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**Datasheet for the decision
of 7 March 2007**

Case Number: T 0848/06 - 3.2.07

Application Number: 03028028.3

Publication Number: 1431201

IPC: B65D 25/04

Language of the proceedings: EN

Title of invention:

Single-piece multi-compartment container for food products to be directly consumed

Applicant:

Ferri, Franco

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 54, 111(1), 113(1), 115

Keyword:

"Novelty - yes, after amendment"
"Right to be heard - not respected"
"Substantial procedural violation - yes"
"Reimbursement of appeal fee - no, not equitable"
"Remittal to department of first instance - yes"
"Third party observations - not considered in view of remittal"

Decisions cited:

-

Catchword:

-



Case Number: T 0848/06 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 7 March 2007

Appellant: Ferri, Franco
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Representative: Lorenz, Werner
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 19 January 2006
refusing European application No. 03028028.3
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
C. Holtz

Summary of Facts and Submissions

I. European application No. 03028028.3 was refused by the examining division for lack of novelty.

The appellant (applicant) filed an appeal against this decision.

II. The documents cited in the present decision are the following:

D1: DE-U-202 01 602

D2: US-A-4 691 821

D3: US-A-5 850 919

III. In a first communication dated 4 February 2005 the examining division expressed the view that the subject-matter of claims 1 to 6, 8 and 9 lacked novelty in view of D1 or D2. The examining division further considered that the subject-matter of dependent claim 7 was rendered obvious in view of a combination of D3 with D1.

With its response dated 13 July 2005 the applicant filed an amended set of claims in which the two-part form of the independent claim 1 had been amended. The applicant further filed arguments explaining why it considered that the subject-matter of claim 1 was novel over each of the cited prior art documents.

The examining division subsequently issued a decision refusing the application for lack of novelty of the subject-matter of claim 1 in view of either of D2 **or** **D3**. The subject-matter of claims 2, 3, 5, 6 and 8 was considered to be disclosed in D2 and the subject-matter

of claims 4 and 7 to be within the customary practice of the skilled person.

In respect of D3 the examining division considered that the subject-matter of claim 1 was entirely disclosed therein.

- IV. With the grounds of appeal the appellant filed a main request with a new set of claims wherein claim 1 comprised the combination of claims 1 and 7 as originally filed, and two auxiliary requests. With letter of 19 September 2006 the appellant requested that the appeal be handled with urgency.

In a communication accompanying an invitation to oral proceedings the Board set out its provisional opinion. The appellant subsequently filed a new request and suggested oral proceedings could be dispensed with in the case that the application was in order. It abandoned the previous requests.

In a telephone conversation with the rapporteur this request was discussed and after receipt of further amended claims with fax of 5 December 2006 the Board cancelled the oral proceedings that had been appointed for 8 December 2006 and continued the proceedings in writing.

- V. The appellant further requested that the case be remitted to the department of first instance for further prosecution on the basis of claims 1 to 5 filed by fax of 5 December 2006.

VI. The independent claim of the single request reads as follows:

"1. A multiple-compartment container construction for food products to be directly consumed, said container construction comprising a container body (2) having a substantially cylindrical configuration and being divided into a plurality of sectors (3, 4, 5) which, in a plan view, have the configuration of circular sectors divided by dividing elements formed in a single piece with said container body, thereby each of said sectors (3, 4, 5) is insulated from the adjoining ones and is adapted for holding said food products, characterized in that one of said sectors is provided with a bottom (8) raised with respect to the bottoms of the other sectors, said bottom (8) consisting of a divider element formed in a middle region with respect to the top and the bottom of said container body (2), so that said one sector has a small volume, thereby facilitating the taking out of said food product from said body (2)."

VII. The arguments of the appellant may be summarised as follows:

- (i) Claim 1 is a combination of claims 1, 2 and 7 as originally filed so that it complies with Article 123(2) EPC.
- (ii) The subject-matter of claim 1 is novel over each of D1, D2 and D3 since none of these documents discloses a sector with a raised bottom relative to the other sectors.

VIII. With letter of 14 February 2007 observations were filed by a third party in accordance with Article 115 EPC. The observations included two new documents.

Reasons for the Decision

1. *Article 123(2) EPC*

1.1 Claim 1 is a combination of claims 1, 2 and 7 as originally filed, whereby claim 7 was optionally dependent on claim 2, together with a definition of the raised bottom, i.e. that it is raised with respect to the bottoms of the other sectors. The last-mentioned feature is disclosed in the description and drawings as originally filed, wherein in the paragraph bridging pages 4 and 5 of the former it is explained that there is a sector with a raised bottom formed at a middle region so that the sector has a reduced volume. From this paragraph and the drawings it is clear that the bottom is raised relative to the bottoms of the other sectors.

1.2 The Board is therefore satisfied that the amendments to claim 1 satisfy Article 123(2) EPC.

2. *Novelty*

2.1 The subject-matter of claim 1 is distinguished over the disclosure of D2 in that the container according to D2 does not disclose that one of the sectors has a raised bottom as specified in the characterising portion of present claim 1. In the container disclosed in D2 all the sectors 6, 7 and 8, which are formed by dividing

walls 10, 11 and 12 (cf. column 3, lines 25 and 26), have their bottoms at the same level (see figures 1, 5, 6, 7 and 9).

2.2 The subject-matter of claim 1 is distinguished over the disclosure of D3 in that D3 does not disclose that one of the sectors of the container has a raised bottom, as specified in the characterising portion of claim 1. In D3 the embodiments of figures 1 to 4 have sectors which are formed by dividing the cylindrical container vertically by the provision of horizontal or partially horizontal dividers 16, 32 or 34. In the embodiments of figures 5 to 7 there is a horizontal divider 216 which forms compartments which are separated vertically from each other. Within these vertically separated compartments there may be a vertical divider 217 which forms circular sectors in a plan view. However, none of these sectors has a raised bottom with respect to another sector formed by the same vertical divider.

2.3 Although the examining division in its decision did not cite D1 as taking away the novelty of claim 1 it did consider this to be the case in its communication to the applicant and the Board has also considered this document with respect to the novelty of the subject-matter of claim 1.

The subject-matter of claim 1 is distinguished over the disclosure of D1 in that the container according to D1 does not disclose that the dividing elements are formed in a single piece with the container body. D1 also does not disclose that one of the sectors has a raised bottom as specified in the characterising portion of

claim 1, since all the bottoms of the sectors 3 are at the same level.

2.4 The Board also considers that none of the other documents cited in the European search report takes away the novelty of the subject-matter of claim 1.

2.5 Therefore, the subject-matter of claim 1 is novel in the sense of Article 54 EPC.

3. *Right to be heard*

3.1 The examining division in their first communication stated that the subject-matter of claims 1 to 6, 8 and 9 lacked novelty in view of D1 or D2, but gave no reasons for this finding. D3 was mentioned with respect to inventive step for dependent claim 7. In its decision, however, the examining division cited D2 and D3 for lack of novelty against claim 1 (which had not been essentially amended). The examining division gave detailed reasons in its decision for the lack of novelty. This means that the first time that the applicant received reasons for lack of novelty over D2 was when it received the decision under appeal. The same applies to the argument based on D3.

D2 was mentioned in both the communication of the examining division and in its decision. The container disclosed in D2 has compartments on two levels and the document does not explicitly refer to dividing elements formed as a single piece with the container body, so that it cannot be assumed that the mere statement that the subject-matter of claim 1 lacks novelty in view of the document is a sufficient reasoning.

- 3.2 The right of the applicant under Article 113(1) EPC to be heard before a decision was taken by the examining division has not therefore been respected by the examining division which is to be considered a substantial procedural violation.

Pursuant to Article 10 of the Rules of Procedure of the Boards of Appeal the Board can immediately remit the case to the department of first instance in such a case with reimbursement of the appeal fee. In the present case the Board has considered it appropriate, in view of the appellant's request for acceleration of the proceedings, to deal with the substantive (novelty) and formal (Article 123(2) EPC) aspects of the case itself and to remit (see point 4 below) the case in an acceptable form in these respects for further examination of inventive step, as agreed to by the appellant. Reimbursement of the appeal fee, even if not requested by the appellant, would therefore not have been equitable (Rule 67 EPC).

4. *Remittal to the department of first instance*

The Board has examined claim 1 for compliance with Article 123(2) EPC and its subject-matter for novelty. The Board has not examined the subject-matter of claim 1 for inventive step nor has it examined the dependent claims or the description for compliance with the Convention. The examining division also has not yet examined claim 1 (as amended during appeal proceedings) with regard to inventive step. In accordance with Article 111(1) EPC, the Board therefore considers it

appropriate to remit the case to the department of first instance.

5. *Observations by a third party in accordance with Article 115 EPC*

Since the Board intends to remit the case to the department of first instance it has concluded that it would not be appropriate for the Board to take into account these observations so as not to prejudice their consideration by the said department.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

C. Moser

H. Meinders