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**Datasheet for the decision
of 18 June 2021**

Case Number: T 1942/17 - 3.2.07

Application Number: 08858318.2

Publication Number: 2231486

IPC: B65D47/08

Language of the proceedings: EN

Title of invention:
CAP FOR A CONTAINER

Patent Proprietors:
Unilever IP Holdings B.V.
Unilever Global IP Limited

Opponent:
Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:
EPC Art. 56, 100(a)
RPBA Art. 12(4)
RPBA 2020 Art. 25(2)

Keyword:

Late-filed evidence - submitted with the statement of grounds of appeal - admitted (no)

Late-filed evidence - could have been filed in first instance proceedings (yes)

Inventive step - (yes) - ex post facto analysis

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1942/17 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 18 June 2021

Appellant: Henkel AG & Co. KGaA
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Respondent: Unilever IP Holdings B.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 24 July 2017
rejecting the opposition filed against European
patent No. 2231486 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman V. Bevilacqua
Members: A. Cano Palmero
 C. Brandt

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division rejecting the opposition and maintaining European patent No. 2 231 486 as granted and requested revocation of the patent in suit.
- II. The opposition was directed against the patent in its entirety and based on the grounds for opposition pursuant to Article 100(a) EPC (lack of novelty and inventive step).
- III. The patent proprietor (respondent) submitted with its reply to the statement of grounds of appeal arguments in support of its main request to dismiss the appeal and filed an auxiliary request (auxiliary request 1).
- IV. With letter of 2 December 2019, the respondent submitted a further auxiliary request (auxiliary request 2).
- V. The appellant filed additional inventive step arguments against auxiliary requests 1 and 2 (and against possible combinations thereof) with its letter of 13 February 2020.
- VI. In preparation for oral proceedings, scheduled upon the parties' requests, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the appeal was likely to be dismissed.

VII. In response to this communication, both the appellant and the respondent filed submissions dated 22 January 2021 and 16 April 2021 respectively.

VIII. Oral proceedings before the Board took place by videoconference on 18 June 2021. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

IX. The final requests of the parties are as follows,

for the appellant:

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

for the respondent:

that the appeal be dismissed and the patent be maintained as granted (main request),
or, in the alternative, when setting aside the decision under appeal,

that the patent be maintained in amended version according to the set of claims according to the auxiliary request 1 filed with the reply to the statement of grounds of appeal,
or, in the further alternative,

that the patent be maintained in amended version according to the set of claims according to the auxiliary request 2 filed with letter dated 2 December 2019.

X. In the present decision reference is made to the following documents:

- D1: EP 2 117 951 A1;
- D2: US RE38,816 E;
- D3: WO 2005/090185 A1;
- D4: WO 99/59886 A1;
- D5: "Kunststoff-Bauteile werkstoffgerecht konstruieren";
- D6: US 4,087,028; and
- D7: WO 02/068284 A1.

XI. The lines of arguments of the parties relevant for the present decision, which are focused on the admissibility of documents D6 and D7 and the inventive step of the subject-matter of claim 1 as granted in view of D4 as closest prior art in combination with the teaching of D2 or in combination with the common general knowledge (depicted by D5), are dealt with in detail in the reasons for the decision.

XII. Independent **claim 1** according to the patent as granted reads as follows:

"Cap for a container for a flowable composition, the cap comprising a lid (1) and a base (2) hingedly connected to one another, the lid (1) comprising a base contact edge which contacts the base and an elastomeric pad (4) which is apart from the base contact edge, and characterized in that the pad (4) is disposed opposite to the hinge (6) on the lid."

XIII. As the auxiliary requests do not form part of this decision, it is not necessary to reproduce them here.

Reasons for the Decision

1. *Transitional provisions*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), with the exception of Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Admittance of documents D6 and D7 in the proceedings - Article 12(4) RPBA 2007*

2.1 Documents D6 and D7 have been filed for the first time by the appellant with the statement setting out the grounds of appeal. The appellant also submitted two new lines of attack of inventive step based on these documents as follows:

D6 as closest prior art in combination with the teaching of document D2, and
D3 as closest prior art in combination with the teaching of **D7**.

2.2 As a consequence, neither these documents, nor those lines of attack have been dealt with by the opposition division in the decision under appeal.

2.3 Article 12(4) RPBA 2007, which is to be applied in the present case, stipulates that the Board has the power to hold inadmissible facts, evidence or requests which could have been presented in the opposition proceedings.

2.4 According to the appellant the reasoning brought up by the opposition division in point 4.5.1 of the reasons of the decision under appeal is the cause for introducing D6 and D7 in the proceedings. In particular, the appellant argues that the opposition division erred in its assessment of the content of the disclosure of D4 by concluding that there is no distance between the gripping zone disclosed therein and the base contact edge. In addition, this issue had been first discussed during the oral proceedings before the opposition division, so the appellant. Under a correct interpretation of D4 (*i.e.* that the gripping zone and the base contact edge are indeed spaced apart in D4), this document would be more relevant than D6 or D7, so that their filing during the opposition proceedings would have not been necessary.

2.4.1 The Board disagrees for the following reasons. It seems undisputed that both D6 and D7 clearly disclose a gripping zone or an elastomeric pad which is spaced apart from the base contact edge. It follows that the relevance of these documents is and has always been independent from the allegedly incorrect view of the opposition division that D4 discloses a gripping zone extending until the base contact edge. The Board is thus convinced that the findings of the opposition division in relation to the content of the disclosure of D4 have absolutely no impact on the potential relevance of D6 and D7, filed for the first time in appeal.

2.4.2 The appellant further argues that since the arguments under 4.5.1 do not apply in particular to **D6**, an inventive step attack based on this document would lead in an obvious way to the subject-matter of claim 1 of the patent in suit. The document is *prima facie*

relevant, so the appellant, since its consideration leads to a different conclusion on the patentability of the the subject-matter of claim 1 as granted. The content of D6 also supports the inventive step objections formulated starting from D4. Furthermore, D6 contains only a few pages (cover page, one page drawing and two pages text), so that it can be examined without much effort by the Board of Appeal and the respondent. In this respect, the introduction of D6 would not be to bring about a delay in proceedings.

2.4.3 The Board is not convinced by this justification provided by the appellant either. The mere allegation that an inventive step objection starting from another document already present in the proceedings (D4) cannot be straightforwardly applied starting from a new document, in this case D6, cannot be seen as a valid justification for not having submitted the new document already in the opposition proceedings. The attack based on D6 as closest prior art in view of the teaching of D2 is independent from the allegedly wrong interpretation of D4 chosen by the opposition division.

2.5 As regards document **D7**, the appellant further argues at the end of point IV of the statement of grounds of appeal that while in the preliminary view the opposition division considered that D1 was detrimental to novelty, in the contested decision the novelty of the subject-matter of claim 1 of the patent in suit was acknowledged against the disclosure of D1. Since D1 was prior art according to Article 54(3) EPC it was not to be considered for discussing of inventive step. For this reason, so the appellant, document D7, disclosing an elastomeric pad spaced apart from the contact edge, was to be introduced into the proceedings.

D7 should also be admitted because its content was not complex, so that the Board and the patent proprietor were able to take account of this document without a great deal of additional work.

In addition D7 also involved features of the dependent claims. D7 supported the argumentation of the appellant that the use of elastomeric cushions to increase grip of closures was known to the skilled person. Also a possible combination of grip ribs and elastomeric cushions was disclosed in D7 (page 9, lines 18 to 20).

- 2.5.1 The Board cannot follow this justification either. The fact that D1 is prior art according to Article 54(3) EPC and that the opposition division did not maintain their preliminary opinion as regards novelty vis-à-vis document D1 does not provide an opportunity for submitting new objections of inventive step in appeal. It is in particular not apparent why the appellant could not have submitted document D7 for an attack of lack of inventive step with document D3 before the opposition division.
- 2.6 In view of the above, the Board does not admit documents D6 and D7, as well as the corresponding lines of argumentation based on this evidence in the appeal proceedings, according to Article 12(4) RPBA 2007.
3. *Patent as granted - Inventive step - Articles 100(a) and 56 EPC*
- 3.1 The appellant argues that the subject-matter of claim 1 as granted lacks inventive step starting from D4, in combination with the common general knowledge, depicted by D5, or in combination with the teaching of D2.

- 3.2 It is uncontested that **D4** is to be considered as the **closest prior art**, and that this document discloses a cap from which the subject-matter of claim 1 as granted **differs** at least in that:
the lid has an elastomeric pad, and in that this pad is apart from the base contact edge.
- 3.3 The opposition division acknowledged inventive step on the basis of the above features. The technical effect assigned thereto was to reduce the chances of peeling the pad away due to the absence of a leading edge (see point 4.2 of the reasons of the decision under appeal). The problem to be solved according to the opposition division, was to provide a cap for a container having improved resistance to wear after repeated use.
- 3.4 The appellant contests the above findings, and in particular puts forward that the technical effect has not been correctly identified by the opposition division.
- 3.5 The Board concurs with the appellant that claim 1 as granted merely requires the provision of an elastomeric pad positioned apart from the base contact edge, which does not automatically result in an absence of a leading edge.
- 3.6 In view of this, the Board agrees with the appellant that the advantage provided by the pad is rather to increase the grip of the lid, as disclosed in paragraph [0024] of the patent in suit. The **objective technical problem** to be solved is thus to be seen as improving the known cap of D4 so that the grip of the lid is increased or that the opening and closing of the lid is further simplified, as argued by the appellant.

- 3.7 The appellant then argues that the skilled person, starting from D4 as closest prior art and **in view of** the above technical problem, would immediately realize that the use of an elastomeric pad would increase the grip, either on the basis of the **common general knowledge** as depicted by D5 or following the **teaching provided by D2**, which deals with the same problem (see column 1, lines 48 to 50 and column 4, lines 58 to 67 of D2).
- 3.8 The skilled person would therefore be hinted to replace the protruding ridges 63 with an elastomeric cushion, possibly forming the elastomeric cushion itself with surface structures such as ribs, or to coat the ribs of D4 with an elastomeric material. This would result in the provision of an elastomeric pad only in the surface intended to interact with the finger. The opposition division therefore wrongly concluded that the entire area of the outer surface 61 was to be considered as the area intended to be pressed in by the finger. This replacement or coating, limited to the surface interacting with the finger, would thus result in an elastomeric pad spaced apart from the base contact edge. By doing so, the skilled person would therefore arrive at the subject-matter of claim 1 as granted without exercising an inventive skill.
- 3.9 The Board is not persuaded by the arguments of the appellant. As noted by the respondent, there is no teaching in D2 that the elastomeric pad on the lid or the portion being formed of an elastomer has to be spaced from the base contact edge, or that only selected parts of the gripping zone are to be coated with elastomer, let alone apart from the base contact edge. The Board is also not convinced that it would be obvious for the skilled person that only the ridges or

part of the front face of the cap of D4 are to be provided with an elastomeric material. Although the Board acknowledges that the skilled person could provide such an elastomeric coating in selected zones only, as argued by the appellant, the Board is of the view that, in the absence of any specific hint or motivation, the skilled person, in view of the common general knowledge or of the teaching of D2, would have no specific reason to realize an elastomeric pad which is spaced from the base contact edge, and that he would rather consider coating the whole front face. In other words, the Board is convinced that the skilled person would only coat selected zones spaced apart the base contact edge of D4 and thus arrive at the subject-matter of claim 1 as granted as a result of an *ex post facto* analysis.

3.10 The appellant further argues that even in the case that the front wall 61 of D4 would be completely coated with an elastomeric material, this zone would still be spaced apart from the base contact edge, since, as it can be seen for example in figure 5 of D4, the front wall containing the grip zone and the ridges does not include the vertical portion extending upwardly from the horizontal surface 77. As a consequence of the above, the vertical portion extending upwardly from the horizontal surface 77 is to be considered as a separate part, distinct from said front wall. Therefore, even by coating the complete front wall, the skilled person would still arrive at a cap with an elastomeric pad spaced apart from the base contact edge in an obvious manner.

3.11 The Board is not convinced by the above arguments of the appellant and concurs with the respondent that these are based on a far fetched interpretation of the

disclosure of D4. Contrary to the appellant's view, the Board considers that a skilled reader of D4 would not conclude that the front face of D4 does not extend to the base contact edge. As it has been discussed in point 3.9 above, the skilled person, starting from D4, would only modify the cap disclosed therein and arrive at the subject-matter of claim 1 as granted by deliberately stopping the coating with the elastomeric material just at a certain distance from the base contact edge, which, in the absence of any hint or motivation (see also point 3.9 above), can only be seen as the result of an *ex post facto* analysis.

4. *Conclusion*

In view of the above, the Board concludes that the appellant has not submitted convincing and/or admissible arguments that would demonstrate that the subject-matter of claim 1 as granted is not inventive. Since the ground of opposition according to Article 100(a) EPC in combination with Article 56 EPC does not prejudice the maintenance of the patent as granted, the appeal shall be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

V. Bevilacqua

Decision electronically authenticated