum, the attack on lack of inventive step of claim 1 of auxiliary request 2 starting from D3 as closest prior art is not considered in the appeal proceedings under Article 13(2) RPBA.
- 9.3 With respect to the rest of the objections, the board concurs with the patent proprietor that the subject-matter of claim 1 according to auxiliary request 2 is inventive starting from any of documents D1, D2 or D4 as closest prior art, for the following reasons.

- 9.3.1 Starting from D1/D1', opponent 2 argued that the objective technical problem could be seen as providing a clear container which is easy to manufacture. The skilled person would be aware that it lacked technical sense to apply a layer of adhesive extending beyond the peripheral flange onto the vertical sidewalls and onto the base, since this would result in a contamination of the content of the container. In addition, the skilled person would be motivated to use the least adhesive possible and applying adhesive on other parts would require complex machinery. The choice of a clear PET for the base and side wall was a mere alternative. Consequently, starting from D1/D1' as closest prior art and in view of the objective technical problem, the skilled person would apply the layer of adhesive only on the peripheral flange and would choose a clear PET as an obvious alternative, thereby arriving at the subject-matter of claim 1 of auxiliary request 2 in an obvious manner.
- 9.3.2 The board is not persuaded by the arguments of opponent 2. As correctly argued by the patent proprietor, the application of a layer of adhesive only at the peripheral flange is not less complicated than an adhesive application without spatial restrictions. Furthermore, applying adhesive on the top inside part of the walls or on the outside part of walls of the container would not result in a contamination of the content. Therefore, the distinguishing feature 1.5 is not considered an obvious measure.
- 9.3.3 The effect of the distinguishing features is rather that the contamination of the PET material by the adhesive is minimized. This enables the container to be recyclable into clear products. The board finds that the problem to be solved is therefore to be seen as

providing a container which can be recycled into clear products, as identified in the patent in suit at many instances, for example in paragraphs [0005] and [0006].

9.3.4 None of D1, D2 or D4 is directed to the problem of recycling, so that there is no motivation for the skilled person to depart from the teaching of these documents and implement the distinguishing features of claim 1, even if the issues linked to the recycling might be part of the common general knowledge of the skilled person as depicted by D15. In addition, D2 and D4 appear to teach the use of crystalline PET, which cannot be generally considered as a clear material.

9.3.5 The board thus concludes that the skilled person, starting from any of documents D1, D2 or D4 as closest prior art, would only arrive at the subject-matter of claim 1 of auxiliary request 2 as the result of an *ex post facto* analysis.

9.4 In sum, the board is of the view that the subject-matter of claim 1 according to auxiliary request 2 is inventive. This conclusion is also applicable to independent claims 10 and 16 of auxiliary request 2, which has not been disputed by the opponents.

10. *Conclusions*

10.1 It follows from the above that the patent proprietor has convincingly demonstrated the incorrectness of the decision under appeal with regard to auxiliary request 2. The decision under appeal is thus to be set aside.

10.2 Since the opponents have not admissibly and convincingly demonstrated that auxiliary request 2 does not meet the requirements of the EPC, the board finds

that the patent can be maintained in amended form with the claims according to auxiliary request 2 and a description to be adapted thereto where necessary.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form with claims according to the auxiliary request 2 filed with the patent proprietor's statement setting out the grounds of appeal and a description to be adapted thereto where necessary.

The Registrar:

The Chairwoman:



G. Nachtigall

S. Watson

Decision electronically authenticated