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Aktenzeichen / Case Number / N<sup>o</sup> du recours : T 523/89 - 3.2.1

Anmeldenummer / Filing No / N<sup>o</sup> de la demande : 82 830 233.1

Veröffentlichungs-Nr. / Publication No / N<sup>o</sup> de la publication : 0 074 936

Bezeichnung der Erfindung: A squeezable container, in particular for  
Title of invention: ice-cream and the like.  
Titre de l'invention :

Klassifikation / Classification / Classement : B65D 85/78

**ENTSCHEIDUNG / DECISION**

vom / of / du 1 August 1990

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /  
Titulaire du brevet :

Cartotecnica Seda di Salvatore D'Amato s.a.s

Einsprechender / Opponent / Opposant :

I Sweetheart International B.V.  
II Sandherr Packungen AG

Stichwort / Headword / Référence :

EPO / EPC / CBE Articles 52(1) and 54

Schlagwort / Keyword / Mot clé :

"Novelty (no) - prior art article suitable  
for claimed use"

Leitsatz / Headnote / Sommaire



Case Number : T 523/89 - 3.2.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.1  
of 1 August 1990

**Appellant :** Cartotecnica Seda di Salvatore D'Amato s.a.s.  
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**Representative :** Patentanwälte Grünecker, Dr. Kinkeldey,  
Dr. Stockmair, Dr. Schumann, Jakob,  
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**Respondent :** Sweetheart International B.V.  
(Opponent I) Houtwal 3  
NL-7140 Groenlo (NL)

**Representative :** Patentanwälte Schönwald, von Kreisler,  
Fues, Keller, Selting, Werner  
Deichmannhaus am Hauptbahnhof  
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**Respondent :** Sandherr Packungen AG  
(Opponent II) CH-9444 Diepoldsau (CH)

**Representative :** Horst Quehl, Dipl.-Ing.  
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**Decision under appeal :**      **Decision of the Opposition Division of the European Patent Office dated 9 May 1989 and posted on 29 June 1989 revoking European patent No. 0 074 936 pursuant to Article 102(1) EPC.**

**Composition of the Board :**

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**Chairman :** F. Gumbel  
**Members :** S. Crane  
              W. Moser

**Summary of Facts and Submissions**

I. European patent No. 0 074 936 was granted with effect from 30 April 1986 on the basis of European patent application No. 82 830 233.1 filed on 15 September 1982, priority being claimed from Italian Utility Model application No. 3 600 981 U dated 15 September 1981.

II. The granted patent has three claims, of which independent Claim 1 reads as follows:

"Squeezable container for ice-cream and the like, comprising a tubular body (1) of a relatively flexible and relatively stiff material, such as waterproof paper or plastic material, said body including a grip part for holding the container and being open at one end (2) and closed at the other end (3) by means of a flattened end portion which is designed as a sealed and flattened bottom part characterized in that said tubular body (1) has the shape of a frustum of a cone, the tapering end portion (3) thereof which is designed as the bottom part (5) forms a stiffened grip part (5), and in that at the open end (2) of said frustoconical body a stiffening hem is formed."

Dependent Claims 2 and 3 relate to preferred features of the container according to Claim 1.

III. The patent was opposed by the present first and second Respondents (respectively Opponents I and II).

One ground of opposition was that the subject-matter of Claim 1 allegedly lacked novelty with respect to

(D1) JP-U-56 109 908.

- IV. By its decision taken at the oral proceedings on 9 May 1989 and notified in written form on 29 June 1989, the Opposition Division revoked the patent on this ground.
- V. The Appellants (Proprietors of the patent) appealed against this decision on 10 August 1989 and paid the appeal fee on the same day. The Statement of Grounds of Appeal was received on 9 November 1989.
- VI. The Appellants request that the decision of the Opposition Division be set aside and that the patent be maintained in the granted form.

The arguments of the Appellants in support of their request, insofar as relevant to the objection of lack of novelty with respect to document D1, can be summarised as follows:

In paragraph 3, page 2 of the English translation of D1 a reference is made to the container described therein being made of "glass". The Opposition Division had assumed that this was probably a translation error and that some clear or translucent plastics material was intended. There was however no basis for this assumption and conventional glass was indeed what was meant. This being so, it was clear that the inventor of D1 had never considered creating a squeezable container which is confirmed by the fact that there was no suggestion in the whole of D1 that the container should be squeezable. Furthermore, there is no suggestion anywhere in D1 that the container it relates to is intended to be used for ice-cream.

- VII. The arguments of the Respondents in reply are in essence as follows:

The containers described and shown in D1 have all the structural features specified in Claim 1 of the contested patent. Even if glass is one of the materials for the container mentioned in D1 this does not detract from the fact that a container made of one of the other materials mentioned, in particular film- or sheet-like paper or plastics, would by virtue of the very nature of these materials be squeezable. Furthermore, for the disclosure of D1 to be novelty destroying it is merely necessary that the containers described therein be suitable for use as containers for ice-cream. This is clearly the case.

The Respondents therefore request that the appeal be dismissed, an auxiliary request for oral proceedings being made by the first Respondents.

Moreover, the second Respondents request a refund of their opposition costs.

#### Reasons for the Decision

1. The appeal is admissible.
2. Document D1 relates to containers having a generally frustoconical form and is particularly concerned with the problem that when such containers are stacked together they may be difficult to separate from each other, which is particularly disadvantageous in automatic machinery for filling the containers with product.

In a reference to the prior art it is stated that known cups or containers of this form are provided at their open upper end with a folded-over collar, the bottom edge of which engages the upper end of the next lower container in the stack and thereby prevents the frustoconical walls of

the containers from coming into close contact. This solution is not however suitable for container materials, such as paper, where the collar cannot be given sufficient rigidity.

To solve this problem it is proposed to close and seal the narrower bottom end of the tubular body of the container by flattening it and adhesively securing together the flattened sides. When stacked together these flattened bottom parts due to their form are effective to prevent significant contact between the frustoconical walls of adjacent containers.

It is already apparent from the introductory description, not least the mention therein of cups, that D1 is concerned in general terms with the same basic type of container to which the contested patent relates, that is a container which is intended to be held in the hand and out of which a liquid or pasty product may be consumed. The Appellants do not dispute this in any way. In fact they have specifically stated in the opposition proceedings that in their opinion the container shown in D1 is of the type available in the USA as throw-away cups at water dispensing machines. This opinion may be questionable having regard to the mention in D1 of automatic filling machinery but nevertheless confirms the view expressed above of the basic nature of the container of D1.

This being the case it is also apparent that the flattened bottom part constitutes a stiffened part that may be gripped in the hand of the user of the container, it being stiffer than the tubular body of the container by virtue of its double thickness. The stiffened grip part of the container according to the contested patent is formed in identical fashion.

D1 states (paragraph 3, page 2 of the English translation) that the containers disclosed therein "can be made from any film- or sheet-like materials which are adherable by heat-sealing, pressing or other means, such as paper, plastics, glass etc." There has been much dispute as to whether this reference to glass is a translation error. Although the Board indeed feels it unlikely that the form of container shown in D1 is suitable for being made of conventional glass, it does not consider this question as being in any way decisive. The fact that one of the materials mentioned in D1 would lead to an essentially stiff container does not alter the fact that the other materials mentioned, paper and plastics foil or sheet, are "relatively flexible and relatively stiff" within the terms of Claim 1 of the contested patent. The relative stiffness of these materials is confirmed by the fact that the containers are self-supporting, the relative flexibility by the fact, see above, that the prior art technique of preventing jamming in the stack is considered inappropriate. By the very nature of these materials it is evident that the containers of D1 are squeezable within any conventional meaning of this term.

Finally, and this has not been disputed by the Appellants, it is clear from the drawings of D1 that a stiffening hem is formed at the open end of the container.

Summing up, it is therefore clear that D1 discloses a squeezable container comprising a tubular frustoconical body of a relatively flexible and relatively stiff material, the larger open end of the container having a stiffening hem formed therearound and the smaller bottom end of the container being flattened and sealed, whereby this flattened bottom portion forms a stiffened grip part for the container. In other words, D1 discloses a



container having all the structural features of the container defined in Claim 1 of the contested patent.

Hence, the only outstanding issue is the fact that D1 nowhere indicates that the container disclosed therein is intended to be used for ice-cream.

The question of anticipation of a claim to an article for a particular use is dealt with in the Guidelines C-III, 4.8 and C-IV, 7.6 from which it is clear that, with the exception of medical uses of known substances, the indication of intended use is only to be seen as limiting to the extent that the article has to be suitable for this use. In other words, the disclosure of an equivalent article without an indication of the particular use claimed but which is nevertheless suitable therefor will destroy the novelty of a claim to the article for that particular use. The present Board sees no reason to disagree with this general principle of interpretation as stated in the Guidelines, which to its best knowledge has not been put into contention in any previous cases before the Boards of Appeal. Indeed, the Appellants themselves have not put forward any grounds as to why this principle of interpretation should be called into question, they seem much more to be operating under the misapprehension that a statement of corresponding intended use in the prior art is a prerequisite for anticipation.

In the particular circumstances of the present case suitability for use as a container for ice-cream imposes the requirements that the container be of a size in or from which ice-cream is normally delivered or consumed and that the walls of the container be substantially resistant to the penetration of the ice-cream, particularly as it melts. As explained in detail above, the container of D1

in view of its basic nature and the materials from which it may be made meets these requirements.

Even if, having regard to the totality of the disclosure of the contested patent, the characteristics of squeezability and suitability for ice-cream are linked so that Claim 1 is interpreted as being directed to a container for ice-cream, the container being squeezable such that the ice-cream may be squeezed up from the container for consumption, then this would not lead to a different conclusion, since the container of D1 is also suitable for use in this way, as can be seen from the above explanations of its structure. This method of consuming ice-cream has long been known, as witnessed by the documents cited in the introductory part of the description of the contested patent.

3. Having regard to the above, the Board comes to the conclusion that, in agreement with the essential aspects of the impugned decision, the subject-matter of Claim 1 of the granted patent lacks novelty with respect to D1 and that therefore Claim 1 does not meet the requirements of Articles 52(1) and 54 EPC.
4. Since the Board is bound by the single request of the Appellants it is unnecessary to consider the merits of dependent Claims 2 and 3. These claims must fall with Claim 1.
5. The Board interprets the request of the second Respondents for a refund of their opposition costs as having two aspects. Firstly, it is a request for reconsideration by the Board of the refusal by the Opposition Division to apportion the costs of the opposition proceedings in favour of said Respondents. Secondly, it is a request for apportionment of costs of the appeal proceedings.

The request for apportionment of costs before the Opposition Division was based on the assertion by said Respondents that an allegedly novelty-destroying document cited by them (not D1) was previously known to the Appellants through a nullity action against the corresponding Italian Utility Model. The Opposition Division based its negative decision on this request on the facts that the circumstances surrounding the assertion of said Respondents had not been substantiated and that in any case the revocation decision was based on a different prior art document. The Board can find no fault with the decision of the Opposition Division in this respect.

As for the appeal proceedings, there have been no oral proceedings or taking of evidence which could justify an apportionment of costs (Article 104(1) EPC in connection with Rule 66(1) EPC). In fact, the only new evidence introduced in the appeal proceedings was presented by the second Respondents themselves and plays no role in the substantive decision reached above.

6. Oral proceedings according to the auxiliary request of the first Respondents were not necessary since their main request has been fully met.

Order

For these reasons, it is decided that:

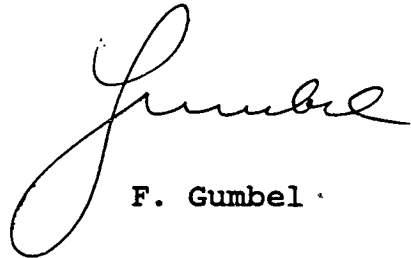
1. The appeal is dismissed.
2. The request for apportionment of costs is refused.

The Registrar:



S. Fabiani

The Chairman:



F. Gumbel

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