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**Datasheet for the decision  
of 22 January 2018**

**Case Number:** T 2551/16 - 3.2.07

**Application Number:** 09807669.8

**Publication Number:** 2376332

**IPC:** B65D5/06, B65D5/74

**Language of the proceedings:** EN

**Title of invention:**

IMPROVEMENTS IN OR RELATING TO PACKAGING

**Patent Proprietor:**

ELOPAK SYSTEMS AG

**Opponent:**

Tetra Laval Holdings & Finance SA

**Headword:**

**Relevant legal provisions:**

EPC Art. 56

RPBA Art. 12(4), 13(1), 13(3)

**Keyword:**

Late-filed evidence - admitted (yes)

Inventive step - (yes)

**Decisions cited:**

**Catchword:**



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Case Number: T 2551/16 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 22 January 2018**

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
29 November 2016 concerning maintenance of  
European patent No. 2376332 in amended form.**

**Composition of the Board:**

**Chairman** G. Pricolo  
**Members:** G. Patton  
C. Brandt

## **Summary of Facts and Submissions**

I. Appellant I (patent proprietor) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent N° 2 376 332 in amended form.

Appellant II (opponent) likewise lodged an appeal against this interlocutory decision.

II. The opposition was directed against the patent in its entirety and was based on grounds under Article 100(a) EPC (lack of novelty and/or inventive step).

In the opposition proceedings the then main request was held unallowable pursuant to Rule 80 EPC (amendment to the description not caused by a ground for opposition), the then first and second auxiliary requests were held unallowable pursuant to Article 123(2) EPC (combination of amended claim 1 with dependent claim 4 not originally disclosed) and the then third auxiliary request was withdrawn during the oral proceedings. The patent was maintained on the basis of the then auxiliary request 3A filed during the oral proceedings.

III. In the course of the appeal proceedings, the board provided its preliminary, non-binding opinion, annexed to the summons to oral proceedings, on appellant I's requests (main request corresponding to the patent as granted and first to sixth auxiliary requests) filed with the statement setting out its grounds of appeal.

IV. During the oral proceedings held on 22 January 2018, appellant I filed a new request and withdrew all its other requests. Appellant II did not contest the admissibility of appellant I's late-filed sole request

and objected only that the claimed subject-matter lacked inventive step.

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

- V. Appellant I's sole request was that the decision under appeal be set aside and that the patent be maintained on the basis of the set of claims and the adapted description and figures filed during the oral proceedings.
- VI. Appellant II requested that the decision under appeal be set aside and that European patent N° 2 376 332 be revoked.
- VII. Independent claim 1 of appellant I's sole request reads as follows:

"A carton blank for forming a carton, and comprising a row of first, second, third and fourth substantially four-edged panels (a-d), each comprising a side wall part (4,6,8,10), a top closure obturating part (24,26,28,30) and a top sealing fin part (33), the obturating part of one of said panels including a loop of weakness (44), and a horizontal line of weakness (71) between the top closure obturating part (28) and its sealing fin part, characterized in that in this one of said panels (c) from a lowermost boundary of the side wall part (8) to an uppermost boundary of the top closure obturating part (28) the only line of weakness that is present is the loop of weakness (44)."

Independent claim 4 of appellant I's sole request reads as follows:

"A carton comprising a loop of first, second, third and fourth substantially four-edged panels, each comprising a side wall part (4,6,8,10), a top closure obturating part (24,26,28,30) and a top sealing fin part (64), the obturating part (28) of one of said panels including a loop of weakness (44), and a horizontal line of weakness (71) between the top closure obturating part (28) and its sealing fin part, characterized in that in this one of said panels from a lowermost boundary of the side wall part (8) to an uppermost boundary of the top closure obturating part (28) the only line of weakness that is present is the loop of weakness (44)."

Claims 2-3 and 5-6 represent preferred embodiments of claims 1 and 4, respectively.

VIII. The following documents from the opposition proceedings are of relevance for the present decision:

D1: JP-H11-236027 A;  
D2: WO-2004/076302 A;  
D3: EP-1 332 969 A;  
D4: JP-2000-289736 A;  
D5: US-2007/0170233 A; and  
D6: EP-0 438 735 A.

The following documents cited for the first time in the appeal proceedings are of relevance for the present decision:

D7: US-6 139 480 A;  
D9: BE 401923 A; and  
D9E: translation of D9 into English by "Patent Translate", 7 pages.

IX. Appellant I argued in substance essentially as follows:

*Admissibility of D7, D9 and D9E*

Document D7 was filed for the first time on appeal with appellant II's statement setting out its grounds. Since it is *prima facie* not relevant it should not be admitted into the proceedings.

Documents D9 and its translation into English D9E were filed late by appellant II after the summons had been sent. Appellant II has not provided any sound explanation as to why they could not have been filed earlier. D9 is *prima facie* not relevant and its interpretation would introduce new, complex issues to be discussed at a late stage in the proceedings, i.e. at the oral proceedings before the board. Hence, document D9 and its translation D9E should not be admitted into the proceedings.

*Inventive step - starting from D2*

Document D2, in particular figures 14, 19 and 22, can be seen as a plausible closest prior art for the carton blank of claim 1. It does not disclose the features of the characterising portion, namely that:

in this one of said panels from a lowermost boundary of the side wall part to an uppermost boundary of the top closure obturating part the only line of weakness that is present is the loop of weakness.

In view of the technical effects associated with the distinguishing features the problem to be solved can be seen as to modify the carton blank of D2 so as to

provide greater flexibility in selecting the size of the pour spout fitment while achieving an improved seal between the carton material and the pour spout fitment.

The skilled person would have no reason, in view of D2 or any of the available documents, or even his common general knowledge, to come up with the claimed solution, i.e. to remove the lines of weakness 168, 268 and 468 in the embodiments of figures 14, 19 and 22 of D2.

The distinguishing features of claim 1 over D2 cannot be seen as merely relating to an aesthetic effect since they have technical effects, as evident from the above discussion.

Hence, the skilled person would not arrive at the claimed subject-matter in an obvious manner in view of document D2 alone.

The above also applies to claim 4.

*Inventive step - starting from D6*

D6 cannot be regarded as a plausible closest prior art for claim 1 since it does not relate to containers comprising a pour spout fitment.

D6 discloses all the features of claim 1 except that the relevant top obturating part of one of said panels includes a loop of weakness.

In view of the technical effect associated with the distinguishing features, the problem to be solved can be seen as to allow for attachment of a pour spout fitment to the carton of D6.



The skilled person would not think of attaching a pour spout fitment on the wider sides 2 and 6 of the carton of D6 since it would be difficult for the user to grip the carton with one hand. Further it would not be possible in such a configuration to pour all the content out of the carton. In addition, since the wider side walls 2 and 6 of the carton of D6 are more flexible, thicker material would have to be used in order to accommodate the pour spout fitment, which would add to the costs.

Furthermore, none of the available documents supports appellant II's allegation that having just a loop of weakness, i.e. without a line of weakness between the side wall part and the top closure obturating part on the relevant panel, belongs to the skilled person's common general knowledge. They all show the opposite, including D7.

Therefore, the skilled person starting from D6 and using his common general knowledge as illustrated by D7 would come up with a line of weakness in addition to the loop of weakness on panel 2 or 6 of D6. By doing so he would not arrive at the claimed subject-matter.

The same applies to claim 4.

*Inventive step - starting from D9*

The arguments above starting from D6 also apply starting from D9.

X. Appellant II argued in substance essentially as follows:

*Admissibility of D7, D9 and D9E*

Document D7 was filed as a reaction to auxiliary request 3A which was filed during the oral proceedings before the opposition division and on which basis the patent was maintained. The filing of the statement setting out the grounds of appeal was the earliest possible time for doing so. Hence, document D7 should be admitted into the proceedings.

Appellant I was already aware of D9 from a pending divisional application derived from the contested patent. Document D9 and its translation into English D9E were filed as a reaction to appellant I's argument about the combination of the teaching of document D6 with common general knowledge as illustrated by D7. Document D9 is *prima facie* relevant in that it provides a further example to that of D6 of a gable-top container with no lines of weakness on the front panel. Consequently, document D9 and its translation D9E should be admitted into the proceedings.

*Inventive step - starting from D2*

Document D2, figures 14, 19 and 22, can be seen as a plausible closest prior art for claim 1, the distinguishing features being those of the characterising portion as mentioned by appellant I.

In view of the fact that both D2 and the contested patent describe a similar effect associated with the distinguishing features, the problem to be solved can

be defined as to provide an alternative blank carton to that of figures 14, 19 or 22 of D2.

Since D2 already teaches the advantages of having a zone (merger zone 92) without lines of weakness adjacent to the loop of weakness, the skilled person would immediately consider increasing this merger zone to its maximum in order to maximise said advantages. Since the lines of weakness 168, 268 and 468 of figures 14, 19 and 22 are the limiting factors for enlarging the merger zone, the skilled person would immediately come up with the solution consisting in removing said lines of weakness. By doing so, he would arrive at the claimed subject-matter in an obvious manner.

In addition, the distinguishing features provide the carton with smooth corners on the front panel between the front side and the roof. As this effect is not technical but instead aesthetic, the distinguishing features cannot justify any inventive step.

The same applies to claim 4.

*Inventive step - starting from D6*

D6 can be regarded as a plausible closest prior art for claim 1 since it concerns carton blanks for forming cartons with an opening/pouring means.

D6 discloses all the features of claim 1 except that the relevant top obturating part of one of said panels includes a loop of weakness.

Since an opening/pouring means is already provided in D6, the problem to be solved can be seen as to provide

the blank/carton of D6 with an alternative opening/pouring means.

The loop of weakness as claimed makes it possible to attach a standard pour spout fitment which provides tight reseal capability as well as enhancing consumers' perception that the carton contains a fresh and healthy product. As described in D7, this fitment and its advantages belong to the skilled person's common general knowledge. Hence, the skilled person using his common general knowledge would be motivated to implement in the carton blank of D6 a loop of weakness such as the one disclosed in D7.

The skilled person would have no prejudice against implementing such a standard pour spout fitment on the larger side wall panel 2 or 6 of the carton blank of D6 since this is already known practice in the field, as illustrated for instance in D3. It is also taught in D7 that the best place to locate the fitment is on the front panel and not under the gable folds.

Consequently, faced with the above-mentioned technical problem, the skilled person using his common general knowledge would immediately arrive at the claimed subject-matter in an obvious manner.

There would be no prejudice in the prior art against applying just a loop of weakness, without any other lines of weakness on the relevant panel, in the manner as claimed.

The skilled person would first try to implement just a loop of weakness on panel 2 or 6 of D6. Only in the event that he encountered difficulties would he come up with an additional line of weakness. By doing so, he

would arrive at the subject-matter of claim 1 in an obvious manner.

The same applies to claim 4.

*Inventive step - starting from D9*

The arguments above starting from D6 also apply starting from D9.

### **Reasons for the Decision**

1. *Documents D7, D9 and D9E*
- 1.1 Document D7 was filed for the first time with appellant II's statement setting out its grounds of appeal. Its admission into the proceedings is hence subject to the conditions set out in Article 12(4) RPBA.
- 1.1.1 In the annex to the summons to oral proceedings, point 4.2, the board provided the parties with the following preliminary opinion regarding the admissibility of D7:  
  
*"Auxiliary request 3A on which basis the patent was maintained was filed during the oral proceedings before the opposition division. The board is of the preliminary opinion that the filing of documents D7 and D8 can be seen, as argued by appellant II, as a reaction to the late-filing of the then auxiliary request 3A. Hence, D7 and D8 were filed at the earliest time possible in the proceedings with appellant II's statement setting out the grounds of appeal, i.e. in due time pursuant to Article 114(2) EPC.*

*Hence, the board tends to preliminarily admit D7 and D8 into the proceedings (Article 12(4) RPBA).*

*The board notes that the criteria of prima facie relevance as argued by appellant I for contesting the admission of D7 and D8 into the proceedings is not mentioned in Article 12(4) RPBA."*

- 1.1.2 This preliminary opinion has not been discussed or contested by the parties' subsequent written or oral submissions.

Therefore, since the board, after reconsidering the parties' arguments, sees no reason to deviate from its preliminary opinion, document D7 is admitted into the proceedings (Article 12(4) RPBA).

- 1.2 Documents D9 and its translation into English D9E were late-filed by appellant II's letter dated 23 November 2017, i.e. after the summons had been sent to the parties. Hence, their admission into the proceedings is subject to the conditions set out in Article 13(1) and (3) RPBA (hereafter reference will be made only to D9; the same reasoning and conclusion apply to D9E).

- 1.2.1 Appellant I contested the admission of D9 into the proceedings, arguing that appellant II had not given any sound explanation as to why it had not filed it earlier. D9 was *prima facie* not relevant and its interpretation would introduce new, complex issues to be discussed at a late stage in the proceedings, i.e. at the oral proceedings before the board.

- 1.2.2 The board disagrees since, as emerged from the discussion at the oral proceedings, appellant II's line

of argument based on the combination of the teaching of document D9 with common general knowledge as illustrated by D7 is in substance identical to that previously on file based on the combination of the teaching of document D6 with common general knowledge as illustrated by D7 (see point 3.3 below; see also appellant II's letter dated 23 November 2017, pages 4-6). In particular, the board cannot see any new issue to be discussed in relation to D9 which would require adjourning the oral proceedings.

Consequently, document D9 and its translation D9E are admitted into the proceedings (Article 13(1) and (3) RPBA).

2. *Outstanding objections*

The set of claims according to appellant I's sole request filed at the oral proceedings before the board corresponds to the set of claims filed as auxiliary request 4A with letter dated 7 November 2017.

At the oral proceedings appellant II withdrew the objections it had previously raised to the admissibility of the request (see its letter dated 23 November 2017, page 3). It further explicitly admitted that the subject-matter of claims 1 and 4 was novel and did not raise any objections to the amendments introduced in the claims, e.g. in the light of Articles 83, 84, 123(2) and (3) EPC.

The board sees no reasons to deviate from appellant II's view.

Appellant II objected only that the subject-matter of claims 1 and 4 lacked inventive step in view of:

- the teaching of D2 alone; and
- the combination of the teaching of either D6 or D9 as the closest prior art with common general knowledge as illustrated by D7.

3. *Claim 1 - inventive step*

3.1 Starting from D2

The board shares the parties' view that document D2 can be regarded as a plausible closest prior art since, like the subject-matter of claim 1, it lies in the technical field of carton blanks for forming a carton and aims at allowing greater flexibility in the selection of pour spout fitments to be applied (page 1, lines 2-3, and page 14, lines 3-16).

3.1.1 Disclosure of D2

Document D2 (figures 14 and 22) discloses a carton blank for forming a carton (see for instance figure 19), and comprising a row of first, second, third and fourth substantially four-edged panels (see "main panels" 6, 8, 10 and 12 in figure 1, to be found by analogy in figures 14 and 22), each comprising a side wall part ("sub-panels" 36, 38, 40 and 42 in figure 1, to be found by analogy in figures 14 and 22), a top closure obturating part (see "sub-panels" 26, 28, 30 and 32 in figure 1, to be found by analogy in figures 14 and 22) and a top sealing fin part ("top sealing sub-panels" 16, 18, 20 and 22 in figure 1, to be found by analogy in figures 14 and 22), the obturating part 30 of one 10 of said panels including a loop of weakness ("circular hole" 70 in figure 1, to be found by analogy in figures 14 and 22), and a horizontal line of weakness (see "score line" 74 in figure 1, to be



found by analogy in figures 14 and 22) between the top closure obturating part 30 and its sealing fin part 20.

As a result, document D2 discloses all the features of the preamble of claim 1.

### 3.1.2 Distinguishing features

The distinguishing features of claim 1 over D2 are those of the characterising portion, namely that:

in this one of said panels from a lowermost boundary of the side wall part to an uppermost boundary of the top closure obturating part the only line of weakness that is present is the loop of weakness.

As a matter of fact, all embodiments of D2 show that score lines are present on the relevant front panel; see for instance score lines 168, 268 and 468 in figures 14, 19 and 22.

The above analysis of D2 with respect to the features of claim 1 was accepted by both parties at the oral proceedings (see also appellant I's statement setting out its grounds of appeal, pages 5-17, and letter dated 4 August 2017, pages 35-44 and 66-70; appellant II's statement setting out its grounds, pages 8-12, and letters dated 20 June 2017, pages 51-55, 27 September 2017, pages 10-11, and 23 November 2017, page 4).

### 3.1.3 Technical effects

The technical effects associated with said distinguishing features are to provide greater flexibility in selecting the size of the pour spout

fitment (see contested patent, paragraph 26) while still achieving a good, possibly improved, seal between the carton material and the flange of the spout as the carton material is able to conform to the flange in view of the absence of a line of weakness.

#### 3.1.4 Problem to be solved

In view of said technical effects the problem to be solved can be seen as to modify the carton blank of D2 so as to provide greater flexibility in selecting the size of the pour spout fitment while still achieving a good seal between the carton material and the pour spout fitment.

#### 3.1.5 As argued at the oral proceedings, appellant II considered that D2 itself motivated the skilled person to modify its disclosure in such a manner as to remove the line of weakness as claimed.

For appellant II, D2, page 13, lines 12-21, taught that there should be no score lines adjacent to the pour spout fitment so as to form a merger zone 92 between the top obturating part 130 and the side wall part 140 where such lines of weakness were absent, as shown for instance in figures 14, 19 and 22 (see also page 4, line 32, to page 5, line 2). As unambiguously derivable from page 14, lines 3-16, this teaching was linked to the advantages of greater flexibility in the selection of the pour spout fitment size ("*...thus allows a variety of fitments to be applied...*") and of a reduced risk of the carton material cracking. In view of the similar advantages described in the contested patent, paragraph 26, e.g. to allow for greater flexibility in the size of the pour spout fitment to be attached, the problem to be solved was then less ambitious and should

be defined as to provide an alternative blank carton to that of figures 14, 19 or 22 of D2.

Still according to appellant II, the skilled person would, in view of this problem, immediately realise that in order to maximise these advantages the size of the merger zone 92 should be increased to the maximum so as to *de facto* remove the lines of weakness 168, 268 and 468 between the top obturating part 130 and the side wall part 140, since these lines of weakness 168, 268 and 468 represented the limiting factor for increasing the size of the merger zone 92. He would see no hindrance to or technical difficulties in removing said lines of weakness from the carton blank shown in figures 14, 19 and 22 of D2. By doing so he would arrive at the claimed subject-matter without any inventive skill.

The skilled person would derive that the teaching on page 15, lines 20-25, only referred to the preferred embodiments, i.e. those shown in the figures, as indicated by the wording "*In all of the carton blanks **shown...***". The skilled person would not see the disclosure of D2 as being limited to these embodiments but instead would consider the whole disclosure of D2 as discussed above.

For appellant II, the technical effect mentioned by appellant I of achieving improved sealing between the pour spout fitment and the carton material would merely - if ever obtained - be a bonus effect.

- 3.1.6 The board cannot share appellant II's view for the following reasons given by appellant I.

There is no teaching in D2 to remove the score lines between the top obturating part 130 and the side wall part 140. On the contrary, in all the embodiments of D2 there are such score lines on the front panel; see for instance score lines 168, 268 and 468 in figures 14, 19 and 22. On page 15, lines 20-25, it is explicitly stated that **all the carton blanks shown** have such lines of weakness. Therefore, contrary to appellant II's view, it is clear to the skilled reader that lines of weakness between the top obturating part and the side wall part are required in D2.

In D2, page 14, lines 8-16, the skilled person is taught that, in order to allow for greater flexibility in the selection of pour spout fitments to be applied, the size of the merger zone 92 is to be varied, which is achieved by **adjusting the configuration** of the score lines. There is therefore a solution taught in D2 for solving the technical problem mentioned under point 3.1.4 above, which is clearly not that of removing said score lines.

Document D2 is in fact in line with traditional carton blanks as illustrated in the documents provided by appellant II in the opposition-appeal proceedings (see the figures of D1, D3-D5 and D7), in which a line of weakness is present between the top obturating part and the side wall part on the panel comprising the loop of weakness for the fitment. As a result, the board shares appellant I's view that the skilled person would find no motivation in D2 or any of the available documents, or even his common general knowledge, to remove such lines of weakness in the figures 14, 19 and 22 of D2 such as to arrive at the claimed subject-matter.

The above applies even when starting from the less ambitious problem defined by appellant II of providing an alternative carton blank to those disclosed in D2.

3.1.7 Appellant II further argued that the removal of the lines of weakness in the carton blank between the side wall part and the top closure obturating part merely led to the carton thus obtained having smooth corners on the front panel between the front side and the roof. It therefore did not give rise to any technical effect but rather to an arbitrary modification of the known carton blanks in order to obtain an aesthetic effect. Since aesthetic improvement could not justify any inventive merit, the subject-matter of claim 1 should be seen as lacking inventive step.

3.1.8 The board cannot share appellant II's view since, as discussed under point 3.1.3 above, the absence of lines of weakness in the manner as claimed is unambiguously linked to a technical effect, even if it is only to allow for greater flexibility in the selection of the pour spout fitment.

3.2 Starting from D6

The board shares appellant II's view that document D6 can also be regarded as a plausible closest prior art since, like claim 1, it lies in the technical field of carton blanks for forming a carton and aims at providing the cartons with an opening/pouring means (column 1, lines 1-5, and column 3, lines 42-44).

3.2.1 Disclosure of D6

Document D6 (column 2, lines 22-48; figures 1 and 2) discloses a carton blank for forming a carton, and

comprising a row of first, second, third and fourth substantially four-edged panels ("Seitenwand" 3, 2, 4, 6), each comprising a side wall part (see also 3, 2, 4, 6), a top closure obturating part (upper parts of 3, 2, 4 and 6) and a top sealing fin part ("Siegelrandstreifen" 13), and a horizontal line of weakness ("Faltlinie" 12) between the top closure obturating part (upper parts of 3, 2, 4 and 6) and its sealing fin part 13. In the carton blank of D6, in one of said panels, from a lowermost boundary ("Faltlinie" 11) of the side wall part (2 or 6) to an uppermost boundary ("Faltlinie" 12) of the top closure obturating part (upper part of 2 or 6), there is no line of weakness.

### 3.2.2 Distinguishing features

The distinguishing features of claim 1 over the disclosure of D6 are that the relevant top obturating part of one of said panels includes a loop of weakness.

As a matter of fact, panel 2 or 6 of D6 does not comprise a loop of weakness.

The above analysis of D6 with respect to the features of claim 1 was accepted by both parties at the oral proceedings (see also appellant I's statement setting out its grounds, pages 17-19, and letter dated 4 August 2017, pages 44-53; appellant II's statement setting out its grounds, pages 12-16, and letters dated 20 June 2017, pages 30-38, 27 September 2017, pages 11-12, and 23 November 2017, pages 4-6).

### 3.2.3 Technical effect

As is clear from the contested patent, paragraph 20, lines 36-39, the technical effect of the loop of weakness is to allow for the attachment of a pour spout fitment to the carton.

### 3.2.4 Problem to be solved

Since an opening/pouring means is already provided in D6 (column 3, lines 42-43 "...*Abschneiden oder sonstigen Öffnen...*") the board shares appellant II's view that the problem to be solved can be seen as to provide the blank/carton of D6 with an alternative opening/pouring means.

3.2.5 According to appellant II the skilled person would be motivated to implement on panel 2 or 6 of the carton blank of D6 a loop of weakness like the one disclosed in D7 ("partial incision" 199, see figures 1, 2 and 7) since such a loop of weakness would make it possible to attach a standard pour spout fitment (figures 8-10, "fitment" 600; see also the figures of documents D1 to D5) providing tight reseal capability as well as enhancing consumers' perception that the carton contains a fresh and healthy product (column 1, line 64, to column 2, line 24). This fitment and its advantages (tight reseal and enhancing consumers' perception of freshness) were explicitly described in D7, column 1, lines 35-54, as belonging to the skilled person's common general knowledge. Consequently, faced with the above-mentioned technical problem of replacing the opening/pouring means of D6, the skilled person, having in mind too that D6 also aims at providing packaging that could be sealed, would immediately think of applying his common general knowledge as illustrated

by D7. By doing so, he would arrive at the claimed subject-matter in an obvious manner. Thus, the claimed invention consisted merely in incorporating a known and usual development in the field of gable-top containers into the carton of D6.

Still according to appellant II, the skilled person would have no prejudice against implementing such a standard pour spout fitment on the larger side wall 2 or 6 of the carton blank since this was already known practice in the field, as illustrated for instance in D3, figures 8 to 11. Furthermore, D7 also suggested that the best place to locate the fitment was on the front panel and not under the gable folds; see figures 1 and 2. Hence, when implementing the teaching of D7 the skilled person would do it on panel 2 or 6 of D6, and not on panel 3 or 4.

3.2.6 The board cannot share appellant II's view for the following reasons discussed at the oral proceedings.

Even if it is accepted that the cited passage of D7, column 1, lines 35-54, represents the skilled person's common general knowledge - which still remains to be proven since D7 is a patent specification, i.e. not a standard textbook - this disclosure does not give any hint that the loop of weakness which is necessary for attaching such fitment would be realised without any other line of weakness on the relevant panel as claimed.

On the contrary, the teaching of D7 itself is to have a line of weakness 112 between the front side and the roof on the front panel where the loop of weakness is located (see for instance figures 1, 2 and 7-10). As argued by appellant I, this line of weakness 112



appears on all the embodiments of D7 and is shown especially in figure 10 in structural relation to the pour spout fitment 600, i.e. *de facto* to the loop of weakness 199. Consequently, D7 does not teach that it would belong to the skilled person's common general knowledge that the loop of weakness 199 would be present on the relevant panel without the line of weakness 112. D7 shows exactly the opposite, namely that the loop of weakness 199 is always realised with a line of weakness 112 on the same panel. Appellant II's reasoning amounts to cherry-picking features from the embodiments of D7, or from the figures of documents D1-D5, without any support and/or substantiation for doing so.

In fact, as pointed out at the oral proceedings, none of the available documents supports appellant II's argument that just a loop of weakness, i.e. without a line of weakness between the side wall part and the top closure obturating part, belongs to the skilled person's common general knowledge. Documents D1 to D5 and D7 disclose the opposite, i.e. when a loop of weakness is present, the corresponding panel of the carton blank always comprises a line of weakness between the side wall part and the top closure obturating part.

Consequently, starting from D6 the skilled person using his common general knowledge as illustrated by D7 would come up with a line of weakness in addition to the loop of weakness on panel 2 or 6 of D6. By doing so he would not arrive at the claimed subject-matter in an obvious manner.

3.2.7 Appellant II further argued that, since there was no disclosure in the prior art, i.e. no prejudice,

against applying just a loop of weakness without any other lines of weakness on the relevant panel, in the manner as claimed, the skilled person, taking into consideration his common general knowledge as stated in D7, column 1, lines 35-54, would immediately think of implementing just a loop of weakness on panel 2 or 6 of the carton blank of D6, thus arriving at the claimed subject-matter in an obvious manner.

- 3.2.8 The board cannot share appellant II's view since not having a document showing a prejudice against the claimed solution, or arguing that the claimed solution would not be impossible in view of the available prior art, does not equate to having a document disclosing or suggesting the claimed solution. In fact, appellant II's reasoning amounts to reversing the burden of proof of its allegation. In the present case, appellant II has failed to present any convincing evidence that the claimed solution of just a loop of weakness would belong to the skilled person's common general knowledge.
- 3.2.9 Appellant II additionally argued that the skilled person would first try to implement just a loop of weakness on panel 2 or 6 of D6. Only in the event that he encountered difficulties would he come up with an additional line of weakness on the relevant front panel between the front side and the roof. By doing so, he would realise that he did not need such an additional line of weakness and, thus, arrive at the claimed subject-matter in an obvious manner.
- 3.2.10 The board cannot share this view since it amounts again to an unfounded allegation going against the disclosure of all the available documents, in which a loop of weakness is present together with a line of weakness.

As a matter of fact, in all these disclosures D1-D5 and D7 a loop of weakness is disclosed with an additional line of weakness on the relevant panel of the carton blank (see figures). Hence, the board shares appellant I's view that the skilled person would in fact first think of implementing the loop of weakness together with the additional line of weakness as disclosed in these documents.

### 3.3 Starting from D9

The board shares appellant II's view that document D9 can be regarded as a plausible closest prior art for the same reasons as those provided for document D6 in that, like the subject-matter of claim 1, it lies in the technical field of carton blanks for forming a carton and aims at providing the cartons with an opening/pouring means (page 1, first paragraph; page 2, first complete paragraph; and page 7, second paragraph).

#### 3.3.1 Disclosure of D9

D9 (page 4, line 8, to page 7, line 22; figures 1, 2 and 6) discloses a carton blank for forming a carton, and comprising a row of first, second, third and fourth substantially four-edged panels ("côtés verticaux" 4, 1, 2, 3), each comprising a side wall part (see also 4, 1, 2, 3), a top closure obturating part (upper parts of 4, 1, 2 and 3) and a top sealing fin part (demarcated by line "ligne de moindre résistance" 17), and a horizontal line of weakness ("ligne de moindre résistance" 17) between the top closure obturating part (upper parts of 4, 1, 2 and 3) and its sealing fin part (demarcated by line 17). In the carton blank of D9, on one of said panels, from a lowermost boundary

("entaille transversale" 8) of the side wall part 1 or 3 to an uppermost boundary 17 of the top closure obturating part (upper part of 1 or 3), there is no line of weakness.

- 3.3.2 As a consequence, the distinguishing features of claim 1 over D9 are that the relevant top obturating part of one of said panels includes a loop of weakness.

Hence, the distinguishing features are the same as those over D6, see point 3.2.2 above.

- 3.3.3 As argued by appellant II at the oral proceedings (see also letter dated 23 November 2017, pages 4-6), the reasoning with respect to the objection of lack of inventive step in view of the combination of the disclosure of D9 with common general knowledge as illustrated by D7 is identical to that starting from D6 discussed under point 3.2 above.

- 3.3.4 Consequently, the same reasoning and conclusion as those given above starting from D6 apply starting from D9. Therefore, starting from D9 the skilled person using his common general knowledge as illustrated by D7 would come up with a line of weakness, in addition to the loop of weakness, on panel 1 or 3 of D9. By doing so he would not arrive at the claimed subject-matter in an obvious manner.

- 3.4 In view of the above, the subject-matter of claim 1 involves an inventive step.

4. *Claim 4 - inventive step*

As agreed with by both parties at the oral proceedings, the above reasoning and conclusions on inventive step for claim 1 also apply *mutatis mutandis* to claim 4.

As a result, the subject-matter of claim 4 involves an inventive step for the same reasons as those given above for the subject-matter of claim 1.

5. *Adapted description and figures*

Appellant I filed at the oral proceedings a description adapted to the set of claims as well as figures, the latter corresponding to the figures of the contested patent. Appellant II had no objections to the adapted description and the figures. The board saw no reason to deviate from appellant II's view.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent on the basis of the following documents, all as filed during the oral proceedings on 22 January 2018:
  - claims 1 to 6 according to the sole request (auxiliary request 4A as filed with letter dated 7 November 2017),
  - amended description (columns 1 to 9),
  - figures 1 to 10.

The Registrar:

The Chairman:



G. Nachtigall

G. Pricolo

Decision electronically authenticated