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**Datasheet for the decision
of 9 May 2012**

Case Number: T 2294/08 - 3.2.07

Application Number: 02727721.9

Publication Number: 1390270

IPC: B65D 65/46

Language of the proceedings: EN

Title of invention:
Injection moulded containers

Patentee:
Reckitt Benckiser (UK) Limited

Opponent:
Henkel AG & Co. KGaA

Headword:

-

Relevant legal provisions:

EPC Art. 56, 84
RPBA Art. 15(3)

Keyword:

"Lack of inventive step - main and first to fourth auxiliary requests"

"Claims not supported by an adapted description - fifth to seventh auxiliary requests"

Decisions cited:

T 0917/95

Catchword:

-



Case Number: T 2294/08 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 9 May 2012

Appellant I:
(Opponent)

Henkel AG & Co. KGaA
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Appellant II:
(Patent Proprietor)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
10 November 2008 concerning maintenance of
European patent No. 1390270 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
E. Kossonakou

Summary of Facts and Submissions

I. This decision concerns the appeals of appellant I (opponent) and appellant II (patent proprietor) against the interlocutory decision of the opposition division maintaining European patent No. 1 390 270 in amended form.

II. Opposition had been filed against the patent as a whole based on Articles 100(a) (lack of novelty and lack of inventive step).

The opposition division found that the subject-matter of claim 1 according to the main request filed with letter dated 29 February 2008 is not novel and that the patent with the claims according to the first auxiliary request filed during the oral proceedings on 24 October 2008 meets the requirements of the EPC.

III. Oral proceedings before the Board took place on 9 May 2012. Although having been duly summoned, appellant II did not attend, as announced with its letter dated 23 April 2012. According to Rule 115(2) EPC and Article 15(3) RPBA, proceedings were continued without that party.

Appellant I requested that the decision under appeal be set aside and that the European patent No. 1 390 270 be revoked. The objection regarding the admissibility of the appeal of appellant II was withdrawn.

Appellant II requested in its written submissions that the decision under appeal be set aside and the patent be maintained on the basis of the main request or one

of the seven auxiliary requests filed with its grounds of appeal submitted with letter dated 12 March 2009.

- IV. At the oral proceedings (which appellant II did not attend as announced with letter dated 23 April 2012) appellant I contested *inter alia* the presence of an inventive step (Article 56 EPC) for the subject-matter of claim 1 according to the main as well as any of the first to fourth auxiliary requests vis-à-vis the combination of the teachings of documents D2 (EP-A1-1 045 022) and D15 ("Kunststoff-Verarbeitung im Gespräch, 1 Spritzguss", 2. verbesserte Auflage, BASF, 1970).

As to the amended claims 1 according to the fifth to seventh auxiliary requests, appellant I pointed out that these requests could not be accepted for lack of adequate support by the description, which has not been adapted correspondingly. Therefore, the requirements of Article 84, second sentence EPC were not met.

- V. Independent claims 1 according to the main and first to seventh auxiliary requests read as follows:

Main request

"An array of rigid, water-soluble washing containers made entirely or in part of an injection moulded water-soluble polymer, which polymer when dissolved in water is active in detergency wherein in each container there is present a fabric care, surface care or dishwashing composition, provided that the polymer is not poly(vinyl alcohol); wherein the containers are joined

together but are readily separable from each other for use".

First auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide) poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, provided that the second polymer is not poly(vinyl alcohol); wherein in each container there is present a fabric care, surface care or dishwashing composition; wherein the containers are joined together but are readily separable from each other for use".

Second auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester thereof, or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; which containers are joined together but are readily separable from each other for use".

Third auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester thereof, or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; wherein in each container there is present a fabric care, surface care or dishwashing composition and has bound to the inside or outside of the container or encased within the container said second polymer; which containers are joined together but are readily separable from each other for use".

Fourth auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester

thereof, or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; wherein in each container there is present a fabric care, surface care or dishwashing composition and has encased within the container said second polymer; which containers are joined together but are readily separable from each other for use".

Fifth auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester thereof, or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; wherein in each container there is present a fabric care, surface care or dishwashing composition and has encased within the container said second; which containers are joined together but are readily separable from each other for use; wherein each container is made from a water-soluble receptacle part and is sealed by a water-soluble closure part; wherein the receptacle part has side walls which terminate at their upper end in an outward flange, to which the closure part is sealingly secured; the polymer active in detergency being present in the wash in sufficient quantity to produce the required effect".

Sixth auxiliary request

"An array of rigid, water-soluble washing containers made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester thereof or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; wherein in each container there is present a fabric care, surface care or dishwashing composition and has encased within the container said second; which containers are joined together but are readily separable from each other for use; wherein each container is made from a water-soluble receptacle part and is sealed by a water-soluble closure part; wherein the receptacle part has side walls which terminate at their upper end in an outward flange, to which the closure part is sealingly secured; wherein each container comprises a tablet formulated for delayed and/or sustained release of a material; wherein each receptacle part defines two or more compartments and at least one compartment is made entirely or in part of said water-soluble polymer which when dissolved in water is active in detergency; the polymer active in detergency being present in the wash in sufficient quantity to produce the required effect".

Seventh auxiliary request

"A method of ware washing comprising use of a rigid, water-soluble washing container made of at least two water-soluble injection moulded polymers, a first polymer selected from poly(vinyl alcohol), a cellulose derivative, and poly(glycolide), poly(glycolic acid), poly(lactide), poly(lactic acid) or a copolymer of any thereof; and a second water-soluble polymer which polymer when dissolved in water is active in detergency, wherein the second polymer is selected from at least one of the following: poly(vinylpyrrolidone), poly(acrylic acid) or an ester thereof, or poly(maleic acid) or an ester thereof, or a copolymer of any thereof; in which container there is present a fabric care, surface care or dishwashing composition and has encased within the container said second polymer; wherein the container is joined together with other containers in an array but is but [sic] readily separable therefrom for use; wherein the container is made from a water-soluble receptacle part and is sealed by a water-soluble closure part; wherein the receptacle part has side walls which terminate at their upper end in an outward flange, to which the closure part is sealingly secured; the polymer active in detergency being present in the wash in sufficient quantity to produce the required effect".

VI. Appellant I argued in writing and during the oral proceedings essentially as follows:

Claim 1 according to the main request and first to fourth auxiliary requests - Inventive step, Article 56 EPC

The subject-matter of claim 1 of the main request and of the first to fourth auxiliary requests differs from the washing container(s) known from D2 in that such rigid, water soluble containers are joined together so as to form an array, but are readily separable from each other for use.

The effect achieved by the above-mentioned differentiating features is that a high number of containers can be produced by the injection moulding step of D2 and thus additional post-moulding processing steps are avoided.

Starting from this technical effect the objective technical problem to be solved is then how to economically achieve a high production rate for the washing containers known from D2, avoiding at the same time additional post-moulding processing steps.

The person skilled in the art starting from the injection moulded container(s) known from D2 and seeking a solution to the above-mentioned problem, would take the production process via injection moulding of D2 as the basis and would look for solutions in the more general field of injection moulding.

D15 belongs to said general field of injection moulding and discloses the teaching that in injection moulding processes, by using multiple tools and connecting channels, two or more workpieces can be produced simultaneously, see page 117, first paragraph and page 120, last illustration. D15 reveals further multiple

tools capable for producing fillable containers (tablet tubes), see page 119, penultimate paragraph. The lower figure of page 124 as well as of page 129 of D15 showing arrays of rigid moulded cups joined together but being readily separable from each other for use are further evidence that the production of such arrays is a production process well known to the person skilled in the field, so that it does not require an inventive activity.

The combination of the teachings of D2 and D15 renders therefore the subject-matter of claims 1 of the main request and of the first to fourth auxiliary requests not inventive.

