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**Datasheet for the decision
of 13 January 2021**

Case Number: T 0411/16 - 3.2.07

Application Number: 10718307.1

Publication Number: 2421764

IPC: B65D21/02, B65D43/16

Language of the proceedings: EN

Title of invention:

LID PART FOR A CONTAINER ASSEMBLY HAVING STACKING PROVISIONS

Patent Proprietor:

N.V. Nutricia

Opponent:

Å&R Carton Lund AB

Headword:

Relevant legal provisions:

EPC Art. 54(3), 113(1), 123(2)

EPC R. 103(4) (a), 115(2)

RPBA Art. 15(1), 13

RPBA 2020 Art. 15(3), 25(3)

Keyword:

Late-filed auxiliary request - admitted (yes)

Novelty - (yes)

Reimbursement of appeal fee - (yes) at 25% due to withdrawal of the appeal before the decision is announced at the oral proceedings

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0411/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 January 2021

Respondent:

(Patent Proprietor)

N.V. Nutricia
Eerste Stationsstraat 186
2712 HM Zoetermeer (NL)

Representative:

Nederlandsch Octrooibureau
P.O. Box 29720
2502 LS The Hague (NL)

Appellant:

(Opponent)

Å&R Carton Lund AB
Patentavdelningen
Box 177
221 00 Lund (SE)

Representative:

Valea AB
Box 1098
405 23 Göteborg (SE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 December 2015 concerning maintenance of the
European Patent No. 2421764 in amended form.**

Composition of the Board:

Chairman

I. Beckedorf

Members:

A. Beckman

A. Pieracci

Summary of Facts and Submissions

- I. The opponent and the patent proprietor both lodged an appeal in due time and form against the interlocutory decision of the opposition division maintaining the European patent No. 2 421 764 in amended form.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of inventive step) and on Article 100(c) EPC (unallowable amendments).

The opposition division considered

- that the ground for opposition according to Article 100(c) EPC held true against the subject-matter of claim 11 of the patent as granted (main request),
- that the first, second, third and fifth auxiliary request, each comprising a claim corresponding to claim 11 of the main request, did not fulfill the requirements of Article 123(2) EPC,
- that the subject-matter of claim 1 of the fourth auxiliary request was not novel over the disclosure of D18 (= WO 2010/071424 A1), and
- that the patent as amended according to the sixth auxiliary request met the requirements of the EPC.

- III. The opponent requested

that the decision under appeal be set aside and that the patent be revoked.

IV. The patent proprietor requested initially

that the decision under appeal be set aside and that the patent be maintained as granted (main request),
or alternatively,
that the patent be maintained in amended form on the basis of one of the sets of claims filed as first to ninth auxiliary request,
wherein the first to fifth auxiliary request were filed with letter dated 8 September 2014 in opposition proceedings,
the sixth auxiliary request was filed during oral proceedings on 10 December 2015 before the opposition division and held by the opposition division to meet the requirements of the EPC,
the seventh to ninth auxiliary request were filed with letter dated 30 August 2016 in appeal proceedings.

V. In preparation for oral proceedings scheduled at the request of both parties, the Board expressed its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2007 dated 19 November 2019

- that the ground for opposition according to Article 100(c) EPC appeared to hold true against claims 1 and 11 of the patent as granted (*c.f.* point 6 of the communication pursuant to Article 15(1) RPBA 2007),
- that the subject-matter of claim 1 of the first to sixth auxiliary request seemed not to fulfil the requirements of Article 123(2) EPC (*c.f.* point 7.1 of the communication pursuant to Article 15(1) RPBA 2007),

- that the subject-matter of claim 10 of the first and second auxiliary request, the subject-matter of claim 9 of the third auxiliary request and the subject-matter of claim 11 of the fifth auxiliary request seemed not to fulfil the requirements of Article 123(2) EPC (*c.f.* point 7.2 of the communication pursuant to Article 15(1) RPBA 2007),
- that the seventh to ninth auxiliary request were likely not to be admitted into the proceedings in accordance with Article 12(4) RPBA 2007 and that the claimed subject-matter of those requests seemed not to fulfil the requirements of Article 123(2) EPC (*c.f.* points 5.4 and 10 of the communication pursuant to Article 15(1) RPBA 2007).

- VI. With their response dated 30 December 2019 to the aforementioned communication of the Board, the patent proprietor submitted further sets of claims according to the tenth to fourteenth auxiliary request.
- VII. The opponent replied with letter dated 16 April 2020 and requested not to admit the tenth to fourteenth auxiliary requests as being *prima facie* not allowable since the claimed subject-matter according to the tenth to twelfth and fourteenth auxiliary requests is not novel over the disclosure of D18 and the claimed subject-matter according to the thirteenth and fourteenth auxiliary requests is non-convergent with that of the previous requests.
- VIII. With letter dated 3 December 2020, the opponent withdrew their request for oral proceedings and indicated not to attend the oral proceedings irrespective of whether they were held by videoconferencing technology or not.

IX. Oral proceedings before the Board were held on 13 January 2021 by videoconference. Although having been duly summoned, the opponent did not attend the oral proceedings, as announced. According to Rule 115(2) EPC and Article 15(3) RPBA 2020, proceedings were continued without the opponent.

For details of the oral proceedings, in particular with respect to the issues discussed with the patent proprietor, reference is made to the minutes thereof. The order of the present decision was announced at the end of the oral proceedings.

X. During the oral proceedings the patent proprietor stated that, while withdrawing their appeal and all higher-ranking requests, they defended the patent only in amended form on the basis of the eleventh auxiliary request.

The patent proprietor, henceforth as respondent, requested finally

that, when setting aside the decision under appeal, the patent be maintained in amended form on the basis of the eleventh auxiliary request filed with letter dated 30 December 2019.

The patent proprietor stated that they did not proceed with the request that the costs for their attendance at the oral proceedings on 10 December 2015 be ordered to be born by the opponent (*c.f.* point 15 of the patent proprietor's letter dated 30 December 2019).

XI. Claim 1 of the eleventh auxiliary request reads as follows (underlined the features introduced and ~~striked-through the features deleted~~ with respect to

claim 1 of the sixth auxiliary request, *i.e.* of the patent as maintained according to the appealed decision):

"A container assembly comprising a container part with a circumferential wall and a bottom wall, and a lid part (2) ~~for a container assembly (1)~~, said lid part comprising a connection portion (5) for connection to a rim of the circumferential wall of the container and a lid (4) which is pivotably connected to said connection portion, said connection portion comprising an upper wall provided with an access opening (6) which can be sealed with said lid, an area of said access opening is at least 50 % of the area of the connection portion, said access opening is surrounded by a circumferential first flange (7) and said lid comprises a circumferential lid flange (8) extending towards said connection portion, perimeters of said lid flange and said first flange mutually adapted to allow said lid to close in a sealing manner on said first flange of said connection portion, said lid being connected to said connection portion (5) via an integrated hinge (9), characterised in that said connection portion (5) is provided with stacking provisions (14) which are provided around said access opening (6), that said lid part has a weight of about 5-100 gr, that said integrated hinge (9) has a connection part connecting to a lower end of said lid flange (8) and that said lid is provided with a lip (10) for opening the lid, which lip is provided at said lower end of said lid flange, wherein the stacking provisions which are provided around said access opening are complementary with stacking provisions at the bottom of said container part."

- XII. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

Reasons for the Decision

1. Right to be heard - non-attendance at oral proceedings

Although the opponent did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the Case Law of the Boards of Appeal, 9th edition 2019, sections III.B. 2.7.3 and V.A.4.5.3).

2. Admittance into the proceedings of the eleventh auxiliary request

The eleventh auxiliary was filed for the first time in appeal proceedings after arrangement of the oral proceedings. Thus, its admittance into the appeal proceedings depends on the Board's discretion under Article 13 RPBA 2007 (by virtue of Article 25(3) RPBA 2020).

The eleventh auxiliary request is based on the sixth auxiliary request, *i.e.* on the version of the patent as maintained according to the appealed decision, and differs therefrom in that claim 1 of the eleventh auxiliary request corresponds to independent claim 4 of the sixth auxiliary request in which the features of claim 1 of the sixth auxiliary request have been explicitly recited whereas independent claim 1 of the

sixth auxiliary request has been deleted. Thus, claim 1 of the eleventh auxiliary request has been restricted to the subject-matter of independent claim 4 of the sixth auxiliary request wherein claim 4 of the sixth auxiliary request has been made the only independent claim of the eleventh auxiliary request. Hence, the eleventh auxiliary request does not constitute a fresh case but is considered a further development of previous requests. Furthermore, it does not cause a delay in the appeal proceedings.

The Board notes that, as far as the preliminary opinion of the Board stated that the subject-matter of claim 1 of the sixth auxiliary request seemed not to fulfil the requirements of Article 123(2) EPC (*c.f.* point 7.1 of the communication pursuant to Article 15(1) RPBA 2007), these objections have been overcome by the amendments made in the eleventh auxiliary request.

The opponent requests not to admit the eleventh auxiliary request into the appeal proceedings since its subject-matter is *prima facie* not novel over the disclosure of D18.

Since novelty of the subject-matter of the eleventh auxiliary request over the disclosure of D18 is established (*c.f.* point 3.3 below), the Board sees no reason not to admit the eleventh auxiliary request into the proceedings.

3. *Novelty (Article 54(3) EPC) - Eleventh auxiliary request*
- 3.1 The opponent contests that the claimed subject-matter of the eleventh auxiliary request is novel over the disclosure of document D18 and notes with letter dated

16 April 2020, under point 3.4, that the limitation to the weight of the lid part in the eleventh auxiliary request does not impart novelty over D18 for the reasons laid out under point 4.3.1 of their letter of reply dated 13 September 2016.

The opponent argues in writing that, contrary to the findings in the impugned decision under point 14.2.1, claim 1 is not explicitly distinguished over the content of D18 by the weight limitation that the lid part has a weight of about 5-100 gr. According to the opponent a weight within the claimed range is implicitly disclosed because D18 and the disputed patent relate to the same objects (lid part and container) and the figures and most of the text of the two documents are identical. Thus, the lids should have exactly the same weight. A short calculation based on data disclosed in D18 leads to a weight within the claimed range. To indicate that the weight of the lid part in D18 is roughly in the middle of the range claimed, the opponent presents a calculation based essentially on the diameter of the connection portion, the material thickness of the lid part, the height of the lid flange and the material of the lid part, as disclosed in D18 on page 8, line 2, on page 14, lines 4, 6-8 and 21-22, and Figures 4 to 6. The opponent argues that the approximate calculation, that easily could be calculated from the data given in D18, leads to a lid part weight range of about 13-21 g. In view of the lid part weight range of about 13-21 g disclosed in D18, the claimed lid part weight range of about 5-100 g is clearly not novel.

- 3.2 The Board does not concur with the opponent's argumentation that the claimed lid part weight range is disclosed in D18.

Even if the figures and some of text of D18 and of the disputed patent are identical, this does not indicate that the lid part of D18 has a weight in the claimed range. As brought forward by the patent proprietor, the similarity of the figures in D18 and the disputed patent does not require that the claimed weight range is anticipated by D18.

With respect to the opponent's calculation of the lid part weight range in D18, the Board agrees with the patent proprietor that the calculation is partly based on assumptions and estimates. For example, with the statement setting out the grounds of appeal it estimates the average thickness of the lid part to be around 1 mm and based on a total projected area of the lid part of 100 cm^2 and a material density of 0.9 g/cm^3 , concludes a lower limit to the weight of 13 g. It also estimates the height of the rim to be around 8 mm. Thus, the claimed weight range of the lid part range is not directly and unambiguously derivable from the disclosure in D18.

Additionally, the Board follows the patent proprietor's view that the calculation under point 4.3.1 of its letter of reply dated 13 September 2016 takes the diameter of the connection portion from an embodiment on page 8, lines 1-2, of D18, which is not directed to the example given on page 14 of D18, from which the further values are taken. Thus, it mixes details from the embodiment discussed on page 8 with an example given on page 14. The Board notes that such a combination of features from different embodiments cannot lead to a finding of lack of novelty, since the opponent has not indicted that such a combination has

specifically been suggested in D18 (see the Case law of the Boards of Appeal, 9th edition 2019, I.C.4.2.).

Furthermore, the Board follows the impugned decision under point 14.2.1 and the arguments of the patent proprietor that the opponent's calculation does not take into account the whole web-like structure of the lid part, e.g. the upstanding portions of the rim and the reinforcement ribs of the lid, as shown in Figures 4 and 5 of the disputed patent, which would contribute additional weight to the lid part. The opponent's calculation is rather based on the assumption that the lid part is in the form of a flat or partly flat disk, but disregards instead the weight of other parts which make up the lid part. Hence, the result of the calculation does not clearly and unambiguously fall within the weight range according to claim 1.

The opponent puts forward that the discussion about the rim, reinforcement ribs etc. mentioned under point 14.2.1 of the decision under appeal is confusing. The Board cannot share this view and follows the findings in the impugned decision under point 14.2.1. The opponent's calculation takes account of the projected surface area, the material thickness and the material disclosed in D18. Since the opponent merely estimates the additional weight of the rim and the flanges of the lid part in the calculation (see e.g. opponent's statement setting of the grounds of appeal, page 12, sixth paragraph: "Based on figure 5, the additional area of the flanges, the non-flat shape of the lid and the parts can roughly be estimated to contribute with 50% of the area of the rim"), the opposition division concludes that it *"empirically added some weight for also taking into account the rim, reinforcement ribs, etc. ... Therefore, a range of weight of 5-100gr is not*

unambiguously described in D18." (see impugned decision, point 14.2.1 of the reasons).

For these reasons, the Board considers the feature of claim 1 that "said lid part has a weight of about 5-100 gr" not to be directly and unambiguously disclosed in D18.

- 3.3 As a consequence, the subject-matter of claim 1 of the eleventh auxiliary request is novel over the disclosure of D18 (Article 54(3) EPC).

4. *Conclusions*

Hence, the opponent has not convincingly demonstrated that the eleventh auxiliary request is not allowable. Since the opponent had not raised any other objections to the eleventh auxiliary request than those discussed under points 2. and 3. above, the Board is in a position to decide on the present case and finds that the decision under appeal is to be set aside and that the patent is to be maintained in amended form on the basis of the eleventh auxiliary request.

5. *Description*

At the oral proceedings the patent proprietor submitted an adapted description to the set of claims according to the eleventh auxiliary request which was discussed with the party. The Board had no objections against it.

6. *Partial reimbursement of the appeal fee*

Due to the patent proprietor's withdrawal of their appeal before the announcement of the decision at the oral proceedings, the appeal fee paid by the patent

proprietor is reimbursed at 25% according to Rule 103(4) (a) EPC.

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 with the order to maintain the patent as amended in the following version:

Description:

Columns 1 to 6 filed during oral proceedings of
 13 January 2021
Columns 7 to 13 of the patent specification

Claims:

No. 1 to 13 according to the eleventh auxiliary
 request filed with letter dated
 30 December 2019

Drawings:

Figures 1 to 9 of the patent specification.

3. The appeal fee paid by the patent proprietor is reimbursed at 25%.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated