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**Datasheet for the decision  
of 3 July 2018**

**Case Number:** T 1629/16 - 3.2.07

**Application Number:** 10181765.8

**Publication Number:** 2305574

**IPC:** B65D75/00

**Language of the proceedings:** EN

**Title of invention:**  
Resealable food container

**Applicant:**  
Intercontinental Great Brands LLC

**Headword:**

**Relevant legal provisions:**

EPC Art. 84  
RPBA Art. 13(1), 13(3)

**Keyword:**

Claims - clarity (no)  
Late-filed request - submitted during oral proceedings -  
admitted (no)

**Decisions cited:**

G 0009/91, T 0307/06, T 1705/07, T 1067/08

**Catchword:**



**Beschwerdekammern**

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Case Number: T 1629/16 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 3 July 2018**

**Appellant:** Intercontinental Great Brands LLC  
(Applicant) 100 Deforest Avenue  
East Hanover, NJ 07936 (US)

**Representative:** Smaggasgale, Gillian Helen  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted on 16 February  
2016 refusing European patent application No.  
10181765.8 pursuant to Article 97(2) EPC

**Composition of the Board:**

**Chairman** G. Patton  
**Members:** V. Bevilacqua  
C. Brandt

## **Summary of Facts and Submissions**

- I. The applicant (appellant) lodged an appeal against the decision of the examining division to refuse European patent application No. 10 181 765.8.
- II. According to the impugned decision, none of the then requests of the applicant (main request, first to third auxiliary requests) fulfilled the requirements of Article 84 EPC.
- III. With the statement setting out its grounds of appeal the appellant requested that the examining division's decision be set aside and that the case be remitted to the examining division on the basis of the claims of the main request discussed in the appealed decision or, as an auxiliary measure, on the basis of one of the first to third auxiliary requests also as discussed in the appealed decision.
- IV. In a communication sent as an annex to the summons to oral proceedings, the Board expressed its preliminary opinion on these requests, and cited ASTM Standard F88-00 as being relevant to the assessment of clarity.
- V. With a letter dated 11 May 2018 the appellant submitted a new main request and new first to seventh auxiliary requests and requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of any of those requests. In the event that the Board was not minded to remit the case to the examining division, the appellant requested that a patent be granted on the basis of any one of the main request or the first to seventh auxiliary requests.

VI. Oral proceedings took place on 3 July 2018, during which the appellant submitted new eighth and ninth auxiliary requests.

For the course of the oral proceedings and the issues discussed with the appellant, reference is made to the minutes.

At the end of oral proceedings the appellant requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of any of the main request or the first to seventh auxiliary requests, all requests as filed with the letter dated 11 May 2018, or on the basis of the eighth or ninth auxiliary request as filed during the oral proceedings. In the event that the Board was not minded to remit the case to the examining division, the appellant requested that a patent be granted on the basis of any one of the main request or the first to ninth auxiliary requests.

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

VII. Independent **claim 1 of the main request**, submitted with the letter dated 11 May 2018, reads as follows:

"A polygonal food container (10) in combination with a food product located within the container (10), the food product being discrete food articles, the food container (10) comprising:

a frame (30) forming a tray for receiving the food product;

a wrapper (11) forming an exterior of the container (10) having a top, an overall structure of the container (10) imparting a certain shape to the wrapper (11) comprising the tray within the wrapper, the certain shape being independent of one of the size and the shape of the discrete food articles within the container (10);

an access opening (18) formed in the top so as to provide access to the discrete food articles within the container (10);

and a sealing cover (20) adhesively sealed to the top with an adhesive (26) so as to cover the access opening (18), said sealing cover (20) being releasable and reclosable against the top to cover the access opening (18) to seal the access opening (18) after the sealing cover (20), having been initially opened, is moved back against the top,

wherein said sealing cover (20), adhesive and top provide a peel force of between 200 to 750 grams per inch to separate the seal between said sealing cover (20) and said top."

**Claim 1 of the first to seventh auxiliary requests** all comprise the last feature of claim 1 of the main request at stake in the present decision:

"wherein said sealing cover (20), adhesive and top provide a peel force of between 200 to 750 grams per inch to separate the seal between said sealing cover (20) and said top."

**Claim 1 of the eighth auxiliary request**, submitted during oral proceedings, reads as follows (features

added with respect to claim 1 of the main request are in bold, emphasis added by the Board):

"A polygonal food container (10) in combination with a food product located within the container (10), the food product being discrete food articles, **which are cookies**, the food container (10) comprising:

a frame (30) forming a tray for receiving the food product;

a wrapper (11) forming an exterior of the container (10) having a top, an overall structure of the container (10) imparting a certain shape to the wrapper (11) comprising the tray within the wrapper, the certain shape being independent of one of the size and the shape of the discrete food articles within the container (10);

an access opening (18) formed in the top so as to provide access to the discrete food articles within the container (10);

and a sealing cover (20) adhesively sealed to the top with an adhesive (26) so as to cover the access opening (18), said sealing cover (20) being releasable and reclosable against the top to cover the access opening (18) to seal the access opening (18) after the sealing cover (20), having been initially opened, is moved back against the top, wherein said sealing cover (20), adhesive and top provide a peel force of between 200 to 750 grams per inch to separate the seal between said sealing cover (20) and said top, **wherein peel force is measured by ASTM-F88-00 at a rate of grip separation of 200 to 300 mm/min and an angle of 180°.**"

**Claim 1 of the ninth auxiliary request**, submitted during oral proceedings, corresponds to claim 1 of the main request but additionally comprises the following features added at the end thereof:

**"said adhesive is Fasson R5510 applied at a coat weight of 3 pounds per ream".**

VIII. Where relevant to the present decision the appellant argued substantially as follows.

The "peel force" parameter was well known to the skilled person, as it was used in many granted European patents.

The skilled person knew that peel force was to be determined by the objective procedures clearly defined in ASTM Standard F88-00. As a consequence, and by analogy with the *ratio decidendi* of T 307/06, the last feature of claim 1 of the main request relating to the peel force was to be considered clear.

The skilled person would have used the set-up shown in the right-hand portion of figure 1 of ASTM Standard F88-00 (180° supported) and have selected a rate of separation as indicated in the ASTM standard.

The choice of temperature was also clear to a skilled person, as it would not have made any sense to test a package for cookies outside room temperature.

The eighth auxiliary request was admissible in particular because the features introduced had been extensively discussed during the clarity discussion of claim 1 of the main request and did not raise new issues at a late stage of the proceedings.



The ninth auxiliary request was also admissible because the features added to its claim 1 clearly had a basis in the description as originally filed and *prima facie* overcame the clarity objection raised against claim 1 of the main request by providing a trade name which univocally defined the composition and properties of the material used.

### **Reasons for the Decision**

1. Main request - lack of clarity

1.1 The application was refused by the examining division because it was not clear how a "peel force of between 200 to 750 grams per inch" was to be achieved.

The Board concurs with this finding of the examining division.

This lack of clarity arises because claim 1 neither contains structural features of the packaging components suitable to achieve the claimed peel force, nor specifies their composition.

The feature "peel force of between 200 to 750 grams per inch" merely provides to the reader of claim 1 an indication of conditions and restrictions to be achieved for the adhesion between the sealing cover and the top without specifying the technical features by which this result is achieved.

The Board considers that this could still be clear if the results to be achieved were to be directly and positively verified by tests or procedures adequately

specified in the description or belonging to the skilled person's common general knowledge (see also in this respect Case Law of the Boards of Appeal, 8th edition 2016, II.A.3.5).

In the present case, however, none of the above conditions are satisfied for the following reasons.

ASTM Standard F88-00, which the Board agrees is the standard the skilled person will apply, clearly states that the results of a peel force measurement are influenced by the peel angle (see page 1, point 4.3 and figure 1), by the peel rate (see annex 1.2) and by the temperature (see page 2, point 8.3). However, it does not provide the skilled person with unambiguous guidance on how to select those parameters (peel angle, peel rate and temperature).

When the skilled person applies this standard to measure peel force, the fact that these parameters are not defined in the standard itself nor in claim 1 of the main request, not even in the description, makes it impossible, in practice, to directly and positively verify the value of the peel force.

In these circumstances and for the reasons indicated above, the definition of the peel force of claim 1 of the main request in terms of a value to be achieved is considered to be unclear, and so claim 1 lacks clarity (Article 84 EPC).

- 1.2 The appellant argued that ASTM Standard F88-00, when read by a skilled person, clearly established a univocal procedure for determining the peel force of the package claimed in claim 1 of the main request,

which had only to be followed to achieve consistent results.

Being aware that peel angle plays an important role in the measurement of peel force, the skilled person would have used the set-up shown in the right-hand portion of figure 1 of ASTM Standard F88-00 (180° supported).

This was because the angle of 180° reproduced the peel angle selected by a user opening the package, and the stiffness provided by the frame was reproduced by the specimen being supported during the test.

Speed would not have played a role in the measurement because the skilled person would have selected the value within the range indicated in the ASTM standard, point 9.6. There was no indication in that standard that the speed within the given range influenced the measurement.

Temperature would also not have influenced the results, as it would not have made any sense to test a package for cookies outside room temperature.

Hence, there was clear guidance in ASTM Standard F88-00 for the skilled person to measure the peel force.

As a consequence, and by analogy with the *ratio decidendi* of T 307/06, this feature was to be considered clear.

### 1.3 The Board disagrees.

In T 307/06 the claims contained a parameter (T<sub>g</sub>, glass transition temperature) for which there were different measurement methods, and the board concluded that this

left doubt as to what subject-matter was covered by claim 1, and thus rendered said claim **unclear**.

As noted by the board in T 307/06, the mere fact that several measurement methods existed did not render the claim unclear.

According to the *ratio decidendi* of T 307/06 the claimed subject-matter is clear if at least one of the two following conditions is met:

(a) the different methods yield essentially the same values of the parameter for the same material, or

(b) the person skilled in the art would have associated the range of values mentioned in a claim with only one standard method of measurement.

In T 307/06 neither condition (a) nor (b) was fulfilled.

The same applies here to claim 1 of the main request.

ASTM Standard F88-00 makes clear that peel angle, peel speed and temperature (corresponding to the "different methods" mentioned in condition (a) of T 307/06) essentially yield **different values** of the "peel force" parameter for the package.

Contrary to the appellant's opinion, the person skilled in the art would not have associated the range of values mentioned in claim 1 of the main request with only one possible method of measurement, i.e. one single set of parameters: peel angle, peel speed and temperature (condition (b) of T 307/06).

The grounds submitted in support of the appellant's assertion that a skilled person would have measured peel force exclusively by selecting the configuration "supported 180°" shown in the right-hand portion of figure 1 of ASTM Standard F88-00 did not persuade the Board.

This is because the appellant has submitted no reason why only the angle of 180° would have been selected by a user opening the package (see for example figure 2 of the application, where a different angle is shown).

Based on that it is not possible to rule out that other possible peel angle configurations (see point 4.3 of the ASTM standard, according to which those shown in figure 1 are only examples of the possible configurations) could also have been selected during measurement, yielding different results, and therefore leading to lack of clarity.

The Board additionally notes that it was also not clear why a skilled person would only have performed the measurement in the supported configuration as indicated by the appellant.

This is because the frame of claim 1 forms a tray, which is open at the access opening, and cannot therefore support the top during peeling.

The same applies to temperature, as a food package, as claimed in claim 1 of the main request, is not necessarily intended to be used at room temperature, as use at a refrigerated temperature would also be contemplated by a skilled person.

It is therefore not apparent that a skilled person would have measured peel force exclusively by selecting room temperature.

Concerning the rate of separation (peel speed) the Board notes that the appellant argued that it would have been sufficient, to achieve reliable results, to perform the test at a speed comprised within the range given in ASTM Standard F88-00 (see point 9.6).

The Board disagrees, because the influence of this parameter on the results is clearly explained in the annex (point A.1.2 of ASTM Standard F88-00), and no evidence has been submitted that two different speeds within the range comprised between 200 and 300 mm/min would have yielded the same results.

In conclusion the Board is convinced that ASTM Standard F88-00 does not establish a univocal procedure, i.e. a single set of parameters, for determining the peel force of the package claimed in claim 1 of the main request.

As a consequence, the subject-matter of claim 1 of the main request lacks clarity and the main request cannot be allowed.

Finally, the Board notes that it concurs with the appellant's view that the expression "peel force" was in itself well known to the skilled person. However, as discussed at the oral proceedings, none of the granted patents cited by the appellant in its statement of grounds, point 16, used the term in the claims or, if they did so, it was with a given method for its measurement, unlike the present application.

2. First to seventh auxiliary requests - lack of clarity

As acknowledged by the appellant, claims 1 of the first to seventh auxiliary requests also comprise the unclear feature discussed above. Furthermore, they do not contain structural features of the packaging components suitable to achieve this peel force, nor specify their composition.

As a consequence, none of these requests can be allowed for the same reasons as those already discussed above for the main request (Article 84 EPC).

3. Eighth auxiliary request - admissibility

The following features have been added to claim 1 of the eighth auxiliary request:

**"wherein peel force is measured by ASTM-F88-00 at a rate of grip separation of 200 to 300 mm/min and an angle of 180°."**

3.1 The appellant argued that as the relevance of these features mentioned in ASTM Standard F88-00 to clarity had been extensively discussed in relation to claim 1 of the main request, no new issue was raised at a late stage of the proceedings by the submission of the eighth auxiliary request during oral proceedings.

3.2 The Board disagrees. The appellant filed the eighth auxiliary request during the oral proceedings before the Board. Due to this late filing, the admission of this request into the proceedings is subject to the discretionary power of the Board in accordance with Article 13(1) and (3) RPBA.

As ASTM Standard F88-00 was not mentioned in the description and was introduced into the proceedings by the Board, the issue of adding subject-matter by introducing it into claim 1 was never dealt with by the examining division and is not part of the impugned decision.

Hence, the Board is now confronted with said issue of added subject-matter, and possibly also with that of the patentability of the claimed subject-matter on its basis, for the very first time at the oral proceedings, i.e. at a late stage in the proceedings.

In this respect, it is emphasised that appeal proceedings are largely determined by the factual and legal scope of the preceding proceedings and are not about bringing an entirely fresh case to the Board. This means that an appellant is not at liberty to bring about the shifting of its case to the appeal proceedings as it pleases, and so compel the Board either to give a first ruling on the critical issues or to remit the case to the department that issued the decision under appeal, as is the case at present in view of the appellant's amendments in claim 1 of the eighth auxiliary request.

Conceding such freedom to an appellant would run counter to orderly and efficient appeal proceedings. In effect, it would allow a kind of "forum shopping" which would jeopardise the proper distribution of functions between the departments of first instance and the boards of appeal and would be absolutely unacceptable for procedural economy generally (G 9/91, OJ EPO 1993, 408, Reasons 6; T 1705/07, not published, Reasons 8.4; T 1067/08, not published, Reasons 7.1 to 7.2).



For these reasons, the Board decides to exercise its discretion under Article 13(1) and (3) RPBA not to admit the eighth auxiliary request into the appeal proceedings.

- 3.3 The appellant argued that the features added to claim 1 of the eighth auxiliary request were discussed when the clarity of the subject-matter of claim 1 of the main request was examined. Consequently, it considers itself entitled to file a request containing those features.

The Board cannot share the appellant's view, since the mere fact that these features are mentioned in ASTM Standard F88-00 does not change the fact that the Board is confronted for the first time at the oral proceedings with a discussion of fresh issues as explained above.

4. Ninth auxiliary request - admissibility

- 4.1 The appellant argues that the ninth auxiliary request is admissible because the features added thereto ("**said adhesive is Fasson R5510 applied at a coat weight of 3 pounds per ream**") clearly have a basis in the description as originally filed and *prima facie* overcome the clarity objection raised against claim 1 of the main request by providing a trade name univocally defining the composition and properties of the material used.

- 4.2 The Board disagrees.

As the appellant filed the ninth auxiliary request during the oral proceedings before the Board, the admission of this request into the proceedings is

subject to the discretionary power of the Board in accordance with Article 13(1) and (3) RPBA.

The mere fact that an adhesive is mentioned in the description does not change the fact that the Board is confronted for the first time with a discussion of whether in the present case it was sufficient to provide a trade name to identify a material and establish clarity, knowing that this is not normally the case, as the manufacturer of the material may cease its manufacture or change the composition and properties of the material bearing the trade name, such that the material could cease to possess its characteristics.

Hence, the Board is, as with the eighth auxiliary request, again confronted with a new issue for the very first time at the oral proceedings, this time the clarity of a claim comprising a trade name.

For these reasons, the Board decides to exercise its discretion under Article 13(1) and (3) RPBA not to admit the ninth auxiliary request into the appeal proceedings.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



K.Götz-Wein

G. Patton

Decision electronically authenticated