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**Datasheet for the decision
of 19 March 2013**

Case Number: T 2179/09 - 3.2.07

Application Number: 03028028.3

Publication Number: 1431201

IPC: B65D 25/04, B65D 5/48,
B65D 77/20

Language of the proceedings: EN

Title of invention:
Single-piece multi-compartment container for food products to
be directly consumed

Patent Proprietor:
Ferri, Franco

Opponent:
FERRERO S.p.A.

Headword:
-

Relevant legal provisions:
EPC Art. 54(3), 104(1)
RPBA Art. 16

Keyword:
"Novelty (main request and 1st to 3rd auxiliary requests): no"
"Amendments (4th auxiliary request): not admissible"
"Non-attendance at oral proceedings without notification:
apportionment of costs"

Decisions cited:
T 0053/06

Catchword:
-



Case Number: T 2179/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 19 March 2013

Appellant: Ferri, Franco
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Respondent: FERRERO S.p.A.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 September 2009
revoking European patent No. 1431201 pursuant
to Article 101(3) (b) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 431 201.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC on the grounds of lack of novelty (Article 54 EPC) and of lack of inventive step (Article 56 EPC), based on Article 100(b) EPC on the ground of lack of sufficient disclosure and also based on Article 100(c) EPC on the ground of unallowable amendments.
- III. The Opposition Division found that the subject-matter of claim 1 as granted lacks novelty over D1 (EP-A-1 424 289, state of the art according to Article 54(3) EPC).
- IV. In the statement of grounds of appeal, the appellant requested to set aside the decision of the opposition division and to maintain the patent as granted (main request) or to maintain the patent in amended form according to one of the 1st to 4th auxiliary requests as attached to the statement of grounds of appeal. Oral proceedings were requested as an auxiliary measure.
- V. With its facsimile of 10 June 2010 the respondent (opponent) requested the dismissal of the appeal. Oral proceedings were auxiliarily requested.
- VI. The independent claims 1 according to the main request and the 1st to 4th auxiliary requests read as follows (amendments over claim 1 as granted are underlined):

Main request

"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)".

Auxiliary request 1

"A multiple-compartment container construction for food products to be directly consumed, said container construction comprising a single-piece 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)".

Auxiliary request 2

"A multiple-compartment container construction for food products to be directly consumed, said container construction comprising a single-piece container body (2) having a substantially cylindrical configuration and being divided into a plurality of sectors (3,4,5), each having a specific own bottom, forming a single piece with the same container body and 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)".

Auxiliary request 3

"A multiple-compartment container construction for food products to be directly consumed, said container construction comprising a single-piece container body (2) having a substantially cylindrical configuration and being divided into a plurality of sectors (3,4,5), each having a specific own bottom, said bottoms being formed in a single piece to the corresponding sector, said latter being moulded in a single piece with the body (2) of the container (1) and 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)".

Auxiliary request 4

"A multiple-compartment container construction for food products to be directly consumed, said container construction comprising a single-piece container body (2) having a substantially cylindrical configuration and being divided into a plurality of liquid tight insulated sectors (3,4,5), each having a specific own bottom, said bottoms being formed in a single piece to the corresponding sector, said latter being moulded in

a single piece with the body (2) of the container (1) and 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. With its communication dated 30 October 2012 the Board summoned the parties to oral proceedings on 19 March 2013. The annex to said summons reflected the Board's reasoned provisional opinion that the subject-matter of claim 1 according to the main request and according to each of the 1st to 3rd auxiliary requests lacks novelty over D1 and that claim 1 according to the 4th auxiliary request does not meet the requirements of Article 123(2) EPC. The Board also stated that "[it] appears therefore that the appeal has to be dismissed".

VIII. Until the date of the oral proceedings the appellant remained silent.

The oral proceedings before the Board were held as scheduled on 19 March 2013 and were attended by the respondent. The duly summoned appellant, however, did not show up. The commencement of the oral proceedings was deferred to allow the Board's registrar to

telephone the representative's firm to inquire whether anyone was going to attend. The Board's registrar received only then the information from the appellant's representative that neither the appellant nor its representative would be attending the oral proceedings; the appellant was no longer interested in the case and in the representative's office it had been forgotten to notify the Board and the other party well in advance of the oral proceedings of the appellant's intention not to be represented at the oral proceedings.

The oral proceedings were continued without the appellant according to Rule 115(2) EPC and Article 15(3) RPBA.

- IX. The appellant requested in the written proceedings that the decision under appeal be set aside and the patent be maintained in accordance with the main request (patent as granted) or with one of the 1st to 4th auxiliary requests filed with the statement setting out the grounds of appeal dated 19 January 2010.

The respondent requested that the appeal be dismissed and that the costs which have been unnecessarily incurred due to the appellant's unannounced absence from the oral proceedings, such as travel and accommodation costs, as well as preparation and presence time expenditure, be apportioned.

X. The appellant argued essentially as follows:

*Claim 1 according to the main request - Novelty,
Article 54(3) EPC*

The term "insulated sectors" in claim 1 defines sectors which are sealed against the leakage of liquid food products from one sector to another, avoiding thereby the need of packaging each single food product in a specific own single cup or package, see paragraphs 8, 13, 16 and 21 of the patent. In the present case the patent is its own dictionary and the claimed term "insulated sectors" has to be read as having the same meaning as "liquid tight insulated sectors". Such "liquid tight" insulated sectors are not present in the container known from D1, since the bottom 9 is separate from the walls dividing the container into sectors and is not integral with the side walls of the compartments.

*Claim 1 according to the 1st auxiliary request - Novelty,
Article 54(3) EPC*

In D1 the lid 9 is attached to the body 2 of the container exclusively through said hinge 10 and, consequently, said lid 9 is not in a single piece with said body, as claimed.

*Claim 1 according to the 2nd auxiliary request - Novelty,
Article 54(3) EPC*

The container body according to the 2nd auxiliary request has a plurality of sectors, each having a specific own bottom, forming a single piece with the same container body, as claimed.

These features are not present in D1, since at least the sectors 5 and 7 have a bottom completely separate therefrom.

Claim 1 according to the 3rd auxiliary request - Novelty, Article 54(3) EPC

The container body according to the 3rd auxiliary request has a plurality of sectors, each having a specific own bottom, said bottoms being formed in a single piece to the corresponding sector, said latter being moulded in a single piece with the body of the container.

These features are not present in D1, since at least the sectors 5 and 7 have a bottom completely separate therefrom.

Claim 1 according to the 4th auxiliary request - Amendments, Article 123(2) EPC

According to the disclosure of the originally filed application the food products including the beverage can be directly filled in the corresponding sectors without the need of additional cups or bags. This means that the sectors have to be "liquid tight" insulated sectors. Hence, the introduction into claim 1 according to the 4th auxiliary request of the expression "liquid tight" in connection with the insulated sectors does not violate the requirements of Article 123(2) EPC.

XI. The respondent argued essentially as follows:

*Claim 1 according to the main request - Novelty,
Article 54(3) EPC*

There is no passage in the originally filed application supporting the appellant's restrictive interpretation of the term "insulated" as "liquid tight". Moreover, in the description, as well as in claim 1, there is no requirement that the sector(s) should be adapted to directly contain a liquid without leaking, as also argued by the appellant.

From figure 3 of D1 it is apparent that receptacles 6 and 7 are not in the form of open channels, but are receptacles having confining side walls and a bottom wall, whereby any goods placed in receptacle 6 or in receptacle 7 cannot mix with goods contained in the other receptacles. The same conclusion applies to receptacle 5, which - in the configuration where the lid 9 is closed - is adapted to hold goods and/or food products and is "insulated" from the other receptacles in the sense that any goods contained therein cannot mix with the goods contained in the other receptacles 6 and 7.

It is noted that the wording of claim 1 of the opposed patent does not require that any or all of the sectors 3, 4 and 5 contain a liquid in a liquid tight manner, but it simply requires that said sectors be insulated from the adjoining ones and be adapted for holding a food product.

Furthermore, according to paragraph [0013] and claim 2 of D1 the lid 9 is connected to the body 2 by an integral hinge, whereby the lid and the cylindrical wall 2 form a single piece container body.

Thus, the subject-matter of claim 1 according to the main request is not novel over D1.

Claim 1 according to the 1st auxiliary request - Novelty, Article 54(3) EPC

The amendment in claim 1 is not suitable to change the conclusion about lack of novelty of claim 1 according to the main request.

Claim 1 according to the 2nd auxiliary request - Novelty, Article 54(3) EPC

In the container of D1 each sector has its own specific bottom forming a single piece with the container body; namely:

- the bottom wall of receptacle 6 as depicted by the two lower dashed lines indicating the change of curvature of said bottom wall;
- the bottom wall of said receptacle 7 as depicted by the two lower dashed lines indicating the change of curvature of said bottom wall; and
- the bottom wall of receptacle 5 as constituted by the lid 9 in the closed configuration, said lid 9 being formed in a single piece by moulding with the body 2, see paragraph [0013] and claim 2 of D1.

Thus, the subject-matter of claim 1 according to the 2nd auxiliary request is not novel over D1.

Claim 1 according to the 3rd auxiliary request - Novelty, Article 54(3) EPC

The reasons mentioned above concerning lack of novelty of the subject-matter of claim 1 according to the 2nd auxiliary request are also valid for the subject-matter of claim 1 according to the 3rd auxiliary request.

Claim 1 according to the 4th auxiliary request - Amendments, Article 123(2) EPC

The introduction into claim 1 according to the 4th auxiliary request of the expression "liquid tight" in connection with insulated sectors, said feature having no basis in the originally filed application, violates the requirements of Article 123(2) EPC.

Apportionment of costs

The oral proceedings were clearly unnecessary in view of the Board's negative opinion expressed in its annex to the summons and the absence of the appellant. If the latter had made it clear that it would not be attending the oral proceedings, the respondent would not have needed to prepare for and attend these oral proceedings.

Reasons for the Decision

1. *Claim 1 according to the main request - Novelty, Article 54(3) EPC*
- 1.1 The Board, in accordance with the impugned decision, considers that D1 discloses a multiple-compartment container construction (see figure 1) for food products to be directly consumed (see paragraph [0001], lines 1-3), said container construction comprising a container body 2 having a substantially cylindrical configuration and being divided into a plurality of sectors 5, 6, 7 which, in a plan view (see figure 4), have the configuration of circular sectors divided by dividing elements 3, 4 formed in a single piece with said container body (see paragraph [0009]). Thereby each of said sectors is insulated from the adjoining ones and is adapted for holding said food products, whereby one of said sectors 6 is provided with a bottom (see figure 3) raised with respect to the bottoms of the other sectors, said bottom consisting of a divider element formed in a middle region with respect to the top and the bottom of said container body (see figures 2 and 3, paragraph [0010], second sentence), so that said one sector has a small volume, thereby facilitating the taking out of said food product from said body.
- 1.2 Thus, D1 discloses a multiple-compartment container construction having all the features claimed in claim 1 according to the main request.
- 1.3 The appellant argues that the feature of claim 1 that "each of said sectors is insulated from the adjoining ones" means that the sectors are "liquid tight

insulated" from each other.

1.4 The Board notes that in the paragraphs referred to by the appellant it is stated that the container construction is adapted "to allow said food products to be easily consumed, by directly using the container", see paragraph 8, that each sector "is insulated from the adjoining sectors and is adapted to hold a food product and/or other products and a beverage", see paragraph 13, the sectors "have been specifically designed for respectively holding breadsticks, chocolate cream and tea", see paragraph 16, and "the size of the top edge portion of the third sector would allow to also take the beverage directly therefrom, by possibly holding the breadsticks by the fingers of the same hand supporting the container, to prevent said breadsticks from disengaging from their seats, as the container is slanted to drink", see paragraph 21. In the above-mentioned paragraphs there is neither a reference to the need of avoiding packaging each single food product in a specific own single cup or package nor to liquid tight insulated sectors.

1.5 Thus the Board cannot find any basis in the patent in suit for the restrictive interpretation of the term "insulated" in claim 1 as argued by the appellant, see also point 3 of the Board's annex to the summons.

1.6 Since according to paragraph [0013] and claim 2 of D1 the bottom 9 is formed in a single piece by moulding with the body 2, the appellant's argument that D1 does not disclose a container body having a substantially cylindrical configuration according to claim 1, because the bottom 9 is separate and not in a single piece with

- respect to the lateral wall 2 of the known container, also cannot hold.
- 1.7 Also the appellant's further argument that receptacles 5, 6 and 7 in D1 are in fact divided by dividing elements which are not in a single piece with the bottom 9 of the container, since it can be opened with respect to said receptacles, cannot be followed by the Board for the same reasons. What the appellant means is that the side walls of the receptacles are not integral with the bottom 9 at the location where they come together. However, that is not a feature present in claim 1.
- 1.8 For the above-mentioned reasons the subject-matter of claim 1 according of the main request lacks novelty over D1.
2. *Claim 1 according to the 1st auxiliary request - Novelty, Article 54(3) EPC*
- 2.1 Claim 1 according to the 1st auxiliary request differs from claim 1 according to the main request in that the term "container body" has been replaced by the term "single-piece container body".
- 2.2 As stated under point 1.6 above according to paragraph [0013] and claim 2 of D1 the bottom 9 is formed in a single piece by moulding together with the container body 2. Thus, this amendment to claim 1 is not suitable to distinguish the container of this claim 1 from the container in D1.

2.3 For the above-mentioned reasons the subject-matter of claim 1 according of the 1st auxiliary request also lacks novelty over D1, see also point 4 of the Board's annex to the summons.

3. *Claim 1 according to the 2nd auxiliary request - Novelty, Article 54(3) EPC*

3.1 Claim 1 according to the 2nd auxiliary request differs from claim 1 according to the 1st auxiliary request in that it has the additional features "each (sector) having a specific own bottom, forming a single piece with the same container body".

3.2 The Board considers, in accordance with the respondent's arguments, see point XI above, that it is derivable from figure 3 of D1 that each one of the sectors 5, 6 and 7 of the container has its own specific bottom forming a single piece with the container body; namely:

- the bottom wall of receptacle 6 as depicted by the two lower dashed lines indicating the change of curvature of said bottom wall in its connection with the side wall;
- the bottom wall of receptacle 7 as depicted by the two lower dashed lines indicating the change of curvature of said bottom wall in its connection with the side wall; and
- the bottom wall of receptacle 5 as constituted by the bottom 9 in the closed configuration, said bottom 9 being formed in a single piece by moulding with the body 2, see paragraph [0013] and claim 2 of D1.

3.3 Therefore, the subject-matter of claim 1 according to the 2nd auxiliary request lacks also novelty over D1, see also point 6 of the Board's annex to the summons.

4. *Claim 1 according to the 3rd auxiliary request - Novelty, Article 54(3) EPC*

4.1 Claim 1 according to the 3rd auxiliary request differs from claim 1 according to the 2nd auxiliary request in that the feature "each (sector) having a specific own bottom, forming a single piece with the same container body" has been replaced by the feature "each (sector) having a specific own bottom, said bottoms being formed in a single piece to the corresponding sector, said latter being moulded in a single piece with the body of the container".

4.2 The argument presented under point 3.2 above is, however, also applicable for the amended feature of claim 1 according to the 3rd auxiliary request.

4.3 Therefore, the subject-matter of claim 1 according to the 3rd auxiliary request lacks novelty over D1, see also point 8 of the Board's annex to the summons.

5. *Claim 1 according to the 4th auxiliary request - Amendments, Article 123(2) EPC*

5.1 Claim 1 according to the 4th auxiliary request differs from claim 1 according to the 3rd auxiliary request in that the expression "liquid tight" has now been introduced in connection with the insulated sectors.

5.2 However, as already stated under point 1.5 above the Board cannot find any basis in the patent in suit supporting the appellant's restrictive interpretation of the term "insulated" in claim 1 such that the sectors are "liquid tight" with respect to each other, see also point 9 of the Board's annex to the summons. The patent in suit is in this respect no different from the application as originally filed.

5.3 Therefore, claim 1 according of the 4th auxiliary request does not meet the requirements of Article 123(2) EPC.

6. *Respondent's request for different apportionment of costs*

6.1 As regards costs, the respondent made a request for a different apportionment of costs during the oral proceedings, thus complying with Article 16(1) RPBA. That article provides, so far as relevant to the present case:

"(1) Subject to Article 104, paragraph 1, EPC, the Board may on request order a party to pay some or all of another party's costs which shall, without limiting the Board's discretion, include those incurred by any ...

(c) acts or omissions prejudicing the timely and efficient conduct of oral proceedings;..."

6.2 In case T 53/06, not published in OJ EPO, the deciding Board stated:

"Article 104(1) EPC, referred to in Article 16(1) RPBA, contains the general power of the Opposition division to order, for reasons of equity, a different apportionment of costs from the norm in which each party bears its own costs. It is well-established by case-law that, regardless of which party requested oral proceedings and of whether a communication has been sent or not, every party summoned to oral proceedings has an equitable obligation to inform the board as soon as it knows it will not attend the oral proceedings and that, if a party fails both to respond to a communication and to attend oral proceedings, costs may be awarded against it (see "Case Law of the Boards of Appeal of the European Patent Office", 5th edition 2006, pages 585 to 587)"(now 6th edition 2010,VII.C.7.2.2(a)).

"In the present case the appellant requested oral proceedings "in case the board considers not to set the decision aside". As soon as it received the Board's summons to oral proceedings and communication of ..., the appellant knew not only that oral proceedings would take place but also that the condition it had itself placed on its own request for oral proceedings had been fulfilled, since the communication clearly indicated that the Board's provisional opinion was that the decision under appeal would not be set aside. However, the appellant neither replied to the communication nor indicated at all, let alone as soon as it knew, that it would not attend oral proceedings. Since the respondent had, in the absence of any additional submissions from the appellant, nothing to add to its own case in its reply to the grounds of appeal, the oral proceedings proved to be unnecessary."

"Accordingly it is clear that, as a result of the appellant's conduct, the oral proceedings were not only unnecessary but also an inefficient use of the time and effort of both the respondent and the Board. In those circumstances, an apportionment of costs in favour of the respondent is appropriate under Article 16(1)(c) RPBA. Since it is also clear that the appellant could have made its position known well in advance of the date appointed for the oral proceedings, and thereby not only spared the respondent and the Board unnecessary work but also allowed the date for the oral proceedings to be used for another pending appeal, such an apportionment of costs is also appropriate under Article 16(1)(e) RPBA."

6.3 The present Board can only fully concur with this reasoning in T 53/06 which is equally applicable to the present case.

6.4 In the Board's judgment, therefore, for reasons of equity and in accordance with Article 104(1) EPC the appellant shall pay the respondent the costs for travel, accommodation for one night and five hours preparation and attendance time for the present oral proceedings.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The appellant shall bear the following costs incurred by the respondent for attending the oral proceedings on 19 March 2013:
 - travel costs;
 - accommodation costs for one night;
 - five hours preparation and attendance time.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders