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**Datasheet for the decision  
of 31 May 2021**

**Case Number:** T 0727/16 - 3.2.07

**Application Number:** 07112821.9

**Publication Number:** 1873067

**IPC:** B65D1/02

**Language of the proceedings:** EN

**Title of invention:**

Container for a flowable product, process of manufacture and the use thereof

**Patent Proprietor:**

Nestlé Waters Management & Technology

**Opponent:**

COMPAGNIE GERVAIS DANONE

**Headword:**

**Relevant legal provisions:**

EPC 1973 Art. 76(1)

**Keyword:**

Amendments - extension beyond the content of the earlier application as filed (yes)

**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 0727/16 - 3.2.07**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 31 May 2021**

**Appellant:**

(Opponent)

COMPAGNIE GERVAIS DANONE  
17 Boulevard Haussmann  
75009 Paris (FR)

**Representative:**

Plasseraud IP  
66, rue de la Chaussée d'Antin  
75440 Paris Cedex 09 (FR)

**Respondent:**

(Patent Proprietor)

Nestlé Waters Management & Technology  
20, rue Rouget de Lisle  
82130 Issy-les-Moulineaux (FR)

**Representative:**

Santarelli  
49, avenue des Champs-Élysées  
75008 Paris (FR)

**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
29 January 2016 concerning maintenance of the  
European Patent No. 1873067 in amended form.**

**Composition of the Board:**

**Chairman**

V. Bevilacqua

**Members:**

G. Patton

C. Brandt

## **Summary of Facts and Submissions**

- I. The opponent lodged an appeal in the prescribed form and within the prescribed period against the opposition division's decision maintaining European patent No. 1 873 067 in amended form.
- II. The opposition was directed against the patent as a whole and was based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC (insufficient disclosure) and Article 100(c) EPC (unallowable amendments).
- III. In a communication pursuant to Article 15(1) RPBA 2020 dated 26 February 2020 the board provided its preliminary, non-binding opinion that the decision under appeal would likely be set aside and the patent would likely be revoked.

In reaction the respondent filed an auxiliary request by letter dated 14 August 2020.

Oral proceedings were held on 31 May 2021. For matters that arose during the oral proceedings, in particular the issues discussed with the parties and their requests, reference is made to the minutes.

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

- IV. The opponent (hereinafter "appellant") requested
- that the decision under appeal be set aside and that the patent be revoked.

The patent proprietor (hereinafter "respondent") requested

that the appeal be dismissed or, alternatively, that the decision under appeal be set aside and the patent be maintained on the basis of the auxiliary request filed by letter dated 14 August 2020.

V. Claim 1 of the **main request** reads as follows:

"Container for a flowable product, particularly for a beverage and, in particular, for mineral water, essentially consisting of:

a body (1) and of

at least one neck (2) which can be closed by a means (3) of closing off and/or of distributing the said flowable product contained in the said container, the wall or walls (4) forming the body (1) of said container being made by stretch blow molding of a thermoplastic preform,

the thickness of said wall or walls (4) forming said body (1) being comprised between 30  $\mu\text{m}$  and 100  $\mu\text{m}$ , preferably between 50  $\mu\text{m}$  and 70  $\mu\text{m}$ ,

characterized in that,

it has an ovoid or substantially ovoid overall shape and the wall or walls (4) are made of flexible plastic which can reversibly deform for constant surface area."

Compared with claim 1 of the main request, claim 1 of the **auxiliary request** further contains the following feature at the end of the claim:

", particularly under the weight of the flowable product contained in the said container when the said wall or walls (4) encounter a point or bearing surface,

so as to form, at least locally at this contact, at least one non-planar wall portion (5)."

VI. The following document considered in the opposition proceedings is relevant to the present decision:

D8: WO 03/033361 A

The contested patent is based on a divisional application from earlier European patent application No. 02785198.9 (hereinafter: "the earlier application") and D8 is the publication of that earlier application.

VII. The appellant essentially argued as follows (the arguments are discussed in more detail in "Reasons for the Decision" below):

The reasoning under point 15.4 of the impugned decision relating to the ratio  $d_2$  to  $d_1$  being between 1:3 and 1:10 was incorrect.

Said feature was specified in claim 1 of D8 and presented in D8 as being essential to solve the technical problem stated in that document. At no point did D8 disclose a container without the specific claimed range for the ratio  $d_2$  to  $d_1$ .

The skilled person would not derive from the disclosure of D8 as a whole that an invention on the basis of the "*ovoid or substantially ovoid overall shape*" was disclosed independently of the features of claim 1, i.e. a range of between 1:3 and 1:10 for the ratio  $d_2$  to  $d_1$ . The structure of the set of claims of D8 is reflected in the description.

The range of between 1:3 and 1:10 for the ratio d2 to d1 was specific and limiting. According to the description of D8 it applied to all shapes of containers, i.e. including those having an *"ovoid or substantially ovoid overall shape"*.

The respondent's argument that the range for the ratio d2 to d1 according to claim 1 of D8 was inherent in claim 1 of the main request was nothing more than an assertion.

Consequently, omitting the range of between 1:3 and 1:10 for the ratio d2 to d1 from claim 1 of the main request extended beyond the content of the earlier application as filed.

The same arguments applied to the auxiliary request.

VIII. The respondent essentially argued as follows (the arguments are discussed in more detail in "Reasons for the Decision" below):

The reasoning in point 15.4 of the impugned decision relating to the ratio d2 to d1 was correct.

In claim 1 and on page 2, lines 9-20, D8 disclosed a first invention aimed at solving the general problem, specified on page 2, lines 3-8, of providing containers with good mechanical properties while using less plastic. The claimed ratio d2 to d1 was the solution to that problem.

On page 5, lines 17-23, D8 further disclosed a second invention in accordance with claim 1 of the main request, aimed at solving the specific problem of withstanding vertical loads while using less plastic.

Giving the containers an "*ovoid or substantially ovoid overall shape*" was the solution to this specific problem.

The second invention in D8 was independent of the first one.

The range of between 1:3 and 1:10 for the ratio d2 to d1 was not to be considered limiting in this technical field.

The range for the ratio d2 to d1 according to claim 1 of D8 was also inherent in claim 1 of the main request.

Therefore, omitting the range of between 1:3 and 1:10 for the ratio d2 to d1 from claim 1 of the main request was not objectionable under Article 76(1) EPC 1973.

The same arguments applied to the auxiliary request.

## **Reasons for the Decision**

### 1. Applicable provisions of the EPC

As mentioned under point VI above, the contested patent is based on a divisional application from the earlier application **D8**, which was filed as international patent application PCT/EP02/11411 on 10 October 2002 and was still pending at the time the revised EPC (EPC 2000) entered into force on 13 December 2007. The documents for the divisional application of the contested patent were received on 20 July 2007, i.e. before the EPC 2000 entered into force.



Under Articles 1(1) and 6, first sentence of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the Act revising the EPC of 29 November 2000 (Special edition No. 4, OJ EPO 2007, English version, 217), Articles 76 and 100 EPC 1973 apply.

2. Main request

2.1 Claim 1 of the main request does not contain the following feature of claim 1 of the earlier application as originally filed (D8; see also impugned decision, points 15.1 and 15.2):

"the ratio  $d_2$  on  $d_1$  is comprised between 1:3 and 1:10".

2.2 The board considers that omitting this feature from claim 1 of the main request is not allowable pursuant to Article 76(1) EPC 1973 in view of the disclosure of D8.

In claim 1, D8 presents this specific range in such a way that a skilled reader construes it as an essential feature. It is further presented in the description (page 2, lines 3-33) as part of the solution to the stated problem.

Contrary to the impugned decision, point 15.4.3, the board considers that adding the expression "*ovoid or substantially ovoid overall shape*" to claim 1 of the main request does not equate to any specific upper limit so that the ratio  $d_2$  to  $d_1$  does not exceed 1:3.

Furthermore, by having a small internal diameter  $d_2$  of the neck, i.e. a small opening for the flowable

product, it is possible to give the container the desired shape in relation to the problem of optimising the resistance to vertical loads; this is unambiguously linked with a lower limit for the ratio of  $d_2$  to  $d_1$ . The skilled person knows that below the limit of 1:10 disclosed in D8 the container would not have the required mechanical properties, contrary to point 15.4.4 of the impugned decision. As also correctly put forward in the impugned decision, the ratio of  $d_2$  to  $d_1$  is disclosed in D8 independently of the shape of the container, i.e. it is essential per se for solving the general problem stated on page 2, lines 3-8 of D8 *"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 mechanical properties, and the geometric shape of which can allow eased storage, even in tight spaces such as inside a refrigerator for example"*.

On the other hand, the *"ovoid or substantially ovoid overall shape"* is not disclosed independently of the ratio  $d_2$  to  $d_1$  but rather as a preferred embodiment. This appears on page 5, lines 17-24 of D8, where the feature *"ovoid or substantially ovoid overall shape"* is disclosed for the first time as a preferred embodiment (this passage uses the expression "[a]s a preference").

Hence, the requirements of Article 76(1) EPC 1973 are not fulfilled since claim 1 of the main request does not contain the range of between 1:3 and 1:10 for the ratio  $d_2$  to  $d_1$ .

2.3 At the oral proceedings, the respondent argued that claim 1 of D8 and the disclosure on page 2, lines 9-33 concerned a first invention aimed at solving the general problem of providing containers with good

mechanical properties while using less plastic; see page 1, lines 22-28 and page 2, lines 3-8.

The "*ovoid or substantially ovoid overall shape*" of the container added to claim 1 of the main request was disclosed in D8 as a solution to a more specific problem of providing containers that withstand vertical loads, while likewise containing less plastic; see page 5, lines 17-23.

The latter passage of D8 (also illustrated in Figures 1 and 2) was independent of the ratio  $d_2$  to  $d_1$ , so it provided the support for the amendment to claim 1 of the main request. The paragraph on page 3, lines 28-29 of D8 (which also mentioned the figures) merely disclosed a specific single ratio for  $d_2$  to  $d_1$  and did not refer to any shape of the container.

The "*ovoid or substantially ovoid overall shape*" was disclosed on page 5, line 17 as "a preference" for the embodiment of a container with a circular or substantially circular cross-section, as disclosed a few lines above on page 5, lines 6-7. The expression "according to the invention" used on page 5, lines 6-7 referred to page 2, lines 3-8 describing the "present invention", which did not include any reference to the ratio  $d_2$  to  $d_1$ . Therefore, the range for the ratio  $d_2$  to  $d_1$  according to claim 1 of D8 was not disclosed as being essential for solving the specific problem of containers for withstanding vertical loads.

Consequently, D8 disclosed both a first invention in claim 1 aimed at solving a general problem, with the ratio  $d_2$  to  $d_1$  as the solution, and a second invention, now specified in claim 1 of the main request, aimed at

solving a specific problem, with the "*ovoid or substantially ovoid overall shape*" as the solution.

At any rate, having the range of between 1:3 and 1:10 for the ratio d2 to d1 was not limiting in this technical field given the usual shapes of containers, i.e. including for containers with an "*ovoid or substantially ovoid overall shape*".

In fact, the range for the ratio d2 to d1 according to claim 1 of D8 was inherent in claim 1 of the main request. The claimed product was obtained by stretch blow molding a thermoplastic preform and had wall thicknesses between 30 µm and 100 µm (see the contested patent, paragraph 8). These conditions necessarily led to the ratio d2 to d1 being between 1:3 and 1:10 in order to obtain suitable containers with the expected mechanical properties.

In view of the above reasons, omitting the range of between 1:3 and 1:10 for the ratio d2 to d1 from claim 1 of the main request was justified and did not contravene Article 76(1) EPC 1973.

- 2.4 The board does not share the respondent's view for the following reasons, as put forward by the appellant at the oral proceedings.

The disclosure on page 5, lines 17-23 of D8, where the feature "*ovoid or substantially ovoid overall shape*" appears for the first time, concerns a preferred embodiment ("As a preference ..."). Even if this preferred embodiment were to relate to the receptacles with a circular or substantially circular cross-section of page 5, lines 6-7, as argued by the respondent, it still refers to "the container according to the

invention". The container according to the invention is described on page 2, lines 9-20, where the features of claim 1 are recited and indicated as being the solution to the general problem stated on page 2, lines 3-8, i.e. obtaining good mechanical properties while using less plastic. Hence, the invention of D8 unambiguously contains the feature that the ratio  $d_2$  to  $d_1$  is between 1:3 and 1:10; see page 2, lines 19-20 and claim 1, lines 14-15.

The fact that the preferred embodiment with the "*ovoid or substantially ovoid overall shape*" makes it possible to provide containers that withstand vertical loads, i.e. containers with additional advantages and technical effects beyond those obtained with the containers according to the general disclosure (page 2, lines 3-8), does not mean that it concerns an independent invention.

The above is confirmed by the structure of the set of claims, which reflects the disclosure of the description of D8. Claim 4 contains the "*ovoid or substantially ovoid overall shape*" and refers back to claim 3 with the container having a circular or substantially circular cross section, the latter referring back to claim 1 with said range for the ratio  $d_2$  to  $d_1$ .

Even the figures referred to in the passage on page 5, lines 17-23 illustrate the diameters  $d_2$  and  $d_1$  as specified on page 3, lines 28-29 with a ratio of 1:8 in accordance with claim 1.

Therefore, the skilled person would not derive from the disclosure of D8 as a whole that an invention on the

basis of the "*ovoid or substantially ovoid overall shape*" would be independent of the features of claim 1.

Furthermore, contrary to the respondent's view, the range of between 1:3 and 1:10 for the ratio d2 to d1 cannot be considered a non-limiting feature.

This range is specific and applies to all containers, i.e. including those having an "*ovoid or substantially ovoid overall shape*".

Lastly, for the board, the respondent's view that the range for the ratio d2 to d1 according to claim 1 of D8 was inherent in claim 1 of the main request due to the process for manufacturing the containers and their wall thicknesses is nothing more than an assertion that cannot be accepted for want of any evidence.

### 3. Auxiliary request

Like claim 1 of the main request, claim 1 of the auxiliary request does not contain the missing feature of the ratio d2 to d1 (see point V above).

The respondent's arguments for the auxiliary request were identical to those for the main request.

As a consequence, the same reasoning and conclusion as put forward for the main request under point 2 above also apply *mutatis mutandis* to the auxiliary request.

Consequently, the auxiliary request does not fulfil the requirements of Article 76(1) EPC 1973.

## 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:



G. Nachtigall

V. Bevilacqua

Decision electronically authenticated