Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 25 November 2015

Case Number: T 0112/13 - 3.2.07

Application Number: 04104029.6

Publication Number: 1627819

IPC: B65D5/74

Language of the proceedings: EN

Title of invention:
Opening device for a sealed package containing a pourable food product

Patent Proprietor:
Tetra Laval Holdings & Finance S.A.

Opponent:
SIG Technology AG

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 13(1), 13(3)

Keyword:
Inventive step - (yes)
Late-filed argument - admitted (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0112/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 25 November 2015

Appellant: (Opponent)	SIG Technology AG Laufengasse 18 8212 Neuhausen am Rheinfall (CH)
Representative:	Cohausz & Florack Patent- & Rechtsanwälte Partnerschaftsgesellschaft mbB Bleichstraße 14 40211 Düsseldorf (DE)
Respondent: (Patent Proprietor)	Tetra Laval Holdings & Finance S.A. Avenue Général-Guisan 70 1009 Pully (CH)
Representative:	Bergadano, Mirko Studio Torta S.p.A. Via Viotti, 9 10121 Torino (IT)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 November 2012 concerning maintenance of the European Patent No. 1627819 in amended form.**

Composition of the Board:

Chairman K. Poalas
Members: V. Bevilacqua
R. Cramer

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the interlocutory decision of the opposition division maintaining European patent No. 1 627 819 in amended form.

II. Notice of opposition had been filed against the patent as a whole on the basis of Article 100(a) EPC (lack of novelty and lack of inventive step) and of Article 100(b) EPC (insufficient disclosure).

III. The opposition division found that the subject-matter of claims 1 to 6 filed by fax on 19 September 2012 met the requirements of the EPC.

IV. Oral proceedings took place before the board on 25 November 2015.

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

b) The respondent (patent proprietor) requested that the appeal be dismissed and the patent maintained as upheld by the opposition division (main request) or alternatively that the decision under appeal be set aside and the patent maintained in amended form on the basis of one of the sets of claims of the first or the second auxiliary request filed with the reply to the statement of grounds of appeal.

V. The following documents are referred to in the present decision:

D2: WO 99/42375 A,
D4: EP 1 352 840 A.

VI. Independent claims 1 and 6 according to the main request, i.e. as upheld by the opposition division read as follows:

"1. An opening device (3) for sealed package (1) containing a pourable food product and having at least one removable portion (7), said opening device (3) comprising:
- a frame (10) defining a pour opening (11), having a fastening portion (17) fixable to said package (1) about said removable portion (7), and comprising an externally threaded annular first portion (16);
- a cap (12) fitted to said frame (10) to close said pour opening (11) through a closing portion (19), removable from the pour opening (11) to permit pour-out of the food product, and comprising an integrally threaded annular second portion (20) which screws onto said first portion (16); and
- an anchoring portion (13), which engages said pour opening (11), is fixable directly to said removable portion (7), and is removable from the pour opening (11) to at least partly detach said removable portion (7) from said package (1);
said anchoring portion (13) being connected integrally to said frame (10) by means of breakable connecting means (23), and being connected to said cap (12) so as to move together with the cap when removing the cap (129 from said pour opening (11);
characterised in that said cap (12) comprises at least two tabs (21) projecting through said pour opening (11)

from said closing portion (19) and connected at their free ends (22) to said anchoring portion (13), so that, in use, said cap (12) rotates integrally with said anchoring portion (13) to break off said connecting bridges (23) and remains attached to the portion of said removable portion (7) joined to said anchoring portion (13)".

"6. A method of forming the opening device (3) as claimed in any one of Claims 1 to 4, and of applying said opening device (3) to a sheet packaging material (2) having at least one removable portion (7), said method comprising the steps of:
- forming a single body defined by said frame (10) and said anchoring portion (13) joined to each other by breakable connecting means (23);
- forming said cap (12);
- fitting said cap (12) to said frame (10) to close said pour opening (11), by fitting the cap to said anchoring portion (13); and
- fixing the whole so formed to said packaging material (2), so that said fastening portion (17) of said frame (10) adheres about said removable portion (7), and said anchoring portion (13) adheres to said removable portion (7);
characterized in that, when fitting said cap (12) to said frame (10), connection of the cap (12) to said anchoring portion (13) is purely mechanical; and in that said cap (12) is made integral with said anchoring portion (13) when fixing said opening device (3) to said packaging material (2)".

In view of the board's decision, see points 2 and 3 below, the wording of the first and second auxiliary requests is not of relevance to the present decision.

VII. The appellant's arguments may be summarised as follows:

Admissibility of the line of argument starting from D4 and applying the teaching of D2 in respect of inventive step, as presented during the oral proceedings – Article 13(1) and (3) RPBA

A line of argument based on the combination of the teachings of D4, considered to represent the closest prior art, and D2 had already been presented in the statement setting out the grounds of appeal, see sixth and seventh paragraphs of page 6.

Furthermore, the board in point 4.2.4 of its communication pursuant to Article 15(1) RPBA gave a provisional opinion on the inventive step of claim 1, starting from D4 and applying the teaching of D2.

The detailed and expanded line of argument starting from D4 and applying the teaching of D2 presented during the oral proceedings is the appellant’s reaction to the board’s above-mentioned provisional opinion on inventive step.

For these reasons the detailed and expanded line of argument presented during the oral proceedings should be admitted into the proceedings.

Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC

The opening device for a sealed package according to claim 1 differs from the one known from D4, which represents the closest prior art, in that its anchoring portion is connected integrally to the frame by means of breakable connecting means and in that, in use, the

cap rotating integrally with the anchoring portion breaks off the connecting bridges.

The problem to be solved is the improvement of the precision with which the removable portion is detached from the package, see paragraphs [0015] and [0018] of the patent in suit.

The person skilled in the art seeking to solve this problem would take the teaching of D2 into consideration.

Figure 8 of D2 shows a removable anchoring portion having a complicated upper part connecting it to the cap.

The skilled person recognises from the embodiment depicted in figure 8 of D2 that the anchoring portion has to be in the form of a ring, whereby said ring is to be connected integrally only to the frame but does not need to be integrally connected to the cap.

Based on said information in D2 the person skilled in the art would separate the concentric cylinders known from D4 into segments, would provide the lower part with a ring connected via breakable bridges to the frame and would further connect the upper parts of the concentric cylinders to such a ring via form-fitting connecting elements, arriving thereby at the subject-matter of claim 1 without the exercise of inventive activity.

Claim 6 according to the main request – inventive step, Articles 52(1) and 56 EPC

What is stated above for claim 1 according to the main

request is also applicable *mutatis mutandis* to claim 6 according to the main request.

VIII. The respondent's arguments may be summarised as follows:

Admissibility of the line of argument starting from D4 and applying the teaching of D2 in respect of inventive step, as presented during the oral proceedings – Article 13(1) and (3) RPBA

The appellant’s detailed and expanded line of argument starting from D4 and applying the teaching of D2 was presented for the first time during the oral proceedings.

This amendment of the appellant’s case at such a late stage of the appeal proceedings should not be admitted into the proceedings.

Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC

The person skilled in the art seeking to provide a low-cost solution for the opening device known from D4 would extract from D2 the teaching of using the opening device depicted in figure 8 of D2 instead of the one known from D4 and thus disregarding the opening device of D4.

Given that D2 teaches a connection between the anchoring portion and the cap having rotational play, the opening device deriving from the combination of the teachings of D4 and D2 would also not disclose a cap which rotates integrally with the anchoring portion, as required in claim 1.

Therefore, the combination of the teachings of D4 and D2 cannot lead the person skilled in the art to the subject-matter of claim 1.

Claim 6 according to the main request – inventive step, Articles 52(1) and 56 EPC

What is stated above for claim 1 according to the main request is also applicable *mutatis mutandis* to claim 6 according to the main request.

Reasons for the Decision

1. *Admissibility of the line of argument starting from D4 and applying the teaching of D2 in respect of inventive step, as presented during the oral proceedings – Article 13(1) and (3) RPBA*

1.1 In the sixth and seventh paragraphs of page 6 of its statement setting out the grounds of appeal the appellant, in support of its objection as to lack of inventive step, presented a (short) line of argument starting from D4 and applying the teaching of D2.

1.2 The respondent commented on this line of argument in its reply to the statement of grounds of appeal, see page 4, last paragraph, to page 5, second paragraph.

1.3 Furthermore, the board in point 4.2.4 of its communication pursuant to Article 15(1) RPBA gave a provisional opinion on the inventive step of claim 1, starting from D4 and applying the teaching of D2.

1.4 During the oral proceedings the appellant submitted a detailed and expanded line of argument starting from D4

and applying the teaching of D2.

1.5 Said submissions have been contested by the respondent as being inadmissible under Article 13(1) RPBA, since they were presented only during the oral proceedings.

1.6 In the view of the board these submissions do not alter the legal and factual framework of the proceedings, given that said detailed and expanded line of argument is essentially based on the combination of documents D4 and D2, as is the line of argument which was already presented in the statement setting out the grounds of appeal, see point 1.1 above, and does not include any freshly filed evidence. Thus, by submitting the detailed and expanded line of argument at the oral proceedings the appellant did not substantially amend its case as set out in its statement setting out the grounds of appeal.

1.7 For the above-mentioned reasons, the Board decided under its discretionary power (Article 13(1) RPBA) to admit into the proceedings the appellant’s detailed and expanded line of argument presented during the oral proceedings. The board further saw no reason to apply Article 13(3) RPBA.

2. *Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC*

2.1 The board follows the appellant's argument that the anchoring portion 25 in the opening device disclosed in D4 consists of the lower part of the two concentric tubes 26, 27. It therefore also agrees that the opening device for a sealed package according to claim 1 differs from the one known from D4 in that its anchoring portion is connected integrally to the frame

by means of breakable connecting means and in that, in use, the cap rotating integrally with the anchoring portion breaks off the connecting bridges.

2.2 The board follows further the appellant's argument that the above-mentioned differentiating features have the effect of improving the precision with which the anchoring portion is fixed to the removable portion and hence the precision with which the removable portion is detached from the package.

2.3 Accordingly, the problem to be solved can be seen in the improvement of the precision with which the removable portion is detached from the package.

2.4 The board again follows the appellant's argument that the person skilled in the art seeking to solve this problem would take the teaching of D2 into consideration.

2.5 The question at stake is therefore whether the person skilled in the art starting from the opening device known from D4 and applying to it the teaching of D2 in respect of the embodiment depicted in figure 8 of said last document would arrive at the subject-matter of claim 1 and would do so without the exercise of inventive activity.

2.6 In line with the established case law of the boards of appeal, when investigating inventive step it should be borne in mind that the technical disclosure in a prior-art document should be considered in its entirety, as would be done by a person skilled in the art, and that it is not justified to arbitrarily isolate parts of such a document from their context in order to derive from them technical information which would be distinct

from the integral teaching of the document, see Case Law of the Boards of Appeal, 7th edition 2013, I.D.9.4.

2.7 According to the teaching of the part of D2 referring to the opening device depicted in figure 8, the anchoring portion in the form of an inner ring 60 is on the one hand integrally connected to the frame in the form of the pour spout 4 via the frangible bridges 72 and on the other hand is non-integrally connected to the cap 12 via the curved links 62, the outer ring 64, the retaining mechanism 23 and the ratchet teeth 71, see page 12, line 11, to page 13, line 8.

2.8 This means that if the skilled person seeking to solve the problem mentioned in point 2.3 above were to take into consideration the teaching of D2 concerning the opening device depicted in figure 8, he would not single out the connection between the anchoring portion and the frame but would also incorporate into the envisaged solution the remaining elements of said opening device, namely the curved links, the outer ring, the retaining mechanism and the ratchet teeth. This is because said remaining elements are indispensable for the functioning of the inner ring 60 disclosed therein.

2.9 This would result in replacing the mechanism of the opening device known from D4 with the mechanism of the opening device depicted in figure 8 of D2. In such a case there would again be no integral rotation between the cap and the anchoring portion, and thus the combination of the teachings of D4 and D2 would not lead the person skilled in the art to the subject-matter of claim 1 of the main request.

2.10 The appellant argues that the skilled person seeking to solve the problem mentioned in point 2.3 above would specifically single out from the opening device depicted in figure 8 of D2 the information that the anchoring portion is in the form of a ring and that the latter is connected to the frame via breakable bridges, ignoring at the same time any information concerning the other structural elements intended to provide a specific, non-integral connection between the anchoring ring and the cap.

The skilled person would then, according to the appellant, keep the integral connection between the upper parts of the two concentric cylinders 26, 27 of D4 as it is, would further replace the lower part of said cylinders with an anchoring ring 60 according to D2, and would finally incorporate form-fitting connecting means between such an anchoring ring and the upper parts of said cylinders.

By doing so the person skilled in the art would arrive at the subject-matter of claim 1 without exercising any inventive activity.

2.11 The board cannot follow the appellant's above-mentioned arguments for the following reasons:

2.12 There is no general teaching derivable from D2 in the sense that in any kind of opening device for a sealed package, and thus also in an opening device according to D4, the anchoring portion is to be connected integrally to the frame and that at the same time the anchoring portion is to be non-integrally connected to the cap, so that it can rotate (with play) together with the cap.
Only the specific teaching as mentioned in point 2.7

above is derivable from D2.
Furthermore, no teaching is derivable from D2 for incorporating the anchoring portion in the form of the anchoring ring 60 known from D2 into the opening device known from D4, for a specific modification of existing parts (concentric cylinders) of said device and for the incorporation of additional parts (form-fitting connecting means) into said device, as argued by the appellant.
In the present case, the above-mentioned line of argument concerning the different activities which apparently the person skilled in the art would have to carry out in order to arrive at the subject-matter of claim 1 is regarded as artificial and unrealistic and, therefore, is not accepted by the board. In fact, the board is convinced that there are so many technical obstacles connected with the implementation of said activities that the skilled person would refrain from doing so, especially in the absence of any recognisable pointer in this respect in D4 or D2.

2.13 For the above-mentioned reasons the subject-matter of claim 1 involves an inventive step according to Articles 52 and 56 EPC.

3. *Claim 6 according to the main request - inventive step, Articles 52(1) and 56 EPC*

The board's finding under point 2 above in respect of claim 1 according to the main request applies *mutatis mutandis* to claim 6 according to the main request.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall K. Poalas

Decision electronically authenticated