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**Datasheet for the decision  
of 13 November 2020**

**Case Number:** T 2483/17 - 3.2.07

**Application Number:** 07766758.2

**Publication Number:** 2029455

**IPC:** B65D83/14

**Language of the proceedings:** EN

**Title of invention:**

NON-ROUND PLASTIC PRESSURIZED DISPENSER

**Patent Proprietor:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

Henkel AG & Co. KGaA

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 56

**Keyword:**

Grounds for opposition - lack of patentability (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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Case Number: T 2483/17 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 13 November 2020**

**Appellant:** Henkel AG & Co. KGaA  
(Opponent) Henkelstrasse 67  
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**Representative:** Wagner Albiger & Partner  
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**Respondent:** THE PROCTER & GAMBLE COMPANY  
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**Representative:** Mathys & Squire  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 18 October 2017  
rejecting the opposition filed against European  
patent No. 2029455 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** S. Watson  
A. Cano Palmero

## Summary of Facts and Submissions

- I. An appeal was filed by the opponent (appellant) in the prescribed form and within the prescribed time limit against the decision of the opposition division rejecting the opposition to European patent No. 2 029 455.
- II. The opposition was directed against the patent as a whole and was based *i.a.* on the ground for opposition pursuant to Article 100(a) EPC.
- III. In the present decision reference is made to the following documents:
- D3: WO 2004/002854 A1;  
D7: EP 0 873 946 A1;  
D8: EP 1 671 898 A1 (state of the art according to Article 54(3) EPC);  
D14: "Wärmeformbeständigkeit", Wikipedia, the free encyclopedia (3 November 2017), retrieved from the internet: <https://de.wikipedia.org/wiki/Waermeformbestaendigkeit>.
- IV. In preparation for oral proceedings, scheduled at the request of both parties, 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 arguments presented by the appellant regarding the incorrectness of the decision under review with respect to novelty and inventive step of the subject-matter of granted claim 1 appeared not to be convincing.

- V. With letter dated 14 August 2020 the appellant responded to the communication and maintained its arguments with respect to the main request in respect of an alleged lack of inventive step of the claimed subject-matter.
- VI. The patent proprietor (respondent), with letter dated 30 September 2020, responded to the communication of the Board and the submissions of the appellant of 14 August 2020.
- VII. Oral proceedings before the Board took place on 13 November 2020. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.
- VIII. The lines of argument of the parties are dealt with in detail in the reasons for the decision.
- 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, *i.e.* that the patent be maintained as granted,  
or when setting aside the decision under appeal,  
that the patent be maintained in amended form according to one of auxiliary requests 1 to 3 filed with the respondent's reply to the appellant's statement of grounds of appeal.

- X. Independent claim 1 according to the main request, *i.e.* according to the patent as granted, reads as follows:

"A plastic pressurized package having a hollow, plastic, non-round cross-section body, a sealing valve and an actuator, characterized in that the plastic of the body is a blend of a first polymer selected from the group consisting of polyesters, non-crystalline polyester copolymers and mixtures thereof, and a second polymer that is different from the first polymer and selected from the group consisting of polyamides, polycarbonates, polyacrylates, polycarbonate copolymers, polyesters, polyester copolymers and mixtures thereof, said first polymer being included at a ratio of greater than 70% in relation to said second polymer and optional additional materials, said plastic pressurized package being able to contain and dispense a pressurized fluid of at least 103.4 kPa greater than atmospheric pressure at 25°C."

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

### **Reasons for the Decision**

1. *Novelty (Article 100(a) EPC in combination with Article 54 EPC)*

In the contested decision (see Grounds for the decision, II.1.3.4), the opposition division found that document D8 did not directly and unambiguously disclose a plastic pressurized package with a non-round cross-section body.

1.1 The appellant argued, in the statement of grounds of appeal (section 4.), that paragraph [0088] of document D8 discloses a container which may have sections which are flattened or extended ("*aplatie ou étirée selon l'axe X*"), leading to a non-round cross-section. The appellant contended that the opposition division did not interpret the disclosure of D8 as the skilled person would have interpreted it, but used theoretically possible interpretations to argue that the disclosure was ambiguous.

1.2 With its communication pursuant to Article 15(1) RPBA 2020, the Board gave the following opinion regarding the appellant's argumentation:

*"According to established case law of the Boards of Appeal (see Case Law of the Boards of Appeal, 9th edition 2019, I.C.4.1) it is a prerequisite for the acceptance of lack of novelty that the claimed subject-matter is directly and unambiguously derivable from the prior art. It has to be beyond doubt, not merely probable, that the subject-matter has been disclosed.*

*Document D8 shows directly and unambiguously a container having a round cross-section body, for example in paragraph [0089] and figures 1 and 2. The question is whether it additionally shows a container having a non-round cross-section body. The only possible disclosure of a non-round cross-section is found in paragraph [0088]. However, this paragraph can be interpreted in different ways. As argued by the respondent (letter of 21 August 2019, page 3, seventh paragraph), the flattening and extending along the cylinder axis may lead to a*

*container having areas of smaller or larger radius, whilst maintaining a round cross-section in a plane perpendicular to the cylinder axis, or it may refer to a container being shorter and fatter or longer and thinner than the standard size container. As argued by the appellant however, the flattening and stretching along or according to the cylinder axis may on the other hand be understood as leading to a container having flattened or extended areas along the side walls, causing a non-round cross-section, such as an oval cross-section. Both interpretations of the disclosure may be regarded as aesthetically pleasing, as required by paragraph [0088], this being a subjective measure with no apparent technical character. The paragraphs following paragraph [0088] do not clearly indicate which interpretation of paragraph [0088] was intended by the drafter of document D8. Paragraph [0089], which refers to the preferred form being a cylinder along its whole height, could refer equally to different interpretations. Paragraph [0090] does not give any technical information and refers in any case to a cylinder. Paragraph [0091] mentions the advantage of a cylindrical form over a spherical form, but it is not clear if this is connected to the disclosure of paragraph [0088]."*

- 1.3 This preliminary opinion of the Board has not been commented or contested by the appellant in writing or at the oral proceedings. Under these circumstances, the Board - having once again taken into consideration all the relevant aspects put forward in the parties' written submissions - sees no reason to deviate from its above-mentioned preliminary opinion and confirms it. In conclusion, whilst the interpretation of the disclosure of D8 given by the appellant is a possible



interpretation, it cannot be seen as a direct and unambiguous disclosure of a non-round cross-section as is required to support an objection of lack of novelty. Thus the Board is not convinced by the arguments of the appellant on this point.

2. *Inventive Step (Article 100 (a) EPC in combination with Article 56 EPC)*

In the contested decision (see Grounds for the decision II.1.4.3) the opposition division found that a combination of the disclosures of D7 and D3 would not lead to the claimed invention without the use of hindsight. The opposition division found that D7 did not disclose specific cross-sections being selected to solve the problem of providing improved heat deflection temperature (HDT) and that whilst the skilled person could have considered D3, they would not have done so with the expectation of success, in particular as there is no suggestion in D3 that the combination of polymer blend and selected cross-section of the container body would solve the problem of improving heat deflection temperature.

2.1 It is common ground that document D7 discloses all the features of claim 1 with the exception of the "non-round cross-section body".

2.2 The appellant, in the statement of grounds of appeal (section 5., page 8, penultimate paragraph to page 9, second paragraph), argued that the decision of the opposition division was incorrect in its formulation of the objective technical problem, as the problem posed by the opposition division (improved heat deflection temperature) is not related to the distinguishing feature of a non-round cross-section container body.

The heat deflection temperature is a characteristic of the plastic material which is measured using a standard test piece and therefore has no relation to the shape of the package. According to the appellant, the objective technical problem has to be considered as to provide an alternative cross-section for the pressurized package of document D7 (see statement of grounds of appeal, page 9, final paragraph).

The respondent has argued (reply to the statement of grounds of appeal, section III.2.1 b)) that there is a clear link between the non-round cross-section of a container, and the material of the container and the HDT.

The Board agrees with the appellant that the heat deflection temperature, as described in D14 and in paragraph [0040] of the contested patent, is a material property which is determined using a standard testing method with a standardised test piece, and thus relates to the polymer from which the package is made and not the shape of the package.

In its reply to the statement of grounds of appeal (section III.2.1 c)) the respondent reformulates the objective technical problem to be the "provision of a pressurized container capable of maintaining its shape when subject to the pressure exerted by the content within the plastic package". However this problem is not based on a technical effect brought about by the distinguishing feature. A non-round cross-section does not inherently solve this problem.

The Board therefore concurs with the appellant, that the objective technical problems defined by the

opposition division and the respondent appear to be incorrect.

2.3 The appellant argued, with the letter of 14 August 2020, point 1., that document D3 shows a non-round cross-section body and contains an indication to the skilled person to combine the teaching of D3 with that of D7.

Document D3 discloses that a "non-round cross-section provides for an ergonomic and aesthetically pleasing design" (D3, page 1, last line to page 2, line 2). According to the appellant, this gives a clear hint to the skilled person to use a non-round cross-section in the container of document D7.

The appellant also argued (submissions of 14 August 2020, point 2.) that the "could/would" approach is not the correct approach to take when the problem to be solved is to provide an alternative. The mere existence of the alternative, particularly in this case, where the only possible alternative to the "round" form shown in the closest prior art is the complementary form of "non-round", should be sufficient to show a lack of inventive step.

The Board notes that regardless of whether the "could-would" approach is used or not, Article 56 EPC states that an invention "shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.". Therefore the Board has to determine if the subject-matter of claim 1 of the contested patent is obvious in the light of the combination of the teachings of documents D7 and D3.

- 2.4 It is uncontested that document D3 generally discloses the use of a non-round cross-section body in a plastic pressurized package in combination with a skeletal support adjacent to the outer surface of the body, as shown in claim 1 of document D3.
- 2.5 The appellant brought forward during oral proceedings that the inclusion in the package of a skeletal support is not excluded from claim 1 of the contested patent; that document D3 teaches the use of the non-round cross-section without a skeletal support; that document D3 also teaches that the skeletal support may be integral with the body of the package; and that the plastic pressurized package as a whole has to contain the pressurized fluid, not just the body, and that such a package could also include a skeletal support. The respondent argued that the wording of the claim limits the package to a body, a sealing valve and an actuator.

The Board follows the argument of the respondent, that the wording of claim 1 of the contested patent excludes the provision of a skeletal support of the type shown in D3.

- 2.5.1 In support of its argument that document D3 discloses the teaching of a non-round cross-section separately from the skeletal support, the appellant cited page 7, line 11 onwards. This passage discloses the teaching that the design of the exoskeleton-like support structure depends on a number of variables such as size, shape and wall thickness of the body. The appellant argued that this disclosure teaches the skilled person that, depending on the variables, for example the thickness of the body, a skeletal support would not be necessary.

The Board, however, follows the arguments of the respondent (submissions of 30 September 2020, page 4, second paragraph to page 5, first paragraph) that the provision of a skeletal support is disclosed as mandatory in D3 for a non-round cross-section body. Document D3 discloses (page 5, last line to page 7, first line) that round cross-section containers can be made inexpensively and with sufficient strength to not require a skeletal support, whereas a non-round cross-section is maintained by the skeletal support.

The central teaching of document D3 is to provide skeletal support for a pressurized non-round cross-section container. The skilled person would understand from document D3 as a whole, that the skeletal support is necessary for non-round cross-sections.

- 2.5.2 The appellant also brought forward during oral proceedings the argument that document D3 discloses an integral exoskeleton, such that rather than two separate components (skeletal support and body) the container body is a single component with greater wall thickness at weaker locations. In support of this argument the appellant referred to figure 4 and text passages on pages 7 and 8 of document D3.

Whilst the Board agrees that D3 mentions the possibility of forming the skeletal support from the same material as the container body (D3, page 7, lines 22-23), there is no clear teaching that the use of the same material is to be combined with an embodiment where the body and skeletal support are "integrally formed". The passage on page 7, lines 22-23 of document D3 teaches only that the body and skeletal support (two components) may be formed from the same material.

In addition, the disclosure of document D3 is unclear regarding whether an "integrally formed" component can be regarded as one single component. On page 8, lines 15-20, document D3 does define "integrally formed" generally as meaning that the support and body are not discrete components, however this passage further describes "integrally formed" as meaning that the components are not easily physically removed from one another, e.g. components moulded together, or that they are integrally attached, e.g. by adhesive bonding or welding. The skilled person would thus understand that they are made separately and may have differing materials.

Although the passage on page 8, lines 20-21, mentions that if the skeletal support and container body are formed as a unitary structure then they are integrally formed, this has to be read in the context of the whole disclosure. As argued by the respondent at the oral proceedings, figure 4 of document D3 clearly shows two separate components, and the passage on page 8, lines 1 to 3 refers to the skeletal support alone being formed as a unitary structure, not the body and support together being formed as a unitary structure. There is therefore no clear disclosure of a non-round cross-section body which is a single component and made from only one material.

Therefore, the appellant's argument, that D3 discloses a monolithic body with thicker regions, cannot be followed.

2.6 Thus, a combination of the teachings of D7 and D3 does not lead to the subject-matter of claim 1 of the contested patent. The skilled person, if they were to combine the teachings, would arrive at a package with a skeletal support. Therefore the subject-matter of claim

1 cannot be considered obvious with regard to the combination of documents D7 and D3.

3. In conclusion, the Board finds that the arguments relied upon by the appellant to demonstrate the incorrectness of the decision under review with respect to novelty and inventive step of the subject-matter of granted claim 1 are not convincing and the appeal therefore has to be dismissed.

## Order

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

**The appeal is dismissed.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated