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**Datasheet for the decision
of 21 October 2015**

Case Number: T 0343/14 - 3.2.07

Application Number: 03008634.2

Publication Number: 1468930

IPC: B65D23/10

Language of the proceedings: EN

Title of invention:
Thin-walled container

Patent Proprietor:
Nestlé Waters Management & Technology

Opponent:
COMPAGNIE GERVAIS DANONE

Headword:

Relevant legal provisions:
EPC Art. 84, 123(2), 123(3)
EPC R. 80
RPBA Art. 13(1), 13(3)

Keyword:
Late-filed document - admitted (no)
Amendment occasioned by ground for opposition - (yes)
Amendments - broadening of claim (no) -
extension beyond the content of the application as filed (no)
Claims - clarity (yes)

Decisions cited:

G 0002/10, G 0003/14

Catchword:



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Case Number: T 0343/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 21 October 2015

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 28 November 2013 revoking European patent No. 1468930 pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: G. Patton
G. Weiss

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision to revoke European patent No. 1 468 930.

The opposition had been filed against the patent as a whole and was based on Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) EPC (insufficiency of disclosure) and Article 100(c) EPC (inadmissible extension of the subject-matter).

The Opposition Division held that the European patent had been and was amended in such a way that it contains subject-matter which extends beyond the content of the application as originally filed (Articles 100(c) and 123(2) EPC).

- II. With the statement of grounds of appeal the appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of a main request, subsidiarily of one of the auxiliary requests 1 to 4, all filed with the statement setting out the grounds of appeal, further subsidiarily that oral proceedings be held.

With its reply the respondent (opponent) requested that the appeal be dismissed, subsidiarily that oral proceedings be held.

The Board provided the parties with its preliminary non-binding opinion annexed to the summons for oral proceedings that the main request appeared to fulfil the requirements of Articles 123(2), (3) and 84 EPC.

III. In reaction, the respondent filed with letter of 18 September 2015 the following document:

D26: WO-A-03/033361

to support its view regarding an inadmissible extension of the subject-matter.

IV. Oral proceedings took place on 21 October 2015 during which the following issues were discussed:

- the admittance of document D26; and

- the compliance of the main request with the requirements of Articles 84, 123(2), (3) EPC and Rule 80 EPC.

The present decision was announced at the end of the oral proceedings.

V. The appellant requested that the decision under appeal be set aside, that the main request and the auxiliary requests 1 to 4, all requests filed with the statement setting out the grounds of appeal, be found satisfying the requirements of Article 123(2) and (3) EPC and that the case be remitted to the opposition division for further prosecution. Further, the appellant requested that document D26 be not admitted in the proceedings.

VI. The respondent requested that document D26 be admitted in the proceedings and that the appeal be dismissed.

VII. Claim 1 of the main request reads as follows:

"A one-piece container having a body (1) formed by wall or walls with a greater diameter S1 and at least a neck

(2) with a diameter S2, container made from a semi-crystalline PET, having a wall thickness of less than 100 µm substantially in the middle of its body characterized in that said container has:

- a substantially ovoid overall shape, and
- a complex three dimensional shape (3) convenient for gripping substantially in the middle of the body, this part having a diameter S3 smaller than S1, the ratio of diameter of the greater diameter S1 to the smaller diameter S3 being 1.2:1 to 2:1."

In view of the present decision, it is not necessary to repeat the wording of the auxiliary requests 1 to 4.

VIII. The appellant argued essentially as follows:

Admittance of document D26 in the procedure

Late-filed document D26 was published after the filing date of the contested patent and cannot modify the understanding of the disclosure of the application as originally filed. It is therefore not relevant for the issues related to Articles 84 and 123(2) EPC for which it is intended. Hence, D26 should not be admitted.

Main request - Claims - Articles 100(c) and 123(2) EPC

The skilled person derives directly and unambiguously from the description of the application as originally filed the combination of the following features C1 and C2 of claim 1 of the main request:

C1) - substantially ovoid overall shape; and

C2) - a complex three dimensional shape convenient for gripping substantially in the middle of the body, this

part having a diameter S3 smaller than S1, the ratio of diameter of the greater diameter S1 to the smaller diameter S3 being 1.2:1 to 2:1,

Both features C1 and C2 are indeed explicitly described as aiming at solving the same general problem of providing the container with high mechanical properties. The skilled reader would therefore immediately realise that the combination of features C1 and C2 would have a synergetic effect in solving said problem. Hence, the skilled person will derive the subject-matter of claim 1 of the main request directly and unambiguously, using common general knowledge, from the application as originally filed, taken as a whole.

There is no teaching against the combination of features C1 and C2 in the application as originally filed.

The disclosure on page 5 of the application as originally filed, which is the basis for feature C1, should not be seen isolated from the rest of the original disclosure for its interpretation.

There is no mention of two distinct containers in the entire original description. The skilled person will therefore immediately derive that the container mentioned on page 5 having the feature C1 also concerns the container of the claims, including with feature C2.

The passage on page 5 referring to the "three dimensional shape convenient for gripping" concerns a **general** shape of the container and should not be mixed up with a **complex** three dimensional shape convenient for gripping according to feature C2.

The application as originally filed does not lack unity of invention since both features C1 and C2 relate to the problem of improving the mechanical strength of the container.

The skilled reader of the application as originally filed will see the container of the invention as recited in the claims (feature C2) in combination with the further strengthening of said container by providing a substantially ovoid overall shape (feature C1). This is also not contradicted by the use of "substantially".

The "one-piece" container of claim 1 of the main request is based on the original description, page 6, lines 26-30 and original claim 1.

Claim 1 of the main request does not result from an amendment of claim 4 (which has a "product" included in the container), but from an amendment of claim 1, thus showing that the "product" is not an essential feature, which therefore need not be in claim 1.

Main request - Description - Articles 100(c) and 123(2) EPC

The deletion of paragraphs from page 5 of the original description merely corresponds to an adaptation to the amended claims. The definition of an ovoid shape would still remain in the description of the contested patent, [0015]. Hence, the amendments to the description do not add subject-matter.

The fact that the text of paragraph [0006] of the patent specification would be in contradiction with the embodiments shown in figures 1 to 3 relates to a

contradiction between the claims and the description, not to an extension of the subject-matter beyond the original disclosure.

Main request - Claims - Article 84 EPC

The only amendment in claim 1 of the main request with respect to claim 1 of the patent as granted consists in the substitution of the expression "a generally ovoid shape" by feature C1: "a substantially ovoid overall shape".

Since there is no difference in meaning between these two expressions, the amendment does not introduce non-compliance with Article 84 EPC, since that would have been already present in claim 1 of the patent as granted.

IX. The respondent argued essentially as follows:

Admittance of document D26 in the procedure

D26 is *prima facie* relevant for the correct interpretation of the feature "a substantially ovoid overall shape" of claim 1 of the main request. The teaching of D26, on its own and irrespective of any previous discussions, would help to understand what the appellant originally intended with the application as originally filed. Hence, D26 should be admitted in the procedure.

Main request - Claims - Articles 100(c) and 123(2) EPC

The skilled person would not derive the combination of features C1 and C2 from the application as originally filed.

In the description of the application as originally filed, page 5, feature C1 is disclosed as a preferred embodiment of a container with symmetry of revolution, apart from feature C2.

This original teaching is confirmed by the fact that, on the same page 5, a container with a three dimensional shape convenient for gripping (to be understood as being feature C2) is explicitly mentioned as being a feature of "another embodiment", i.e. not to be combined with a container having a substantially ovoid overall shape (feature C1).

In addition, the skilled person aiming at solving the problem of achieving high mechanical properties would not think of weakening a container having convex outer curves as a result of the substantially ovoid overall shape in accordance with feature C1 with the contrary concave curves according to feature C2.

In fact, features C1 and C2 relate to different problems to be solved so that the application as originally filed lacks unity of invention. The skilled reader would not think of combining these features of two originally disclosed distinct inventions.

The word "substantially" used in feature C1 would be understood by the skilled person as providing the container with an ovoid overall shape, apart from details. Since feature C2 could not be regarded as being a "detail" in view of the high diameter ratios claimed, the skilled person would not have derived the combination of features C1 and C2 from the application as originally filed.

In view of the above, the requirements of Article 123(2) EPC are not fulfilled.

The feature "one-piece container" of claim 1 of the main request has no basis in the application as originally filed. Any supplementary part such as the neck would now be excluded from the "one-piece container" of claim 1, whereas that was not the case in the original description, page 6, lines 26-28. This new teaching contravenes Article 123(2) EPC.

The product is originally disclosed as an essential feature of the container. Since this essential feature is missing in claim 1 of the main request, the requirements of Article 123(2) EPC are not fulfilled.

Main request - Description - Articles 100(c) and 123(2) EPC

The first two paragraphs on page 5 of the original description mentioning a symmetry of revolution are linked to the ovoid shape of the container discussed on the same page. Their deletion from the description of the contested patent leads to a change in the definition of the ovoid shape, contravening Article 123(2) EPC.

The text of paragraph [0006] of the patent specification leads to an extension of the subject-matter beyond the original disclosure since it is in contradiction with the embodiments shown in figures 1 to 3.

Main request - Claims - Article 84 EPC

The expressions "a generally ovoid shape" of claim 1 of the patent as granted and "a substantially ovoid overall shape" (feature C1) of claim 1 of the main request, the former having been substituted by the latter, have different meanings.

Feature C1 has a narrower meaning, leading to contradictions with the rest of the claim which were not present in claim 1 of the patent as granted, which had the former expression. As a consequence, the amendment makes that Article 84 EPC is not complied with by claim 1 of the main request.

Reasons for the Decision

1. *Admittance of document D26 in the procedure*
- 1.1 Document D26 was filed by the respondent with letter dated 18 September 2015, i.e. after the oral proceedings have been summoned, so that its admittance in the procedure is subject to the discretion of the Board in accordance with Articles 13(1) and (3) RPBA.
- 1.2 As argued during the oral proceedings (see also respondent's letter dated 18 September 2015, in particular page 11, second paragraph), the respondent considers that D26 enables to better understand the actual disclosure of the application as originally filed, more particularly would be *prima facie* relevant for the correct interpretation of the feature "a substantially ovoid overall shape" of claim 1 of the main request. The reason is that, since the interpretation of D26 is totally independent from any

discussions, D26 would represent the true original meaning intended by the appellant in the application as originally filed.

For the respondent, the three paragraphs of D26, page 5, lines 6-23 (which are word for word identical to page 5, lines 1-27 of the application as originally filed) make clear that the "substantially ovoid overall shape" of the third paragraph is a preferred embodiment of a container with an axis of symmetry of revolution as mentioned in the two preceding paragraphs, i.e. having a circular cross diameter, but without the complex three dimensional shape convenient for gripping. This clear teaching of D26 would help to understand the true appellant's original intention.

- 1.3 As put forward by the appellant at the oral proceedings, document D26 was published on 24 April 2003, i.e. after the filing date of the contested patent of 15 April 2003. D26 is not a standard text book, nor does it comprise any information about the common general knowledge before the filing date of the contested patent or any well-admitted definition in the present technical field, which would help to illustrate or modify the understanding of the skilled reader of the disclosure of the application as originally filed.

In fact, the passage of D26, page 5, lines 6-23, relied upon by the respondent is integrally included, word for word, in the application as originally filed, page 5, lines 1-27. Indeed, it reflects the appellant's understanding of the term "ovoid" or "substantially ovoid overall shape", but that does not make the "container" as mentioned in the application as originally filed the same as the "container" in D26.

The former depends for the perception of its outer form on the context of the application as originally filed, the latter on the context of D26. The two applications are distinct.

The Board therefore shares the appellant's view that D26 does not modify the understanding of the disclosure of the application as originally filed.

As a consequence, the Board judges that D26 is not relevant for the issues at stake related to Articles 84 and/or 123(2) EPC so that it is not admitted in the procedure (Articles 13(1) RPBA).

2. *Main request*

The main request corresponds to the main request underlying the impugned decision.

2.1 Article 123(3) EPC and Rule 80 EPC

2.1.1 With respect to claim 1 of the patent as granted, the only amendment in claim 1 of the main request consists in the substitution of the expression "a generally ovoid shape" by "a substantially ovoid overall shape".

2.1.2 The respondent has raised in its reply to the statement of grounds a conditional objection on the basis of Article 123(3) EPC, that the latter wording would encompass more embodiments than the former.

2.1.3 As pointed out in the annex to the summons to oral proceedings, point 5.2, the Board shares the appellant's view that claim 1 of the main request does not cover embodiments not already covered by claim 1 of

the patent as granted so that the requirements of Article 123(3) EPC are fulfilled.

