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**Datasheet for the decision
of 4 May 2023**

Case Number: T 0655/20 - 3.2.07

Application Number: 14707800.0

Publication Number: 2964542

IPC: B65D79/00, A61J1/18, B65B3/04,
B65B7/16, B65B7/28

Language of the proceedings: EN

Title of invention:
CONTAINER FOR ASEPTIC CONTENT, USE AND METHOD OF PRODUCTION

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
Abbott Laboratories

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 123(2)
EPC R. 100(2)
RPBA 2020 Art. 12(2), 12(4), 12(6)

Keyword:

Novelty - (yes)

Inventive step - (yes)

Amendments - added subject-matter (no)

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

Late-filed evidence - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern
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Case Number: T 0655/20 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 4 May 2023

Appellant: Abbott Laboratories
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Respondent: Société des Produits Nestlé S.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 January 2020 concerning maintenance of the
European Patent No. 2964542 in amended form.**

Composition of the Board:

Chairman V. Bevilacqua
Members: A. Pieracci
C. Brandt

Summary of Facts and Submissions

- I. An appeal was filed by the opponent in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division maintaining European patent No. 2 964 542 in amended form according to the then main request, filed on 27 September 2019.
- II. In preparation for oral proceedings, the Board gave its preliminary opinion in a communication pursuant to Rule 100(2) EPC, to which the opponent responded with a letter dated 3 March 2022.
- III. Oral proceedings before the Board took place on 4 May 2023. At the conclusion of the proceedings, the decision was announced. Further details of the oral proceedings can be found in the minutes.
- IV. The following documents are mentioned in this decision:
- D3: WO 2013/006927 A1
- D6: US 4 684 554 A
- D7: US 4 109 815 A
- D8: K. Hishinuma, "Heat Sealing Technology and Engineering for Packaging", Chapter 3, 1 January 2007
21-41
- D14: GB 2 375 346 A

- D17: J.R.D. David et al., "Handbook of Aseptic Processing and Packaging",
2nd edn., CRC Press,
94-102
- D18: WO 91/08146
- D19: JP H10-287359
- D21: R.R. Petrus and J.A.F. Faria, "Testing a Small Scale Aseptic System for Milkin Plastic Bottles", Food Sci. Biotechnol.,
16(1), 2007, 18-22
- D22: J. Butschli, "HDPE-bottled dairy beverages 'milk' 90-day shelf life", Packaging World
31 January 1999, <https://www.packworld.com/machinery/primarypackaging/article/13331752/hdpebottled-dairy-beverages-milk-90day-shelflife#previous-slide>

V. The final requests of the parties are as follows.

The opponent (appellant) requested:

that the appealed decision be set aside and that the patent be revoked.

The patent proprietor (respondent) requested:

that the appeal be dismissed, i.e. that the patent be maintained in the amended version held by the opposition division to meet the requirements of the EPC (**main request**), or in the alternative, that, when setting the impugned decision aside, the

patent be maintained in amended version on the basis of one of the sets of claims according to auxiliary requests 1 to 3 filed in opposition proceedings on 27 September 2019 and re-filed with the reply to the statement setting out the grounds of appeal.

VI. The arguments of the parties relevant for the decision are dealt with in detail in the Reasons for the Decision.

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

"A container, the content of which is an aseptic fluid, equipped with a closure system comprising a removable flexible foil (1) sealed to the top of a container opening (2) and further comprising a removable plastic cap (4) adapted to the container over the flexible foil, said removable cap being adapted such as creating a headspace (3) between at least part of said foil and the inner surface (6) of the top of the cap, wherein said foil can deflect under the effect of pressure increase in said container and, wherein the headspace extends over the top of the container opening, said container being characterized in that the flexible foil is made of a layered material comprising at least one aluminium layer."

Reasons for the Decision

1. Admittance into the proceedings of documents D18 and D19 and the objections based on them

The opponent filed for the first time with the statement setting out the grounds of appeal documents D18 and D19 together with patentability objections based on them. This constitutes an amendment to its case presented in opposition proceedings (see Article 12(4) RPBA 2020).

The Board cannot accept the argument of the opponent (see page 3, penultimate paragraph to page 4, sixth paragraph of the statement setting out the grounds of appeal; point 2 of the letter dated 28 January 2021 and points 1.10 to 1.17 of the letter dated 3 March 2022) that documents D18 to D19 should be admitted into appeal proceedings since their filing is a reaction to the change of opinion of the opposition division in view of the interpretation of the feature "container, the content of which is an aseptic fluid", allegedly submitted by the patent proprietor for the first time at the oral proceedings before the opposition division.

The Board is of the opinion that, independently of whether the patent proprietor is correct in arguing that the argument presented at the oral proceedings and accepted by the opposition division had already been submitted before the oral proceedings in reply to the annex to the summons (see point 3.1.1 of the reply to the statement setting out the grounds of appeal), the opponent should have immediately reacted to a perceived surprising development in the proceedings putting it in

an allegedly unexpected and disadvantageous situation. This would have allowed the opposition division to deal with the issue and decide on any request the opponent might have considered appropriate to submit.

It appears from the minutes, and it has not been argued otherwise, that the opponent neither contested an unexpected development of the debate during the oral proceedings nor requested any additional measure to be taken by the opposition division.

Reacting to a change of stance taken by the opposition division in the interpretation of a feature, as the opponent did, for the first time in the filing of the statement setting out the grounds of appeal, is contrary to the primary object of the appeal proceedings, which is to review the decision under appeal in a judicial manner, as stated in Article 12(2) RPBA 2020.

Admitting documents D18 and D19 and the related objections would oblige the Board to deal for the first time with documents and objections which were not part of the opposition proceedings or to remit the case to the opposition division, this being contrary to the need for procedural economy (see Article 12(4) RPBA).

The fact that in case T 1180/18 (see letter of the opponent dated 3 March 2022, points 1.10, 1.11 and 1.16) the relevant Board decided not to exercise its discretion under Article 12(4) RPBA 2007 to exclude documents filed with the statement setting out the grounds of appeal does not deprive the current Board of its discretionary power pursuant to Article 12(4) RPBA 2020 to admit amendments.

In view of the above, the Board decides not to exercise its discretion pursuant to Article 12(4) RPBA 2020 to admit documents D18 and D19 and the related objections into appeal proceedings.

2. Sufficiency of disclosure (Article 83 EPC)

The opponent argued that the patent in suit did not provide any teaching for assessing the spoilage of the content of a container by detecting the deflection of the flexible foil while maintaining the cap in place, in particular since the patent proprietor itself indicated in the reply to the opposition that the method of D2 had a low accuracy and detection problems. Since the patent proprietor did not indicate how the detection problems would be overcome by the patent in suit, the opponent argued that the invention according to claim 11 was not sufficiently disclosed (see the statement setting out the grounds of appeal, point 6, in particular page 10, second and fourth paragraph and the letter dated 28 January 2021, point 2, pages 11 to 14).

The argument submitted by the opponent at the oral proceedings before the Board that claim 11 had already been objected to for insufficiency of disclosure in opposition proceedings is not contested by the patent proprietor or the Board.

However, the Board concurs with the patent proprietor (see point 5.1 of the reply to the statement setting out the grounds of appeal) that the objection as formulated in the statement of grounds, based on document D2, was not submitted in opposition proceedings and was therefore not addressed by the opposition division (see point 14.3 of the Reasons).

The above objection of insufficiency of disclosure is thus seen by the Board as an amendment to the case of the opponent presented in opposition proceedings (see Article 12(4) RPBA 2020).

Under Article 12(6), second sentence, RPBA 2020, the Board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

The Board is convinced, in agreement with the patent proprietor, that the objection of insufficiency of disclosure based on D2 should have been submitted in opposition proceedings to allow the patent proprietor to react to it and the opposition division to take it into account when deciding on the case.

The course of action of the opponent is therefore contrary to the primary object of the appeal proceedings, which is to review the decision under appeal in a judicial manner, as stated in Article 12(2) RPBA 2020.

The opponent also failed to submit reasons why this objection could not have been submitted in opposition proceedings, and the Board does not see any such reasons.

Furthermore, it also appears that no circumstances of the appeal case justified the admittance of the new objection of insufficiency of disclosure into the appeal proceedings.

In the absence of any justifying circumstances, the Board does not admit the above objection into the proceedings pursuant to Article 12(6) RPBA 2020.

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

The Board cannot accept the argument of the opponent (see point 5 of the statement setting out the grounds of appeal and point B.1, page 10 of the letter dated 28 January 2021) that the insertion into claim 1 of the feature:

"...wherein a headspace extends over the top of the container opening..."

constitutes an unallowable intermediate generalisation since the corresponding passage of the application as originally filed, page 3, lines 30 to 32, upon which the amendment is based, reads:

"...The closure system is provided with the combination of a cap having a headspace extending over the top of the container opening...as is evident from the drawings..."

thus implying that this feature is disclosed in combination with the other features derivable from the drawings.

The Board cannot share the opinion of the opponent that the reference to the drawings must impose a limitation on the disputed feature (see page 7, second paragraph of the statement setting out the grounds of appeal), but rather concurs with the opposition division (see point 13.2 of the Reasons) that the reference to the drawings is meant to provide examples of

implementations of that feature but not the only possible implementations of it.

Therefore, the fact that claim 1 might cover embodiments not derivable from the drawings (see page 6, last two paragraphs together with the sketch between them and page 8, first paragraph of the statement setting out the grounds of appeal) is thus not relevant since, as outlined above, the drawings are not supposed to present all the possible implementations of the invention.

The Board notes that the reasons which led to the amendment and its interpretation by the patent proprietor and the examining division during prosecution (see page 7, third and fourth paragraphs of the statement setting out the grounds of appeal) have no bearing on the assessment of added subject-matter in the current proceedings.

The Board is thus not convinced by the argument of the opponent that the opposition division was wrong in considering that claim 1 fulfils the requirement of Article 123(2) EPC.

4. Novelty of the subject-matter of claim 1 over D14 (Article 54 EPC)

The Board cannot share the view of the opponent (see the paragraph bridging pages 14 and 15 of the statement setting out the grounds of appeal) that milk sold commercially in containers such as those described in D14 can only be milk for human consumption, which is always free from contamination by harmful organisms and is therefore aseptic in the broadest meaning of the term, meaning that D14 discloses a container the

content of which is an aseptic fluid as according to claim 1.

The Board instead shares the view of the patent proprietor (see point 7.1.2 of the reply to the statement setting out the grounds of appeal) that it is not directly and unambiguously derivable from D14 that the milk it mentions is aseptic.

The Board notes that no property of the milk is explicitly mentioned in D14 (a point which has not been contested by the opponent) and, in agreement with the patent proprietor, concludes that no property of the milk can be directly and unambiguously derived from that document.

The argument of the opponent that, from the features of the container of D14, it has to be directly and unambiguously derived by a skilled person that the milk of D14 is an aseptic fluid, remains unsubstantiated, however broad the expression "aseptic fluid" can be understood to be.

The Board concludes from the above that at least for these reasons the opponent has not convincingly demonstrated the incorrectness of the finding of the opposition division that D14 does not deprive the subject-matter of claim 1 of novelty.

5. Inventive step of the subject-matter of claim 1 in view of D3 in combination with D14 (Article 56 EPC)

The Board concurs with the patent proprietor (see page 32, last paragraph of the reply to the statement setting out the grounds of appeal) that the line of argument of lack of inventive step based on the combination of D3 and D14 was not submitted in

opposition proceedings and was not addressed by the opposition division (see point 17 of the Reasons).

The argument of the opponent is thus an amendment to its case presented in opposition proceedings (see Article 12(4) RPBA 2020).

The Board is convinced, as argued by the patent proprietor, that the opponent should have presented this objection in opposition proceedings to allow the patent proprietor to react to it and the opposition to take it into account in its decision.

In the absence of any justifying circumstances submitted by the opponent, the Board does not admit this objection into the proceedings pursuant to Article 12(6) RPBA 2020.

6. Inventive step of the subject-matter of claim 1 in view of D3 in combination with D6, D7 or D8 (Article 56 EPC)

The Board cannot accept the argument of the opponent presented in writing and discussed at the oral proceedings (see page 27, penultimate paragraph and page 28, first full paragraph of the statement setting out the grounds of appeal) that since claim 1 is directed towards a product per se and does not mention any use of the claimed container for detecting spoilage, the objective technical problem cannot be based on the technical effect derivable from paragraphs [0002] and [0007] of the patent in suit, which is to allow the detection of spoilage using a method which does not require removal of the cap, but rather should be formulated as ensuring that the foil is sealed more easily and in a manner that is sufficiently strong.

The Board notes that in accordance with the established case law, an objective definition of the problem to be solved by the invention should start from the problem defined by the patent in suit where this problem is credibly solved (see the Case Law of the Boards of Appeal (CLB), 10th edn., 2022, I.D.4.2.2, first paragraph).

The Board accepts the argument of the patent proprietor presented in writing and at the oral proceedings (see point 8.5.4 of the reply to the statement setting out the grounds of appeal) that the problem of allowing the detection of spoilage without the removal of the cap, stated in the patent in suit (see paragraph [0002] and [0007] of the patent), is credibly solved by the combination of the features of the claim as it can also be derived from Example 3 discussed in paragraph [0022] and as it is discussed in paragraph [0011] in relation to the technical effect provided by the aluminium layer.

Contrary to the arguments of the opponent at the oral proceedings, the fact that the last sentence in paragraph [0010] of the patent specification indicates that the foil also contributes to the preservation of the fluid does not support the argument of the opponent that the problem should be reformulated based on that technical effect alone.

This passage reads:

"In the present invention, the foil thus has the double usefulness of helping preservation of the fluid content of the container and of acting as a spoilage indicator"

and therefore clearly indicates to a person skilled in the art that the usefulness of helping the preservation of the fluid is an additional and not an alternative technical effect provided by the foil. The effect of spoilage indicator cannot be disregarded as in fact the primary object of the invention is to provide a non-destructive detection of spoiled fluid content (see paragraph [0002], [0007] and [0010] of the patent specification).

Based on the above, the formulation of the problem to be solved proposed by the opponent is considered to be the result of an ex-post facto analysis and thus not convincing.

The argument of the opponent presented in writing and at the oral proceedings (see page 27, penultimate paragraph of the statement setting out the grounds of appeal) that the subject-matter of the claim cannot be considered to be inventive since the claim is directed to a product per se and not to a method, meaning that the problem is not solved across the scope of the claim, is also not convincing. This is because the combination of the features of the claim define a container with a closure system which credibly allows for the non-destructive detection of the spoiled fluid content. The fact that the detection system is not part of the subject-matter of the claim is not relevant since the container still allows non-destructive detection when used with a detection system.

Decision T 2255/10, cited by the opponent, does not lead to a different conclusion since the Board finds that the claimed invention credibly achieves the purpose stated in the opposed patent.

Since the argument of the opponent is based on an incorrect formulation of the objective technical problem, which is the result of an ex-post facto analysis, it cannot be convincing.

The Board has thus no reason to deviate from the finding of the opposition division that the subject-matter of claim 1 is non-obvious in view of the combination of D3 with D6, D7 or D8.

7. Inventive step of the subject-matter of claim 1 in view of D14 in combination with document D17, D21 or D22 or the common general knowledge (Article 56 EPC)

With the statement setting out the grounds of appeal (see page 32, first sentence), the opponent argued against the non-obviousness of the subject-matter of claim 1 starting from D14 in combination with D17, D20 or D21, identifying the problem to be solved as "how is the milk that the container of D14 is intended to contain to be filled into the container".

With the letter dated 3 March 2022 (see page 10, point 2.21), the opponent argued, starting from D14 in combination with the common general knowledge, that the problem to be solved was "the provision of a container containing a fluid that is safe for human consumption, meeting food safety requirements".

In both cases, the opponent considered that document D14 did not state that the content of the container disclosed is an "aseptic fluid" (see the statement setting out the grounds of appeal, page 31, last paragraph; letter dated 3 March 2022, page 10, point 2.19).

The Board concurs with the patent proprietor that also the objection of lack of inventive step of the subject-matter of claim 1 starting from D14 is based on an ex-post facto analysis.

In line with the case law, the Board notes that the closest prior art selected should be prior art which the skilled person would have realistically considered under the circumstances of the claimed invention (see CLB, I.D.3.1, fourth paragraph).

The Board considers that the person skilled in the art faced with the problem of non-destructive detection of spoiled fluid content of a container containing aseptic fluid would have started from a container of this type, i.e. a container the content of which is an aseptic fluid.

The Board finds, as argued by the patent proprietor, that a person skilled in the art would only have started from document D14, which, as assessed in point 4 above, does not contain an aseptic fluid, with hindsight of the invention.

All the objections of lack of inventive step starting from D14 formulated by the opponent are therefore not convincing because they are the result of an ex-post-facto analysis for the choice of the starting point.

The Board is therefore not convinced that the subject-matter of claim 1 of the main request lacks inventive step starting from D14 in combination with document D17, D21 or D22 or the common general knowledge.

8. Conclusions

As apparent from the above, the opponent has not convincingly demonstrated the incorrectness of the appealed decision. The appeal must therefore be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

V. Bevilacqua

Decision electronically authenticated