Fifth to seventh auxiliary requests - Lack of support of the claims by the description

Appellant II's fifth to seventh auxiliary requests to maintain the patent in amended form are based on the corresponding sets of amended claims filed with its statement of grounds of appeal. No correspondingly adapted description has been filed during the appeal proceedings. The only description in the file concerning any of appellant II's auxiliary requests is the one directed to the present second auxiliary request, which is the version upheld by the opposition division as the then first auxiliary request.

As the array of all claims 1 of these auxiliary requests has been extensively modified over the array of claim 1 of the second auxiliary request, the above-mentioned description being adapted solely to the set of claims according to the second auxiliary request is

obviously not compatible with these claims. Said description is thus not suitable to support the claims of the fifth to seventh auxiliary requests as required by Article 84, second sentence EPC.

VII. Appellant II argued in writing essentially as follows:

The subject-matter of claim 1 of the main request and first to second auxiliary requests differs from the washing container(s) known from D2 in that the rigid, water soluble containers are joined together so as to form an array, but are readily separable from each other for use.

The effect achieved by this feature is that a high number of containers can be produced by a single moulding step.

Starting from this technical effect the objective technical problem to be solved may be seen as how to economically achieve a high production rate for the containers known from D2.

None of the documents cited during the opposition proceedings hints that rigid washing containers can be joined together so as to form an array in which they are readily separable from each other for use.

D11 (WO-A-01/10626) deals with the formation of solid detergent spheres, and does not disclose the formation of containers at all. The skilled person would not even take into consideration the disclosure of D11 because this document does not relate to packaging technology at all. Further it does not provide any hint towards

using the technique of D11 for providing an array of washing containers. But even if the skilled person would apply the teaching of D11 he would not arrive at the subject-matter of claim 1.

The third and fourth auxiliary requests are filed to address a possible Article 123(2) EPC objection.

The fifth and sixth auxiliary requests specify further features of the array.

The seventh auxiliary request is the only request directed to a method of ware washing.

The description will be adapted to the amended claims at the end of the oral proceedings, depending on the outcome.

VIII. The Board in its annex to the summons to oral proceedings had also pointed out that inventive step would need to be discussed with respect to D2 and D15, see point 3.1 of the annex.

Reasons for the decision

1. *Claim 1 according to the main request and first to fourth auxiliary requests - Inventive step, Article 56 EPC*

1.1 *Main request*

1.1.1 In the opposition proceedings the opponent relied on the combination of teachings of D2 and D11, with the

result that the decision under appeal examined this argumentation, finding that the skilled person would not even take D11 into consideration as it dealt with the formation of solid detergents spheres, not of containers, and therefore was not related to packaging technology. Further it did not provide a hint towards using the technique of D11 for providing an array of washing containers. Finally, even if the skilled person would apply the teaching of D11 he would not arrive at the subject-matter of claim 1.

1.1.2 The above reasoning is now challenged by appellant I on the basis of D2 and a different document, D15. The Board concurs with appellant I's reasoning as follows:

1.1.3 The containers of D2 are produced via injection moulding. Increasing the rate of such a production method, the problem to be solved, necessarily leads the skilled person to look for solutions in the general field of injection moulding.

D15, which is a handbook from this field, shows solutions to this problem, see pages 117, 119, 120, 124 and 129 as indicated by appellant I. The reference on page 119 in particular relates to tablet tubes, the figures of pages 124 and 129 show hollow caps and lids which according to the text of page 127 are readily separable from the part connecting them. D15 therefore not only relates to injection moulding, but also to the use of such a process in the production of a higher number of entities, more in particular small packages of plastics material.

Its teaching will therefore be taken into consideration by the skilled person starting from D2.

1.1.4 There is nothing in D15 or in D2 preventing the skilled person from applying its teaching in the injection moulding process of D2. In doing so the skilled person will arrive at an array as claimed in claim 1 of the main request, which therefore lacks inventive step.

1.1.5 The above-mentioned appellant's I arguments in respect of D2 and D15 have not been challenged by appellant II.

1.2 *Auxiliary requests 1 to 4*

1.2.1 Claim 1 of the first auxiliary request differs from claim 1 of the main request only in that the containers are made of at least two water-soluble injection moulded polymers, the first polymer being e.g. poly(vinyl alcohol), the second polymer being the water-soluble polymer already claimed. The differing feature, however, is also present in the container of D2, see claim 9 and paragraph [0026], and cannot therefore lead to inventive step.

1.2.2 Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request only in that the second polymer is e.g. an ester of poly(acrylic acid). This differing feature, however, is also present in the container of D2, see claim 9 and paragraph [0026], and cannot therefore lead to inventive step.

1.2.3 Claim 1 of the third and fourth auxiliary requests differs from claim 1 of the second auxiliary request only in that in each container a fabric care is present and in that the second polymer is encased within each container. These differing features, however, are also known for the container of D2, see paragraphs [0001],

[0002], [0014] and [0026], and cannot therefore lead to inventive step.

1.3 Thus, the subject-matter of claim 1 according to the main request and to the first to fourth auxiliary requests does not involve an inventive step and thus, it does not meet the requirements of Article 56 EPC.

2. *Fifth to seventh auxiliary requests - Lack of support of the claims by the description*

2.1 Appellant II's fifth to seventh auxiliary requests that the patent be maintained in amended form are based on the corresponding sets of amended claims filed with its statement of grounds of appeal. No correspondingly adapted description has been filed during the appeal proceedings. The only description in the file concerning any of appellant II's auxiliary requests is the one directed to the present second auxiliary request, said last being the version upheld by the opposition division as the then first auxiliary request.

2.2 Claim 1 of the **fifth** auxiliary request differs from claim 1 of the **second** auxiliary request *inter alia* by the following features:

- each container is made from a water-soluble receptacle part and is sealed by a water-soluble closure part;
- the receptacle part has side walls which terminate at their upper end in an outward flange, to which the closure part is sealingly secured;
- the polymer active in detergency being present in the wash in sufficient quantity to produce the required

effect.

Claim 1 of the **sixth** auxiliary request differs from claim 1 of the **fifth** auxiliary request *inter alia* by the following additional features:

- each container comprises a tablet formulated for delayed and/or sustained release of a material;
- each receptacle part defines two or more compartments and at least one compartment is made entirely or in part of said water-soluble polymer which when dissolved in water is active in detergency.

Claim 1 of the **seventh** auxiliary request differs from claim 1 of the **second** auxiliary request in that it is directed to a method of ware washing by using the array of claim 1 of the **fifth** auxiliary request.

2.3 As the array of all claims 1 of these auxiliary requests has been extensively modified over the array of claim 1 of the second auxiliary request, the above-mentioned description being adapted solely to the set of claims according to the second auxiliary request is obviously not compatible with these claims. Said description is thus not suitable to support the claims of the fifth to seventh auxiliary requests as required by Article 84, second sentence EPC. Already for this reason alone the patent cannot be maintained according to the appellants II's fifth to seventh auxiliary requests.

2.4 In the statement of grounds of appeal appellant II stated:

"We will of course deal with the matter of amending the description in the usual way at the end Oral

Proceedings (*sic*), dependent on the outcome".

2.5 Since appellant II decided not to be represented at the oral proceedings, there was no such corresponding amendment of the description to the claims of these requests.

3. The Board, in agreement with decision T 917/95, point 5.2(ii) of the reasons (not published in OJ EPO), considers that a patent proprietor who files new claims but no description adapted to these claims before oral proceedings, and who is not represented at the oral proceedings, cannot rely on the Board to postpone its final decision at the end of the oral proceedings, in order to offer the patent proprietor the possibility to adapt the description to the claims.

Article 15(3) RPBA states clearly that the Board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written submissions. The latter do not contain anything that can be considered as a description appropriately adapted to these amended claims.

Order

For these reasons it is decided that:

1. The appeal of the patent proprietor is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:

D. Hampe

H. Meinders