2.1.4 The respondent did not wish to further discuss this issue at the oral proceedings.

2.1.5 It also accepted the conclusions of the opposition division regarding Rule 80 EPC (impugned decision, point II.1).

2.2 Articles 100(c) and 123(2) EPC and the claims

2.2.1 Claim 1 of the main request reads as follows (in bold the amendments with respect to claim 1 of the application as originally filed; emphasis added by the Board; see also point VII above):

"A **one-piece** container having a body **(1)** formed by wall or walls with a greater diameter S1 and at least a neck **(2)** with a diameter S2, container made from a semi-crystalline PET, having a wall thickness of less than 100 µm, substantially in the middle of its body

characterized in that said container has:

- a **substantially ovoid overall shape**, and **having**
- a complex, three dimensional shape **(3)** convenient for gripping **substantially in the middle of the body**, this part having a diameter S3 **smaller than S1, the ratio of diameter of the greater diameter S1 to the smaller diameter S3 being 1.2:1 to 2:1.**"

2.2.2 According to the impugned decision, no basis can be found in the application as originally filed, taken as a whole, for the following **combination** of features C1 and C2 of claim 1 of the main request:

C1) - substantially ovoid overall shape, and

C2) - a complex three dimensional shape convenient for gripping substantially in the middle of the body, this part having a diameter S3 smaller than S1, the ratio of diameter of the greater diameter S1 to the smaller diameter S3 being 1.2:1 to 2:1.

This objection would have applied also against claim 1 of the patent as granted (Article 100(c) EPC), since that claim referred to a "a generally ovoid shape" for feature C1.

Feature C1 is based on the original description, page 5, line 20; feature C2 on original claims 1-3.

A basis for the feature "one-piece container" is given on page 6, lines 26-30, of the original description.

2.2.3 The Board notes that, as put forward by the respondent and admitted by the appellant (see also impugned decision, point 2.1, first six paragraphs), the two embodiments described in the description of the application as originally filed from page 11, line 22 to page 12, line 26, and shown in figures 1 and 2 for the first embodiment and figure 3 for the second embodiment cannot form the support for the above combination of features C1 and C2.

The first embodiment describes a container according to claim 1 of the main request except that it has an elliptic vertical cross-section, i.e. without feature C1, which is ovoid, i.e. egg shaped (see figure 2).

The second embodiment describes a container according to claim 1 of the main request with the form of an egg (ovoid overall shape), except that it does not have the

complex three dimensional shape with the ratio S1 to S3, i.e. without feature C2.

The two embodiments are further reflected in the claims of the application as originally filed: the first embodiment illustrates original claim 1 ("container according to the invention") while the second embodiment original claim 4 ("assembly according to the invention").

- 2.2.4 Instead, the Board follows the appellant's view with respect to the general disclosure of the invention in the rest of the description of the application as originally filed. The question is whether this provides a direct and unambiguous disclosure to the skilled person of what is presently claimed in claim 1.

Indeed, as argued by the appellant at the oral proceedings, the problem to be solved by the invention is stated on page 2, lines 12-17 of the description, namely "to supply a container for a flowable product which, for the same volume, requires less plastic than a standard container while at the same time having **comparable or higher mechanical properties.**"

That is confirmed in the following paragraph, page 2, lines 19-25, stating "a container having a body formed by wall or walls with a greater diameter S1 and at least a neck with a diameter S2 made from a semi-crystalline PET, having a wall thickness of less than 100 μm , substantially in the middle of its body and having a **complex, three dimensional shape convenient for gripping**, this part having a diameter S3", to solve the said general problem.

Further down, page 3, lines 6-11, the preferred embodiments are recited in accordance with original dependent claims 2 and 3 which comprise the ratio of diameters S1 to S3 (feature C2).

It is therefore clear for the skilled reader that feature C2, which consists in the combined features of claims 1, 2 and 3 with respect to the complex three dimensional shape convenient for gripping, aims at solving the general problem related to the mechanical properties of the container.

When arriving at the passage of page 5, lines 19-27, the skilled reader will further realize that the "substantially ovoid overall shape" (feature C1) is also related to the general problem with respect to the mechanical properties of the container. As a matter of fact, this specific shape is explicitly mentioned "to achieve **mechanical properties** which are equivalent to or even better than the cylindrical or roughly cylindrical shapes customarily encountered in this domain".

The skilled reader will therefore realise that the combination of the substantially ovoid overall shape (feature C1) with the previously mentioned features of the container for the convenience of gripping (feature C2) have a **synergetic effect** in view of solving the general problem set by the invention.

As a consequence, the Board judges, contrary to the findings of the Opposition Division (impugned decision, point 2.1), that the skilled person will directly and unambiguously derive the combination of features C1 and C2 and, hence, the subject-matter of claim 1 of the main request, using common general knowledge, from the

application as originally filed taken as a whole. Therefore, the requirements of Article 123(2) are fulfilled (G 2/10, OJ EPO 2012, 376, reasons points 4.3, 4.5.1 and 4.6).

- 2.2.5 As put forward by the appellant, the rest of the application as originally filed, relating to the general disclosure of the invention, the examples according to figures 1, 2 and 3, or even the claims, is not in contradiction with the combination of features C1 and C2. The examples according to figures 1, 2 and 3, although falling outside the scope of claim 1 of the main request, remain useful for the understanding of the claimed subject-matter.

As a matter of fact, the Board shares the appellant's opinion, contrary to the respondent's view and the reasoning given in the impugned decision, point 2.1, page 5, first paragraph, that with respect to the first embodiment a depression in one direction leading to a smaller diameter substantially in the middle of the body of the container does not detract from the fact that the overall shape can still be regarded as being elliptical (cf. figure 2). Higher resistance to vertical and/or transverse loads is, hence, still provided, at least to a large extent.

The skilled reader would also accept this teaching for other overall shapes such as a substantially ovoid overall shape (figure 3).

- 2.2.6 For the respondent, as argued during the oral proceedings, the three paragraphs of page 5, lines 1-27, of the original description make clear that the "substantially ovoid overall shape" (feature C1; third paragraph, page 5, line 19-27) is disclosed as a

preferred embodiment of a container with **symmetry of revolution**, i.e. a circular cross section without the complex three dimensional shape convenient for gripping (feature C2; two previous paragraphs, page 5, lines 1-17). This would be all the more true since the skilled person, knowing that a shape with symmetry of revolution enables to increase the mechanical strength of the container, relates this explicit teaching directly to the preferred embodiment of a substantially ovoid overall shape. As a consequence, the skilled person would not derive from page 5, lines 1-27, that feature C1, disclosed therein, may be combined with feature C2, disclosed elsewhere.

This is further confirmed by the following paragraph, page 5, lines 29-32, in which **alternative** solutions are listed, among them a container with a three dimensional shape convenient for gripping (to be understood as being feature C2), which are explicitly mentioned according to "**another embodiment**", i.e. not to be combined with the previous embodiment of a container with a substantially ovoid overall shape (feature C1).

The respondent also argues that the skilled person aiming at solving the problem of achieving high mechanical properties would not think of **weakening** a container having a substantially ovoid overall shape according to feature C1, with concave curves in its middle according to feature C2.

In fact, feature C2 relates to a problem to be solved, namely to enable an easy manipulation of the container, which is different from that of increasing the mechanical properties to be solved by feature C1. For the respondent, the application as originally filed describes in fact two inventions as further illustrated

by, on the one hand, the two embodiments of figures 1 and 2 and claim 1 (with only feature C2), and on the other hand, figure 3 and claim 4 (with only feature C1). As a result, the skilled reader would not think of combining these features of two originally disclosed distinct inventions.

In addition, in view of the used word "substantially", the skilled person would interpret feature C1 as providing the container with an ovoid overall shape **apart from details**. However, in view of the high claimed ratios of diameters S1 to S3, feature C2 could not be considered as a "detail" for the overall shape of the container of claim 1 of the main request. As a result of this contradiction, the skilled person would also not have derived the combination of features C1 and C2 from the application as originally filed.

2.2.7 The Board cannot share the respondent's view for the following reasons as discussed at the oral proceedings.

The three paragraphs, page 5, lines 1-27, of the application as originally filed have to be considered in view of the whole disclosure. They cannot be isolated from the rest of the description. The conclusions of the respondent based on these paragraphs only, i.e. the overall form with a symmetry of revolution, do not hold already for the reasons given under points 2.2.4 and 2.2.5 above.

In addition, as put forward by the appellant at the oral proceedings, for the position of the respondent to be correct, there should also be reference to two distinct containers in the application as originally filed. That is not the case. The "container" referred to is consistently mentioned as "the container" or "the

container according to the invention". Original claim 1 is for "a container" and "claim 4 is for an assembly with "a container", so do not contradict this either. The above also applies to the disclosure on page 5 where **the** container is referred to. Since the container, page 5, line 19-27, has a substantially ovoid overall shape, the skilled person will immediately derive that said feature C1 is to be combined with feature C2 of the claims (claims 1 to 3). Contrary to the respondent's position, there is no reason for the skilled person to think that this passage of the description would relate to original claim 4 only.

As also pointed out by the appellant, the paragraph of page 5, lines 29-32, does not refer to the **complex** three dimensional shape convenient for gripping. The word "complex" is indeed not used. This three dimensional shape convenient for gripping refers to a general shape of the container, not to be mixed up with feature C2. The paragraph merely gives the reader additional alternatives for the overall shape of the container. It is not in contradiction with the previously mentioned preferred ovoid shape. This is further confirmed by claim 12 which combines all alternatives, i.e. including the ovoid shape, and indirectly refers back to claim 1 which comprises the complex three dimensional shape convenient for gripping.

Further, as argued by the appellant, the application as originally filed does not comprise two distinct inventions. As a matter of fact, as already put forward under point 2.2.4 above, feature C2 is directly related in the original description to the general problem with respect to the mechanical strength of the container,

pages 2, line 12 to page 3, line 11, exactly like it is the case for feature C1, page 5, lines 19-27.

All in all, in a case as the present where the wording of the claim can find its source before amendments in original claim 1, the question is whether the rest of the description provides sufficient basis for the final wording. The Board finds that to be the case, starting in particular from the problems the invention intends to solve, namely increasing mechanical strength **as well as** improving convenience of gripping as described on pages 2 to 5 of the original description, for **one and the same** container. The improved mechanical strength requires clearly the substantially ovoid overall shape (feature C1), the improved convenience of gripping requires feature C2.

The use of the term "substantially" does not change the above, even if the term allows only details to depart from the overall ovoid shape.

2.2.8 At the oral proceedings the respondent raised for the very first time the objection that the feature "one-piece container" of claim 1 of the main request has no basis in the application as originally filed.

A basis for this feature would only be given on page 6, lines 26-30 of the original description. However, this passage mentions that the body **and** the neck would be made as a "single-piece". The "one-piece" according to claim 1 of the main request would refer to the container alone, without the neck, which is different and would create a new teaching which was not present in the application as originally filed, contrary to Article 123(2) EPC. The wording of claim 1 would further exclude a container made of a body and a neck

as a single-piece together with additional parts, i.e. a container made of several parts.

2.2.9 The Board cannot share the respondent's view for the following reasons, as given by the appellant. The "one-piece" container, according to claim 1 of the main request, has a body **and** at least a neck, which is completely in accordance with the original description, page 6, lines 26-30 and original claim 1. There is therefore no new teaching. The base of claim 2 of the main request is also originally disclosed as being part of the container (page 4, lines 25-34; original claim 11). There is no teaching in the original description of a container made of several parts, so that the wording of claim 1 does not extend beyond the original subject-matter.

2.2.10 As an additional objection raised during the oral proceedings, the respondent considers that an essential feature has been deleted when coming to claim 1 of the main request. Referring to original claim 4 as the source of this claim and also to the passages of the original description, page 8, line 33 to page 9, line 8 and page 11, lines 6-15, the respondent holds the view that the "product" in the container was originally disclosed as an essential feature of the container in view of the technical problem of withstanding compression, i.e. mechanical strength. The container would be incompressible only if a product would be present in it (page 3, lines 12-30). This essential feature having been deleted from the assembly, the container of claim 1 of the main request does not fulfill the requirements of Article 123(2) EPC.

2.2.11 The Board cannot share the respondent's view for the reasons given by the appellant that the product was not

included in original claim 1, which forms the basis for present claim 1 of the main request. Further, as appearing from the original description, page 4, line 25, the container "according to the invention" is empty or full. Hence, the product has not been disclosed as being an essential feature. Therefore, this objection cannot hold.

2.3 Articles 100(c) and 123(2) EPC and the description

2.3.1 The respondent argued that the first two paragraphs on page 5 of the original description mentioning a symmetry of revolution are clearly linked with the ovoid shape ("derived from an egg") of the container discussed on the same page. Their deletion from the description before grant of the contested patent leads to a change in the definition of the ovoid shape, contrary to the requirements of Article 123(2) EPC.

2.3.2 The Board cannot share this view since the description of the patent has merely been put in line with the granted claims which, in view of the above discussion, do not extend the subject-matter beyond the original disclosure. Further, the definition of an ovoid shape is still provided in the description of the contested patent, [0015] ("natural shape derived from an egg") and shown in figure 3. Hence, contrary to the respondent's view, the deletion of said paragraphs does not lead to a change in the definition of the substantially ovoid overall shape of claim 1.

2.3.3 The respondent argued that the text of paragraph [0006] of the patent specification extends the content of the subject-matter beyond the original disclosure since it is in contradiction with the embodiments shown in

figures 1 to 3. Before grant, it repeated the wording of claim 1, which was in order for figures 1 and 2.

- 2.3.4 The Board cannot follow this view since the passage has simply been adapted to claim 1 as granted. If there is no problem for claim 1 with Article 123(2) EPC, that is also the case for this paragraph. Such a contradiction between the claims and the description, i.e. the embodiment of figures 1 and 2 not falling within the claimed scope, does not relate to an extension of the subject-matter.

As admitted by the appellant during the oral proceedings, the description of the contested patent would in any case have to be adapted in the further opposition proceedings, if maintenance of the patent is to follow (e.g. also the first sentence of paragraph [0036]).

2.4 Claims - Article 84 EPC

- 2.4.1 As already pointed out under point 2.1.1 above, the only amendment in claim 1 of the main request with respect to claim 1 of the patent as granted consists in the substitution of the expression "a generally ovoid shape" by feature C1: "a substantially ovoid overall shape".

As a result, claim 1 of the main request may be examined for compliance with the requirements of Article 84 EPC only, and then only to the extent that the amendment, i.e. feature C1, introduces non-compliance with Article 84 EPC (G 3/14, not yet published in EPO OJ, see reasons points 62, 74-78 and the order).

2.4.2 At the oral proceedings, the respondent argued that the substituted expression and feature C1 would have different meanings.

In particular, the term "generally" in "generally ovoid shape" would imply an ovoid shape allowing more possible modifications from the shape of an ovoid than the term "substantially" of feature C1. For the respondent, the term "substantially" would only allow for some **details** to depart from the ovoid shape. Further, the expression in feature C1 of "overall shape" would consider all the limits of the container, whereas the previous expression only concerned the "shape".

Feature C1 would then have a narrower meaning than the previous expression, which would lead to contradictions with the rest of the claim, in particular with feature C2 which cannot be regarded as a mere "detail" in view of the high diameter ratios S1 to S3. Such contradictions lead to lack of clarity which was not present in claim 1 of the patent as granted with the previous expression. As a consequence, feature C1 would introduce non-compliance with Article 84 EPC so that claim 1 of the main request may be examined to that extent for compliance with the requirements of Article 84 EPC.

2.4.3 The Board cannot share this view for the following reasons as put forward by the appellant.

No difference of meaning can be established in the present case between the terms "generally" and "substantially". This also applies to the expressions of an "ovoid shape" and an "ovoid overall shape" since, for the skilled person, the ovoid shape is *de facto* the

ovoid **overall** shape and not only e.g. a vertical section.

The reason for substituting the former expression by feature C1 was only to rely on an explicit wording of the application as originally filed in reply to an objection based on Article 123(2) EPC in the notice of opposition (see impugned decision, point II.1).

Since the meanings of the substituted feature and that of feature C1 are identical, the latter cannot introduce a non-compliance with Article 84 EPC which would not have been already present in claim 1 of the patent as granted. Therefore, claim 1 of the main request is not to be examined for compliance with the requirements of Article 84 EPC.

3. *Auxiliary requests 1 to 4*

In view of the above conclusions with respect to the main request, there is no reason to discuss the auxiliary requests 1 to 4 in the present decision.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated