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D E C I S I O N
of 30 March 1999

Case Number: T 0001/97 - 3.2.1

Application Number: 89907042.9

Publication Number: 0481981

IPC: B65D 41/04

Language of the proceedings: EN

Title of invention:

Linerless closure for carbonated beverage container

Patentee:

Closures and Packaging Services Limited

Opponent:

Crown Cork AG

Headword:

Naming of appellant/CROWN CORK

Relevant legal provisions:

EPC Art. 56, 123(2), 107, 108

EPC R. 64(a), 65(2), 88

Keyword:

"Failure to name the appellant by its correct designation in
the notice of appeal"

"Apportionment of costs (no)"

Decisions cited:

T 0002/83, T 0483/90, T 0613/91, T 0340/92

Headnote:

In order to comply with Rule 64(a) EPC the notice of appeal shall contain the true name of the appellant. If the appellant's name has not been given correctly, this deficiency can be remedied under Rule 65(2) EPC.



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Boards of Appeal

Chambres de recours

Case Number: T 0001/97 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 30 March 1999

Appellant: Crown Cork AG
(Opponent) Römerstrasse 83
4153 Reinach (CH)

Representative: Hepp, Dieter
Hepp, Wenger & Ryffel AG
Friedtalweg 5
9500 Wil (CH)

Respondent: Closures and Packaging Services Limited
(Proprietor of the patent) P.O. Box 119
St Peter Port
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Channel Islands (GB)

Representative: Marshall, John Grahame
Serjeants
25 The Crescent
King Street
Leicester LE1 6RX (GB)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 4 November
1996 concerning maintenance of European patent
No. 0 481 981 in amended form.

Composition of the Board:

Chairman: F. Gumbel
Members: M. Ceyte
J. Willems

Summary of Facts and Submissions

- I. The respondent is the proprietor of European patent No. 0 481 981 (application No. 89 907 042.9).
- II. The patent was opposed by the appellant (opponent) on the ground of lack of patentability.

In the appeal proceedings only the following documents have played a significant role:

D1: US-A-3 203 571

D4: GB-A-930 866

D8: US-A-4 398 645

D10: Glass Finish No. 1650 - Glass Packaging Institute, 1983

D15: US-A-4 598 835.

- III. By an interlocutory decision posted on 4 November 1996, the Opposition Division maintained the patent in amended form.

Amended claim 1 reads as follows:

"1. A closure (1) for a container (9) having an externally screw threaded neck, said closure (1) being molded in one piece from a resilient plastics material, and comprising a top (4) and a skirt (2) dependent from the top (4), which skirt (2) has on an internal surface a complementary screw thread (3), an annular sealing

rib (6) disposed radially inward of the skirt (2) projecting downwardly from the top (4) lying adjacent or abutting with the skirt (2), said rib (6) having a first portion (7) and a second frusto-conical portion (8) extending from said first portion (7) radially inward to terminate in an annular free edge, the free edge of the frusto-conical portion (8) having a diameter that is smaller than the outside diameter of the neck of the container (9) to which the closure (1) is to be attached, such that the neck of the container (9), during threaded engagement of the closure (1) with the neck, will be engaged by the frusto-conical portion (8) of the rib (6),

characterized by

said first portion (7) being substantially cylindrical and having an inner surface being substantially cylindrical with an inner diameter being equal to or only slightly larger than an external diameter of the neck of the container (9), the frusto-conical portion (8) extending from the terminus of the first portion (7) distal to the top (4), whereby, during threaded engagement of the closure (1) with the neck of the container (9), the second frusto-conical portion (8) will be folded back against the inner surface of the first portion (7) of the rib (6) and into contact with an inner surface portion of the top (4) or a structure (5) contiguous with the top (4), thereafter to form a gas tight seal between the neck of the container (9) and the closure (1) from an outer top surface of the container onto an external cylindrical surface of the container neck."

IV. On 19 December 1996 an appeal was lodged against this decision, with the appeal fee being paid at the same

time.

The notice of appeal contains, translated into English, the following indications (original language: German):

"Opposition against Druitt, Rodney Malcolm et al.
Application No. 89 907 042.9
Patent No. 0 481 981
Opponent: Crown Cork & Seal Co Inc, 4153 Reinach

Having regard to the decision according to
Article 106(3) EPC

This is to lodge an appeal against the above decision
in the name of the opponent..."

The statement of grounds of appeal was filed on 5 March
1997.

In response thereto the respondent submitted that the
appeal was inadmissible because it was filed in the
name of a company which was not party to the opposition
proceedings and thus was not adversely affected by the
decision of the Opposition Division.

V. Oral proceedings before the Board of Appeal were held
on 30 March 1999.

The appellant requested that the decision under appeal
be set aside and the European patent be revoked in its
entirety.

The respondent requested that the appeal be dismissed
as inadmissible or as being not well founded. It also

requested an apportionment of costs.

VI. In support of its requests the appellant made essentially the following submissions:

- (i) The appeal clearly complies with Articles 106 to 108 and with Rule 1(1) and Rule 64(b); therefore it cannot be rejected as inadmissible under Rule 65(1). The non-compliance with the requirements of Rule 64(a) the purpose of which is to identify the appellant can be remedied in accordance with Rule 65(2) on invitation by the Office after expiry of the two-month time limit under Article 108. In the present case there was no reason for such an invitation because the respondent (patentee) had already taken the initiative.

It was requested that the notice of appeal should be corrected under Rule 88 EPC, so that the name of the appealing opponent is "Crown Cork AG". Such a correction should be allowed, since it is established that

- (1) an obvious mistake was made (the same opponent named "Crown Cork AG" in the impugned decision was designated as "Crown Cork & Seal Co Inc" in the notice of appeal),
- (2) what the mistake was (appellant designated incorrectly in the notice of appeal), and
- (3) what the correction should be (the correct

name can only be "Crown Cork AG").

- (ii) The added feature contained in amended claim 1, that the tight seal extends onto an external cylindrical side surface of the neck, is not supported by claim 3 as originally filed which uses the following wording "a continuous seal from said top surface **to** a cylindrical side surface of the container neck". This can only mean "a continuous seal from said top surface towards but not onto a cylindrical side surface of the container neck".

Furthermore, the inclusion of this feature from claim 3 as originally filed into claim 1 without inserting all the features of that dependent claim is not permissible, since there is no indication in the patent application as filed that the added feature can be used separately from the remaining features of claim 3. It follows that the addition of this feature extends the original disclosure and thus contravenes Article 123(2) EPC.

- (iii) Figure 15 of document D1 discloses in essence all the structural features of amended claim 1. Regarding the functional feature that during threaded engagement of the closure with the neck, the frusto-conical portion will be folded back against the inner surface of the first portion of the rib, it should be noted that the words "folded back against" do not necessarily mean "in contact with". In Figure 15 of document D1 the frusto-conical portion is also folded towards the

inner surface of the first portion of the rib. Thus the only difference between the embodiment of Figure 15 of document D1 and the claimed closure is a minor design step amounting merely to providing a sealing rib with a longer first portion. No exercise of inventive skill would have been required to somewhat prolong the first portion of the rib disclosed in Figure 15 of document D1 and thus to arrive at the claimed invention.

- (iv) The subject-matter of amended claim 1 is also not inventive over the combined teachings of documents D8 and D10. This subject-matter differs from the closure disclosed in document D8 only by the location of the tight seal formed between the neck of the container and the closure, which in this citation is provided on the internal cylindrical side surface rather than on the external cylindrical side surface of the container neck as claimed.

However, document D10 which describes a bottle neck, shows clearly the claimed sealing area. In view of this teaching it would be obvious for a skilled person to adapt the closure of document D8 so as to provide a seal against the outside diameter of the bottle neck.

VII. The respondent disputed the appellant's view relying in particular on the following arguments:

- (i) as to the admissibility of the appeal, it is observed that the opponent in this matter was

Crown Cork AG, a Swiss company whose address is Römerstrasse 83, 4153 Reinach Switzerland.

No appeal was lodged and no appeal fee was paid by that company. Since the relevant time limit laid down in Article 108 had expired the opponent was out of time for filing an admissible appeal. The fact that appeal papers were lodged by another company is immaterial, since that other company (Crown Cork & Seal Co., Inc) has no status in this matter and their intervention in these proceedings must be rejected.

Contrary to the appellant's submissions, the appeal was not raised in the name of the opponent. It was raised in the name of Crown Cork & Seal Co., Inc. It is true that there is no Swiss Company called Crown Cork & Seal Co., Inc having an registered office address at 4153 Reinach, Switzerland, however this does not mean that the appealing company Crown Cork & Seal Co., does not have secretarial facilities at that address, or that mail addressed to them would be automatically diverted to Crown Cork AG which is a separate company.

Even if one assumed that Rule 64(a) were met, in that the appeal documents filed do in fact contain the name of the appellant company Crown Cork & Seal Co., and a postal address for that company, Article 107 would be not met simply because then the appeal would have been filed on behalf of an entity who is not a party to the proceedings. The Board could only have required a

correction of defects under Rule 65(2) if the Appeal had failed to comply with the provisions of Rule 64(a) which as stated above was not the case.

Despite the Appellant's submissions, such a deficiency cannot be remedied under Rule 88 EPC. This legal provision allows corrections of genuine mistakes, such as clerical errors, but not of an error of judgment as it could only be the case here. Furthermore, Rule 88 may be used in order subsequently to provide in the form of a correction information concerning the appellant but not to exchange one appellant by another.

- (ii) The added feature (c) that the tight seal extends onto an external cylindrical surface of the neck, is supported by the original claim 3 and the passage on page 5, lines 18 to 28 and the corresponding Figure 2 of the original PCT application and therefore does not contravene Article 123(2) EPC.

- (iii) None of the cited prior art documents shows a second rib portion folded against the inner surface of the first rib portion, when the claimed closure is screwed onto a suitable container. Since the cited documents show no such "two ply construction" of the rib, it is clear that no combination of these documents could possibly produce a closure falling within the wording of claim 1 of the European patent as amended. It follows that the subject-matter of amended claim 1 is inventive over the cited prior

art.

Reasons for the Decision

1. Admissibility of the appeal.

1.1 In accordance with Article 107 first sentence, an appeal may only be filed by a party to proceedings who is adversely affected by a decision. If this requirement is not met, the appeal must be rejected as inadmissible under Rule 65(1).

In accordance with Rule 64(a) the notice of appeal shall contain the name and address of the appellant in accordance with Rule 26(2)(c) EPC.

The non compliance with the requirements of Rule 64(a), can be remedied in accordance with Rule 65(2) on invitation after expiry of the two-month time limit of Article 108, whereas the requirement that the appellant is a party to the proceedings as specified in Article 107 must be complied with within the two-month time limit.

It is true that there is a close relationship between Rule 64(a) and Article 107 first sentence. This follows from the fact that the latter legal provision presupposes the identification of the appellant. However, this does not mean that if Rule 64(a) is not or not correctly met then Article 107 first sentence will necessarily not be complied with. It follows from the case law of the Boards of Appeal that the impugned decision itself, when correctly identified in the

notice of appeal may also be a means of identification of the appellant, since it contains the names and addresses of the parties and their representatives. Thus if e.g. the address of the appellant is omitted in the notice of appeal and if the appeal is said to be lodged in the name of the opponent, the name and address of the appealing opponent can be identified from the decision under appeal and thus the requirement of Article 107 first sentence would be complied with within the two-month period for appeal (see T 483/90 and T 613/91, both not published in the OJ EPO).

It follows from the above considerations that what is required is that the appellant must be sufficiently identifiable within the two-month period, if necessary with the aid of the decision under appeal, in order to establish that it is entitled to appeal under Article 107 first sentence, while deficiencies and omissions concerning the name and address of the appellant stated in the notice of appeal as specified in Rule 64(a) may be remedied later. If the appellant has no representative, the purpose of Rule 64(a) is "to identify the appellant and his address in order that postal correspondence with him can take place" (see Paterson the European patent system, point 2.41). If, as in the present case, the appellant has appointed a representative, the communications of the EPO are dispatched to the business address of the representative so that postal correspondence can take place without the name and address of the appellant.

- 1.2 In the present case the opening sentence of the notice of appeal states unambiguously that the appeal is lodged in the name of the opponent:

"Auf die Entscheidung nach Art. 106(3) EPÜ hiermit wird **im Namen der Einsprecherchen** gegen obige Entscheidung Beschwerde erhoben..." (emphasis added).

Furthermore, the notice of appeal designates the patent in suit by its application number and its publication number. It also contains the name of the patentee as well as the name and address of the appellant's representative which was also the representative of the opponent. Thus the impugned decision is clearly identified in the notice of appeal.

From the foregoing it is established beyond all doubt that the notice of appeal was filed in the name of the opponent and against the decision of the opposition division upholding the patent as amended. The name and the address of the opponent are contained in the decision in question which was identified in the notice of appeal.

Thus the appealing opponent is clearly identified by its name and address and by the name and address of its representative, when the notice of appeal is read in conjunction with the impugned decision. Therefore the requirement of Article 107 first sentence that the appellant is a party to the proceedings who is adversely affected by the decision is complied with.

Given that it is stated expressis verbis in the notice of appeal that the appeal is lodged in the name of the (sole) opponent, the Board cannot accept the respondent's submission that the appeal was raised in the name of Crown Cork & Seal Co which was not the opponent.

Accordingly the appeal complies "with Articles 106 to 108 and with Rule 1, paragraph 1 and Rule 64 sub-paragraph (b)", and therefore it cannot be rejected as inadmissible under Rule 65(1) EPC.

- 1.3 As to the requirement of Rule 64(a) EPC it is observed that since the notice of appeal contains the name and the address of the appellant's representative who was also the opponent's representative in the opposition proceedings postal correspondence could take place with the representative of the appealing opponent.

It is true that there is an inconsistency between the name of the appealing opponent given in the notice of appeal ("Crown Cork & Seal Co") and the name of the opponent taken from the impugned decision ("Crown Cork AG"). However, from the facts and arguments submitted to the Board, it follows clearly that the failure to name the appealing opponent by its correct designation in the notice of appeal was due to an obvious mistake by the appellant's representative.

The respondent agreed that there is no Swiss company called Crown Cork & Seal Co Inc having a registered address at 4153 Reinach, Switzerland. Thus, having regard to the fact that the notice of appeal is filed on behalf of the sole opponent and by the same representative duly authorised by this opponent, and that there is conformity concerning the address and even the first part of the name, and taking into account that there is no company with the full name given in the notice of appeal under this address, there cannot, in the Board's opinion be any reasonable doubt about the true identity of the appellant.

1.4 In the view of the respondent it is immaterial for the purpose of Rule 64(a) EPC whether the appellant's name is given correctly or not. This legal provision merely requires the indication of a name and an address. It is only in the case where the appellant's name and/or address is missing that this rule applies.

This submission cannot be accepted, firstly, because postal correspondence with the appellant may be unduly delayed on account of its incorrect designation if it has not appointed a representative. Furthermore, it would not be adequate if the omission of the appellant's name could be remedied under Rule 65(2) but an incorrect indication of an appellant's name could not be rectified. Finally, the general term "deficiencies" used in this rule is to be interpreted as also referring to an incorrect indication of appellant's name and/or address.

Therefore, the Board considers that the present case could have been dealt with under Rule 65(2) EPC, but this was obviously not done because the respondent (patentee) meanwhile had taken the initiative and submitted the correct name of the appellant.

These considerations are fully in line with a previous decision T 340/92 (not published in the OJ EPO) of the same Board. There it was also held that if an appellant has not been named by its correct designation in the notice of appeal a time-limit is set for correcting this error (Rule 65(2) EPC).

For these reasons in the Board's judgment the appeal is admissible.

2. *Added subject-matter (Article 123(2) EPC)*

When compared with granted claim 1, amended claim 1 contains the added feature:

thereafter to form a gas tight-seal between the neck of the container and the closure from an outer top surface of the container **onto** an external cylindrical surface of the neck of the container and the closure. (emphasis added)

Original claim 3 uses the following wording "a continuous seal from said top surface to a cylindrical side surface of the container neck". The Appellant submits that this can only mean "a continuous seal extending from said top surface towards but not onto a cylindrical side surface of the container neck".

However, in the Board's judgement the added feature is clearly and unambiguously supported by the passage on page 5, lines 18 to 28 and the corresponding Figure 2 of the original PCT application WO 89/12584.

This passage reads as follows:

"As the movement attaching the cap 1 continues, it tends to pinch the free edge of rib 6 between the container and the top 4 and to "pull" the first portion 7 of the outer rib tightly in towards the container end 9 to produce a tight seal about the curved edge surface of the container end 9 extending from its extreme end

annular surface 11 to the Alcoa step region 10"

Thus there is no doubt that the seal extends onto the external cylindrical side surface, that is the so-called Alcoa step region 10 of the container. The tight seal thus obtained is depicted in Figure 2 of the original PCT patent application. It can be seen from this figure that the seal extends onto the external cylindrical side surface of the container neck.

It follows that the contested added feature is clearly and fully derivable from the original disclosure.

Contrary to the appellant's submissions the inclusion of the above feature from original claim 3 into claim 1 without expressly inserting all the features of that dependent claim was admissible in the present case, because the remaining features of claim 3 are already either explicitly or implicitly contained in amended claim 1.

In particular it need not be mentioned that the shape, size and material of construction of the rib should be chosen so as to obtain the desired effect, that is a tight seal extending from an outer top surface of the container onto an external cylindrical surface of the neck of the container. It should be noted that the purpose of a claim is to concisely define the invention and not to mention any details which are implicit for a skilled person.

For these reasons the subject-matter of amended claim 1 does not extend beyond the content of the application as filed (Article 123(2)).

3. *Article 56 EPC*

3.1 It is not in dispute that the closure shown in Figures 15 to 17 of document D1 represents the closest prior art. This closure has a top and a depending cylindrical skirt as well as an integral, downwardly extending annular sealing rib. As it is apparent from Figure 15, the sealing rib has a first portion and a second frusto-conical portion extending from said first portion radially inward. The free edge of the frusto-conical portion has a diameter that is smaller than the outside diameter of the neck of the associated container.

When being applied to a container the sealing rib is pushed against the top of the closure by contact with the neck of the container. A seal is said to be formed between the free end of the neck of the container and the radially outer side of the sealing rib.

According to the patent in suit, the technical problem to be solved by the present invention is to provide a closure for a container of the above type which seals the container particularly effectively.

3.2 This problem is in essence solved by the following features stated in the characterising part of amended claim 1:

(i) the first portion is substantially cylindrical and has a substantially cylindrical inner surface,

(ii) during threaded engagement of the closure with

the neck of the container, the second frusto-conical portion is folded back against the inner surface of the first portion of the rib and into contact with an inner surface portion of the top or a structure contiguous with the top, thereafter to form a gas tight seal between the neck of the container and the closure from an outer top surface of the container neck onto an external cylindrical surface of the container neck.

Feature (ii) is a functional one, defined by the result to be achieved, that is on the one hand the "two-ply construction" of the claimed rib, when the claimed closure is screwed onto a suitable container and, on the other hand, the thus obtained tight seal extending from the annular end surface of the container neck onto the external cylindrical side surface of said container neck.

3.3 In document D1 the second frusto-conical portion of the sealing rib is bent against the inner surface of the top, when the closure is screwed on the container, and then clamped between the inner surface of the top and the annular end surface of the container neck. Thus, the second frusto-conical portion is not folded back against the inner surface of a cylindrical first portion of the rib.

The Appellant alleges that it is obvious for a skilled person to extend the first portion of the rib shown in Figure 15 of document D1 so as to provide a tight seal which extends onto the cylindrical side surface of the container. The skilled person would know that the

external cylindrical side surface of the neck is appropriate for a good seal, because it is likely to be consistent in its shape and it is also less likely to be damaged during manufacture or use than the free end wall of the neck. The Appellant further contends that the extension of the first portion of the rib is the sole conceivable alternative, when it is desired to provide a tight seal on the external cylindrical side surface of the neck.

This submission is based upon hindsight (ex post facto analysis). There is no indication whatsoever in this citation to extend the first portion of the rib so as to arrive at the two-ply construction of the claimed rib, when the closure is applied to the container. The proper question in this regard is not whether the skilled person **could** have extended the first portion of the rib but whether from the starting point of the closest prior art, he **would** have done so in the expectation of solving the technical problem addressed (see e.g. decision T 2/83, OJ EPO 1984, 265).

Contrary to the Appellant's submissions, the claimed solution is not the sole alternative. A seal on the external cylindrical side surface can also be provided by the skirt of the closure, as is the case in document D4.

Document D15 cited by the appellant during the appeal proceedings teaches a further alternative for providing a tight seal extending on the external cylindrical side surface of the neck. The one-piece plastics closure disclosed therein comprises an integral, downwardly extending annular sealing rib attached at the junction

between the top and the cylindrical skirt of the closure. This sealing rib is forked, having two annular and mutually divergent fins. During threaded engagement of the closure with the container neck, the upper fin is engaged by the outer top surface of the container neck and the lower fin by the external cylindrical side surface of the container neck.

- 3.4 The one-piece plastics closure disclosed in document D8 has an integral, downwardly extending annular sealing rib. This sealing rib has a first root portion and a second frusto-conical portion extending radially outward to terminate in an annular free edge.

The root portion of the sealing rib is not cylindrical and has no cylindrical inner surface. Furthermore, the frusto-conical portion is during threaded engagement lifted upwardly against a ridge formed on the top of the closure cap but a clear space can be seen (Figure 2) between the former frusto-conical portion and the root portion of the sealing rib. Therefore the frusto-conical portion of the sealing rib is **not** folded against the root portion. There is thus no disclosure or suggestion in this citation of the above characterising features (i) and (ii).

- 3.5 Whereas in document D8 a seal is formed against an internal cylindrical surface and the outer top surface of the container neck. Document D10 which relates to a bottle finish shows a sealing zone extending from the outer top surface onto the external cylindrical side surface of the container neck. In the view of the respondent, it was not inventive to modify the closure cap of document D8 so as to provide a seal against the

external cylindrical side surface of the container neck, as called for in document D10.

This line of argument cannot be accepted since the skilled person would have to perform a series of steps in order to proceed from the known closure of document D8 to the claimed invention. These steps would in essence be the following:

- (a) shaping the root portion of the sealing rib so as to provide it with a cylindrical inner side surface,
- (b) widening the inner diameter of the root portion so as to be equal to, or slightly larger than the external diameter of the container neck,
- (c) reorientating the second frusto-conical portion of the sealing rib radially inward of the cylindrical skirt, and
- (d) selecting the height of the root portion of the sealing rib so that the second frusto-conical portion can be folded back against the inner surface of the root portion of the sealing rib, when the closure is screwed on the container.

To undertake such a plurality of steps to proceed from the prior art closure disclosed in document D8 to the claimed invention, cannot, in the Board's opinion, be obvious.

3.6 Therefore, in the Board's judgement the subject-matter of claim 1 involves an inventive step (Article 56 EPC)

so that the patent is to be maintained on the basis of this main claim.

4. Dependent claims 2 to 7 which concern particular embodiments of the invention are likewise allowable.

Thus the opposition grounds do not prejudice the maintenance of the patent in amended form.

5. *As to the respondent's request for apportionment of costs*

The Board is unable to see in the present case any reason of equity which would justify an apportionment of costs in the respondent's favour. It is true that the appellant was named incorrectly in the notice of appeal. However, it is not this error alone which has rendered oral proceedings necessary. During the oral proceedings before the Board it was also necessary to discuss the admissibility of the amendments and the patentability of the claimed subject-matter. It is the valid right of an appellant to request oral proceedings on an auxiliary basis in the event that the Board intends to decide against it.

The respondent's request for apportionment of costs is therefore not allowable.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel