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**Datasheet for the decision
of 21 September 2017**

Case Number: T 0128/14 - 3.3.03

Application Number: 04796168.5

Publication Number: 1675904

IPC: C08L23/00

Language of the proceedings: EN

Title of invention:

COMPOSITION IN COMBINATION WITH AN EXTRUSION BLOW MOLDED
THERMOPLASTIC PACKAGE

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponent:

Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 84
RPBA Art. 12(4), 13(1)

Keyword:

Novelty - (no) main request

Inventive step - (no) first auxiliary request

Late-filed request - admitted (no) second, fourth, fifth,
sixth auxiliary requests

Claims - clarity (no) third auxiliary request

Decisions cited:

Catchword:



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Case Number: T 0128/14 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 21 September 2017

Appellant: Henkel AG & Co. KGaA
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 November
2013 rejecting the opposition filed against
European patent No. 1675904 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman D. Semino
Members: M. C. Gordon
R. Cramer

Summary of Facts and Submissions

I. The appeal of the opponent lies against the decision of the opposition division posted on 20 November 2013 rejecting the opposition against European patent No. 1 675 904.

II. The patent was granted with a set of 4 claims, whereby claim 1 read as follows:

"A packaged product comprising the combination of a composition with a packaging system comprising the composition, wherein the packaging system comprises an extrusion blow molded thermoplastic package comprising a combination of a high density polyethylene thermoplastic resin and a low density polyethylene thermoplastic resin in a ratio of from 80% high density polyethylene thermoplastic resin / 20% low density polyethylene thermoplastic resin to 20% high density polyethylene thermoplastic resin / 80% low density polyethylene thermoplastic resin, and the packaging system comprises a wall thickness in the range of from 0.00025 meters to 0.0015 meters, preferably in the range of from 0.0003 meters to 0.0011 meters."

III. A notice of opposition against the patent was filed in which revocation of the patent was requested.

The following document, *inter alia* was relied upon by the opponent:

D6: US-A-5 576 083.

- IV. According to the decision, the subject-matter claimed was novel.

An inventive step could also be recognised because none of the documents cited, in particular D6, related to bottles for the same intended use as the patent in suit, meaning there would have been no reason to consult said documents and because in the light of the information in the patent in suit, the distinguishing features over D6 were linked to technical advantages.

- V. The opponent lodged an appeal against the decision.

Together with the statement of grounds of appeal a further document, cited in D6 and mentioned in the decision under appeal (point 11.2.1, second line) was *inter alia* submitted:

D16: US-A-5 188 250 (cited in D6)

- VI. With the reply to the statement of grounds of appeal the respondent submitted three sets of claims forming first to third auxiliary requests which had previously been presented in proceedings before the opposition division.

Claim 1 of the first auxiliary request differed from claim 1 of the patent as granted by insertion of the following wording at the end of the claim:

"and the high density polyethylene has a density of about 0.950 g/ml +/- 0.020 g/ml, and the low density polyethylene has a density of about 0.900 g/ml +/- 0.020 g/ml".

Claim 1 of the second auxiliary request differed from

claim 1 of the main request by defining the composition within the packaging system as follows:

"wherein the composition is a shear thinning liquid, or shear thickening composition or a Newtonian fluid with a rheology profile equal to or greater than $2 \text{ Pa @ } 950 \text{ s}^{-1}$ ".

Claim 1 of the third auxiliary request differed from claim 1 of the main request by insertion of the following phrase at the end:

", and the minimal amount of force to squeeze wherein the displacement of a packaging system is about 0.0064m would require 0.0199 kg."

VII. The Board issued a summons to oral proceedings and a communication.

The questions of novelty and inventive step in particular with respect to D6 were mentioned therein. It was considered *inter alia* that there were no features in the claim which reflected the differences in constitution or (required) properties of the packaging system relied upon by the respondent in its submissions.

VIII. The respondent made further written submissions and presented further auxiliary requests.

These requests were submitted initially with letter of 21 August 2017. The Board noted in a communication of 8 September 2017 that the texts as submitted did not correspond to the explanations given. Corrected versions of these requests were submitted with letter of 11 September 2017.

Claim 1 of the fourth auxiliary request restricted the thickness to the preferred range and included the specification of the density as for the first auxiliary request. Hence the final part of the claim read as follows:

"in the range of from 0.0003 meters to 0.0011 meters, and the high density polyethylene has a density of about 0.950 g/ml +/- 0.020 g/ml, and the low density polyethylene has a density of about 0.900 g/ml +/- 0.020 g/ml."

Claim 1 of the fifth auxiliary request differed from claim 1 of the fourth auxiliary request by restricting the proportions of the HDPE and LDPE to 50%/50% to 20%/80%.

Consequently the corresponding part of the claim read as follows:

"and a low density polyethylene thermoplastic resin in a ratio of from 50% high density polyethylene thermoplastic resin/50% low density polyethylene thermoplastic resin to 20% high density thermoplastic resin/80% low density thermoplastic resin".

Claim 1 of the sixth auxiliary request differed from claim 1 of the fifth auxiliary request by specifying that the composition was a shampoo or a hair conditioner. The specific addition read as follows:

"wherein the composition is a shampoo or a conditioner,".

IX. Oral proceedings were held before the Board on 21 September 2017.

During the course of the oral proceedings the respondent filed an amended set of claims as second auxiliary request replacing the former second auxiliary request.

Claim 1 of this request was based on claim 1 of the first auxiliary request (see above), augmented by the following wording at the end:

", and wherein the composition is a shear thinning liquid or a shear thickening composition".

X. The arguments of the appellant can be summarised as follows:

(a) Admittance of D16

This document had been discussed during the opposition proceedings in particular on the occasion of the oral proceedings and was invoked in the decision under appeal. Hence D16 was *de facto* already in the proceedings. It had been filed together with the statement of grounds of appeal. D16 was referred to in D6 and consequently was *prima facie* relevant for elucidating the teaching of D6. The citing of this document would not cause any procedural complexity or delay.

(b) Main request - novelty

D6 related to packaging forms that were prepared by extrusion blow moulding compositions which fell within the scope of the operative claims. That D6 related to extrusion blow moulded articles was shown by the reference to D16. There was no indication - express or implied - of any other type

of moulding process in D6, nor could this be implied on the basis of the particular type of bottle envisaged in D6. The term "rotary" blow moulding in D6 related to the handling of preform/moulded articles during the manufacturing process, but not to the actual moulding step itself. Moreover there was an overlap of wall thickness between the patent and the claims of D6, so that all features of claim 1 in combination were disclosed in D6.

(c) First auxiliary request- inventive step

There was a significant overlap between the ranges of density claimed and those disclosed in D6. The property requirements of D6 and of the patent - namely flexibility, recoverability, resilience - were quite similar and differed only in detail or extent. There was no evidence of any technical effect associated with the ranges of values of the properties specified in the claims. The information given in the patent was very general and no details of the measurements made were given. There was consequently no feature of the claim which necessarily and inevitably resulted in a specific combination of properties or the property profile argued for by the respondent. The claimed selection of values from within the disclosure of D6 was therefore not inventive.

(d) Second auxiliary request - admittance

The request was late filed and could not have been foreseen. The matters which, according to the respondent, it was intended to address had all been raised by the Board in its communication.

Consequently the request could have been submitted earlier. The request presented a new combination of features raising additional questions at least in respect of Article 123(2) EPC. On this basis it should not be admitted to the proceedings.

(e) Third auxiliary request - Clarity

No details of the measurement conditions for the "force to squeeze" parameter were given in the patent meaning that the restriction implied by this feature was unclear. The indication of a measurement method in a written submission did not overcome this defect.

(f) Fourth to sixth auxiliary requests - admittance

These requests had been filed very late without any new development of the case and could and should have been filed earlier. On that basis they should not be admitted.

XI. The arguments of the respondent can be summarised as follows:

(a) Admittance of D16

This document had been submitted after the filing of the notice of opposition and was not *prima facie* relevant. Even though D16 was referred to in the grounds of the decision, it had not been formally cited or introduced during the opposition proceedings. It did not relate to the features of the patent, in particular the polymers employed and the thickness of the bottle were not disclosed. D16 also gave no insight as to why extrusion blow

moulding should be used or should be considered to be the method employed in D6. There was no unambiguous link between the processes used in D6 and in D16.

(b) Main request - Novelty over D6.

There were different types of blow moulding - injection and extrusion blow moulding. Each method resulted in characteristic structural features of the resulting articles meaning that the type of moulding employed could be unambiguously identified on the finished article. D6 referred generally to blow moulding and injection blow moulding. The example employed "rotary" blow moulding which term did not relate to the question of whether injection or extrusion blow moulding had been used. The different methods gave rise to bottles suitable for different uses, i.e. injection blow moulding for beverages and extrusion blow moulding for uses such as cosmetics. Since D6 was directed to the production of bottles for beverages this would indicate that injection blow moulding rather than extrusion blow moulding had been employed. There was no disclosure of extrusion blow moulding in D6 and any reference to D16 could not make good this deficit. The range of wall thickness disclosed in D6 extended far below that now claimed, as shown by the example of D6. This confirmed that the whole teaching of D6 was directed to bottles with thinner walls than those defined in the operative claims. Novelty should therefore be acknowledged.

(c) First auxiliary request - inventive step

Even if D6 were to be taken into consideration, a

multiple selection was required from the disclosure thereof to obtain the combination of proportions and densities of the two polymers and the wall thickness. The patent and D6 concerned bottles for entirely different uses and contents which implied different property requirements. The patent was concerned with reclosable containers whereas D6 addressed single use containers. Unlike the packages of D6, those of the patent had to be resilient, so that the original shape was regained after squeezing to eject a portion of the contents. To this end, the patent employed a particular combination of wall thickness and density which was not disclosed in D6 and would not be suitable for the purpose disclosed therein. The patent demonstrated technical effects resulting from these differences, *inter alia* the "minimal force to squeeze" which were discussed in the patent and shown in the figures. Because D6 did not concern this type of container, it provided no guidance to how to select the features as defined in the claims in order to provide such an article having the necessary properties.

(d) Amended auxiliary request 2 - admittance

This request was submitted in view of the assessment of D6 and its relevance to the patent in suit which emerged in the discussion at oral proceedings. This assessment diverged from what had been anticipated in view of the written proceedings.

(e) Third auxiliary request - clarity

The force to squeeze parameter clearly established

novelty over D6. As indicated in the patent, standard test methods and procedures for this parameter existed which were known to the skilled person. Thus the restriction imposed by this feature was clear. Furthermore the specified force to squeeze was a direct consequence of the defined product parameters, i.e. materials and thickness.

(f) Fourth-sixth auxiliary requests - admittance

Prior to the communication of the board there had never been any negative indication about the patent from an organ of the European Patent Office. These requests - also in corrected form - had been filed in due time and the basis for and purpose of the amendments had been set out. It would have been immediately apparent to the opponent and the Board what the intention had been, so that there had been more than enough time to prepare in order to deal with these requests.

XII. The appellant requested that the decision under appeal be set aside and that the European patent No. 1 675 904 be revoked.

XIII. The respondent requested that the appeal be dismissed, or alternatively that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the sets of claims according to the first auxiliary request filed with the rejoinder to the statement of grounds of appeal or according to the second auxiliary request as filed during the course of the oral proceedings before the board or according to the third auxiliary request filed with the rejoinder to the statement of grounds of appeal or according to the

fourth to sixth auxiliary requests filed with the letter of 11 September 2017.

Reasons for the Decision

1. Admittance of D16

Pursuant to Article 12(4) RPBA it is a matter for the discretion of the board whether a document which could have been presented or was not admitted in first instance proceedings is to be held inadmissible.

In the present case the first mention of the document identified as "D16" in the opposition proceedings was by the opposition division in the reasons for the decision (section 11.2.1).

The citation of this document by the opposition document means, in the view of the Board that D16 was *de facto* introduced into the proceedings.

Already in view of this, the Board concludes that D16 does not fall under the categories mentioned in Article 12(4) RPBA ("facts, evidence or arguments which could have been presented or were not admitted") so that it sees no basis to hold it inadmissible.

Furthermore, the Board considers it both reasonable and appropriate for the appellant to refer to a document which was cited (even if not given a number) in the decision and considers the document as *prima facie* highly relevant as is clear from the argument in respect of novelty of the main request (point 2 below).

Document D16 is therefore in the proceedings.

2. Main request - novelty

D6 relates to containers - specifically bottles - for beverages and thus discloses a combination of a packaging system with its contents (see "Field of the Invention" and claims).

According to claim 1 of D6 a blow moulded bottle prepared from 50-80 % of HDPE and 20-50 wt% LDPE is disclosed. According to claim 2 the bottle can have a thickness of from 0.00015 M to 0.00038 M.

The ranges of the amounts of the two polymers disclosed is within the range specified for operative claim 1. The upper value of the thickness is also within the range claimed which overlaps partially with the range of D6.

Accordingly neither the combination of the polymers nor the wall thickness of the packaging system according to claim 1 provides a distinction over the disclosure of D6.

Regarding the significance of the feature "extrusion blow moulded" and whether this could serve to characterise the container, at the oral proceedings it was a matter of consensus between the parties that it would be possible unambiguously upon inspection to ascertain whether a given container had been prepared by injection or extrusion blow moulding. The former method would result in a small nodule on the base of the bottle corresponding to the location of the point of entry of the molten polymer into the mould. In the case of an extrusion moulded bottle a seam at some location of the bottle would be apparent.

Hence this feature, although relating to the process by which the bottle was produced would result in a detectable property of the resulting container and hence could - potentially - provide the basis for a distinguishing feature.

It remains to establish the nature of the moulding method disclosed in D6. Claim 1 of D6 refers to a blow moulded container with no further specification of the type of moulding. The example of D6 (paragraph bridging pages 2 and 3) refers to a rotary blow moulder. As explained by the parties at the oral proceedings, this terminology designates the manner of the handling of the articles (preforms/bottles) during the moulding process, but not to the specific nature of the moulding technique employed.

However the single example of D6 refers to production of the blow moulded products of the document identified as D16. According to D16, column 2, lines 29-30 the bottle is "typically" prepared by extrusion blow moulding. Column 6, lines 4-5 of D16 states unequivocally that the bottle is made by an extrusion blow moulding process.

The conclusion is thus, by reference to D16, that the blow moulded bottle prepared in the single example of D6 is prepared by extrusion blow moulding. This being the only indication of any specific type of blow moulding in D6, it follows that the claims thereof also relate to extrusion blow moulded containers.

Although the intended end uses of the bottle in D6 and the packaging system of the patent in suit are different, D6 being directed to beverage containers for use by children, and the patent being concerned with

the production of containers for compositions such as shampoo and hair conditioners, there are no features in the claim which relate to differences in suitability for any intended uses. Consequently this aspect cannot play any role in the assessment of the allowability of the claims.

From the foregoing it is concluded that the disclosure in D6 of the nature of the resin composition in claim 1, the wall thickness in claim 2 and the disclosure of extrusion blow moulding resulting from the reference to D16 shows that the container as defined in claim 2 of D6 exhibits all the features of operative claim 1.

The main request does not meet the requirements of Article 54 EPC.

3. First auxiliary request

3.1 Novelty

Claim 1 of the first auxiliary request additionally specifies the density of the two polymers.

Claim 1 of D6 discloses that the HDPE component has a density of 0.95 to 0.96 g/cc which falls fully within the range of 0.950 ± 0.020 g/ml defined in operative claim 1. However the density disclosed for LDPE in claim 1 of D6 is from 0.91 to less than 0.94 g/cc, the lower limit of which falls within the claimed range of $0.900 \text{ g/ml} \pm 0.020 \text{ g/ml}$ of operative claim 1, with which there is a partial overlap.

Thus compared to the main request a further selection from the disclosure of D6 is required to arrive at the subject-matter of operative claim 1:

- the wall thickness (see discussion of main request)
- the density of the LDPE.

As there is no pointer to these two selections in combination, novelty has to be acknowledged.

3.2 Inventive step

Although, as argued by the respondent the intended end uses of the containers in D6 and those of the patent in suit are different, as noted for the main request, there is no evidence that the combination of features of operative claim 1 give rise to a particular property profile which would result in suitability for a particular intended use, or conversely, unsuitability for another use. Due to the broad formulation of claim 1 there is therefore no reason to discard document D6 as an appropriate document to be used as closest prior art.

The patent in suit provides very sparse details of the containers actually produced and provides no data which enable conclusions to be drawn regarding the influence of the proportions of polymers, their densities or the wall thickness on the properties of the bottles or their (non)suitability for particular uses. Although the patent includes a number of diagrams, these are not based on specific exemplified packaging systems and so do not make it possible to assess the significance of any of the features of the claims on the resulting properties.

Under these circumstances the only problem which can objectively be formulated as being solved by the distinguishing features over D6 is the provision of further packaging systems.

This problem was solved by selecting - in the light of the available evidence arbitrarily - various values for the properties of the polymers (density) and of the packaging system (wall thickness) from the explicit disclosure of D6.

Such an arbitrary selection from disclosed parameters is an obvious route to solving the above formulated problem, leading to the conclusion that the subject-matter of the first auxiliary request does not meet the requirements of Article 56 EPC.

4. Second auxiliary request - admittance

The second auxiliary request was filed during the oral proceedings following the discussions that resulted in the above indicated conclusions.

Claim 1 of this request introduced a further restriction into the claim, namely the nature of the contents. Although the previous second auxiliary request - as submitted with the rejoinder to the statement of grounds of appeal - contained a definition of the contents, the wording as presented in the newly filed request differed therefrom (see sections VI and X, above).

The Board cannot share the view of the respondent that matters that gave rise to the need to file an amended request emerged only in the course of the discussions in the oral proceedings. In the communication of the Board the question in particular of whether the additional features present in the then valid second auxiliary request provided further distinctions over the prior art was raised (section 8.2 of the communication). Consequently there was a clear

indication prior to the oral proceedings that the Board had concerns about the second auxiliary request. In the written submission filed in advance of the oral proceedings, no mention was made of the Board's position on the second auxiliary request. Accordingly prior to the oral proceedings neither the Board nor the appellant had any reason to anticipate that the former second auxiliary request would not be pursued.

It is therefore concluded that there were no aspects which arose for the first time during the oral proceedings which would have revealed the existence of potential problems with the second auxiliary request. The filing of an amended request only at the oral proceedings hence could not have been anticipated either by the appellant or by the Board.

Furthermore since the request involved introducing a feature from the description there was the matter of Article 123(2) EPC to be considered meaning that the request could not be seen as being *prima facie* clearly allowable. Also the relevance of the further limitation to the question of inventive step would have needed to be addressed - for the first time - at the oral proceedings.

For these reasons the Board finds it appropriate to exercise its discretion under Article 13(1) RPBA by not admitting the second auxiliary request, as filed at the oral proceedings to the procedure.

5. Third auxiliary request - clarity

Claim 1 specifies the minimal force to squeeze.

This parameter is referred to in paragraphs [0040] and

[0041] of the patent where the parameter is explained and it is stated that it is determined using a - non-identified - standard test method. There are no examples elucidating the determination of this property, although figure 21 is stated to demonstrate this.

In the written submissions before the opposition division, in a letter of 19 August 2013, the patent proprietor on page 12 referred to an ASTM Norm as "generally" a standard test method which would be used to determine this property. There is however no indication - even in the most general terms - of this standard in the patent in suit, nor is an indication to be found anywhere in the prior art that this would be the test method understood by the skilled person when reading the patent in suit.

Accordingly the patent provides no explanation of how the named parameter is to be determined, meaning that it would not be possible to ascertain with a reasonable degree of certainty whether a given packaged product system fell within the scope of the claim.

In this respect there is no doubt that with a packaging of unspecified shape and possibly varying thickness, the value of the parameter could vary significantly according to the test method used.

The consequence of this lack of information relating to the measurement of the parameter is that the scope of the claim is unclear.

The result is that the third auxiliary request does not meet the requirements of Article 84 EPC.

6. Fourth to sixth auxiliary requests - admittance

These requests were filed after issue of the communication of the Board. The initially filed versions contained an error which was noted by the Board and resulted in a communication, leading to corrected versions being submitted.

All of these requests present various combinations of subject matter resulting in part from restrictions of existing features (fourth and fifth auxiliary requests) or additionally specifying the nature of the contents of the packaged product (sixth auxiliary request) - see section VIII, above. This gives rise to questions concerning the basis for the amendments made (Article 123(2) EPC).

In the letter filing these requests explanations as to the rationale and the issues which these were intended to address were provided. These explanations however referred in a large part on the submissions made in the response to the statement of grounds of appeal and a subsequent letter, prior to issue of the summons by the Board. Crucially the respondent did not explain whether or in what manner the amendments resulting in the fourth to sixth auxiliary requests were directed to addressing the issues identified as significant by the Board in its communication. This in turn leads to the conclusion that the amendments made could in fact have been filed earlier in the appeal proceedings.

The argument of the respondent that the communication of the Board was the first time that an indication came from an organ of the European Patent Office that there might be deficiencies with the patent is not convincing and does not serve to justify the admissibility of

these late filed requests. This is in particular because the Board did not take position on matters going beyond those set out in the submissions of the parties. The appellant in the statement of grounds of appeal explained why it considered the conclusions of the opposition division to be incorrect. It was incumbent on the respondent to formulate requests to address all the arguments put forward, in particular insofar as the appellant considered the conclusions of the opposition division flawed.

In addition it is not immediately apparent for the Board how these requests would address all the pending issues, in particular with respect to inventive step.

Under these circumstances the Board finds it appropriate to exercise its discretion under Article 13(1) RPBA by not admitting the fourth to sixth auxiliary requests to the procedure.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



P. Martorana

D. Semino

Decision electronically authenticated