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**Datasheet for the decision
of 6 July 2022**

Case Number: T 0494/19 - 3.2.07

Application Number: 10784962.2

Publication Number: 2643238

IPC: B65D77/20

Language of the proceedings: EN

Title of invention:
SEALED CONTAINER FOR FOODSTUFFS

Patent Proprietor:
R. Faerch Plast A/S

Opponents:
Ingenium IP Limited
Studio Ausserer

Headword:

Relevant legal provisions:
EPC Art. 83, 54(3), 56
RPBA Art. 12(4)
EPC R. 115(2)
RPBA 2020 Art. 12(2), 13(1), 13(2), 15(1), 15(3), 25(1), 25(2)

Keyword:

Late-filed evidence - admitted (no)
Amendment to appeal case - exercise of discretion - admitted
(no)
Amendment after summons - cogent reasons (no) - exceptional
circumstances (no)
Sufficiency of disclosure - (yes)
Novelty - (yes)
Inventive step - (yes)
Late-filed facts - could have been filed in opposition
proceedings (yes) - admitted (no)

Decisions cited:

T 0182/89, T 0019/90, T 1119/05, T 0671/08, T 0544/12,
T 1730/19, G 0007/93

Catchword:



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Case Number: T 0494/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 6 July 2022

Appellant:
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Decision under appeal:
Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 December 2018 concerning maintenance of the
European Patent No. 2643238 in amended form.

Composition of the Board:

Chairman I. Beckedorf
Members: A. Cano Palmero
 A. Beckman

Summary of Facts and Submissions

- I. Opponent 1 (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 2 643 238 in amended form on the basis of the main request.
- II. Two oppositions were filed by the appellant and by opponent 2 which were directed against the patent in its entirety based on the grounds for opposition pursuant to Article 100(a) and (b) EPC (lack of novelty, of inventive step and of sufficiency of disclosure).
- III. In preparation for oral proceedings, scheduled upon the parties' requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the appeal was likely to be dismissed.
- IV. In response to the communication under Article 15(1) RPBA 2020, the appellant made a request for clarification on 4 December 2020, which was replied by the Board with a communication dated 11 December 2020.
- V. In response to the Board's previous communications, the appellant filed with letter of 2 June 2022 further evidence of common general knowledge in the form of expert reports (Doc17 and Doc18), further arguments on the compliance of Articles 83 and 56 EPC of the main request and arguments with regard to the auxiliary requests.

- VI. Oral proceedings before the Board took place on 6 July 2022 in the absence of opponent 2 in accordance with Rule 115(2) EPC and Article 15(3) RPBA 2020. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.
- VII. The lines of arguments of the parties are dealt with in detail in the reasons for the decision. These lines of arguments are focused on the following issues:
- admittance into the proceedings of Doc16, Doc17 and Doc18 as evidence for common general knowledge;
 - sufficiency of disclosure of the main request and admittance into the proceedings of a line of attack with respect to sufficiency of disclosure based on Doc17;
 - novelty of the subject-matter of claims 1 and 18 according to the main request;
 - inventive step of the subject-matter of claims 1 and 18 according to the main request; admittance of two lines of inventive step objections starting from "Tray 1" (APET tray) or "Tray 2" (APET-PE tray) as closest prior art; and admittance into the proceedings of a line of interpretation of claim 1 of the main request of the appellant when starting from Doc6 as closest prior art.
- VIII. The appellant requested
- that the decision under appeal be set aside and that the patent be revoked in its entirety.

IX. The patent proprietor (respondent) requested

that the appeal be dismissed, *i.e.* that the patent be maintained in the amended form held by the opposition division to meet the requirements of the EPC (according to the main request),
or, when setting aside the decision under appeal, that the patent be maintained in amended form according to one of the sets of claims filed as auxiliary requests 1 to 3 and re-filed with the reply to the statement of grounds of appeal.

X. Opponent 2 neither lodged an appeal nor filed requests.

XI. Independent **claim 1** according to the main request reads as follows:

"A container (1) for foodstuff, said container comprising
a tray (2) formed from a sheet of material comprising more than one layer, where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate, said tray comprising

a bottom part (4),
one or more side walls (5) and
a peripheral sealing rim (6) at its top, said sealing rim having a substantially flat upward facing sealing surface (7),

wherein, in addition to the material from which the tray is made, the sealing surface is provided with a layer of an adhesive (8) along the full circumference of the tray."

XII. Independent **claim 18** according to the main request reads as follows:

"A method of producing a container for foodstuff, said method comprising the steps of:
forming a tray made from a sheet of material comprising more than one layer, where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate, said tray comprising a bottom part, one or more side walls and a peripheral sealing rim at its top, said sealing rim having a substantially flat upward facing sealing surface; and
providing the sealing surface with a layer of an adhesive along the full circumference of the tray."

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. *Revised Rules of Procedure of the Boards of Appeal (RPBA 2020) - Transitional provisions*

The present 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), except for Articles 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Evidence*

- 2.1 The following documents referred to in the appealed decision are relevant for the present decision:

Doc1 : WO 2009/121834 A1;

Doc1*: US 2011/0014404 A1;
Doc2 : EP 0 440 550 A1;
Doc2*: AU 638092 B2;
Doc5 : US 4,427,148 A;
Doc6 : EP 1 826 139 A1;
Doc7 : WO 2008/017308 A1;
Doc8 : US 4,538,651 A;
Doc10: Opinion 24/16 from UKIPO;
Doc11: Statutory Declaration of A. Coffey;
Doc12: WO 2011/083342 A2;
Doc15: GB 1432219;

whereby Doc15 had been filed during the opposition proceedings and was not admitted by the opposition division.

2.2 The following documents were filed by the appellant with letter dated 4 October 2019:

Doc16: Expert report of Charles Shaw dated 6 December 2018;
Doc19: Judgement of the High Court of Justice Hacon in the UK Intellectual Property Enterprise Court - Case No: IP-2018-000014.

2.3 The following documents were filed by the appellant after notification of the summons to oral proceedings before the Board:

Doc17: Expert Report of Thomas Lyngaard dated 5 December 2018;
Doc18: Reply Expert Report of Thomas Lyngaard dated 8 February 2019.

3. *Admittance of documents **Doc16**, **Doc17** and **Doc18***

3.1 Expert report **Doc16** was submitted by the appellant after the filing of its grounds of appeal and, therefore, is an amendment to the appellant's appeal case. Its admittance is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board as stipulated by Article 13(1) RPBA 2020.

3.2 The expert reports **Doc17** and **Doc18** were submitted by the appellant with letter of 2 June 2022, *i.e.* after notification of the summons to oral proceedings before the Board. The admittance of the amendment to the appellant's case based on documents **Doc17** and **Doc18** is consequently subject to Article 13(1) and (2) RPBA 2020.

3.3 The appellant refers in its justification that the experts' reports **Doc16 to Doc18** relied upon as evidence as to what might be considered as part of the common general knowledge of a skilled person in the field of thermoforming plastic food trays, which had been disputed by the respondent. Furthermore, **Doc17** and **Doc18**, being reports from the inventor listed in the patent in suit, should contain no surprising information or evidence of common general knowledge that could not be already known to the respondent.

3.4 The Board finds this justification not convincing for the following reasons.

3.4.1 The experts' reports **Doc16**, **Doc17** and **Doc18** were publicly available on the date of filing of the statement of grounds of appeal. This has not been disputed by the appellant. Consequently, documents

Doc16 to Doc18 could have been referred to by the appellant when forming its appeal case.

- 3.4.2 The alleged dispute on what was to be considered common general knowledge, in particular whether providing multilayer containers having a single type of material (such as APET) were commonly known, and whether the reference to at least 85% within the claim had to be understood by the skilled person as a reference to conventionally known APET, had already been discussed and took place during the opposition proceedings leading to the decision under appeal (see points 4.1, 4.4 and 5.1 of the minutes of the oral proceedings before the opposition division and at least point II.3.2) of the reasons of the decision under appeal).
- 3.4.3 As a consequence, the Board is convinced that the alleged dispute on what is to be considered as common general knowledge was not triggered by the reply to the statement of grounds of appeal, nor from the preliminary opinion of the Board, as argued by the appellant, but was rather initiated during the opposition proceedings which resulted in the decision under appeal.
- 3.4.4 It follows that documents **Doc16 to Doc18** of what is to be considered to be common general knowledge could and should have been presented at least with the statement of grounds of appeal. In view of this, **the Board** does not find convincing the justification provided by the appellant for such a late filing, which confronts the Board and the respondent with a fresh case, and, **exercising its discretion under Article 13(1) RPBA 2020, does not admit Doc16, Doc17 and Doc18 into the appeal proceedings.**

3.4.5 Moreover the Board, following its previous decision T 1730/19 (see points 2.4 to 2.7 of the reasons) is not convinced that declarations originating from the inventor of the the patent in suit, such as documents **Doc17** and **Doc18**, can be considered as common general technical knowledge of the skilled person at all.

3.4.6 In this light, the arguments of the appellant that **Doc17** and **Doc18** were filed in response to the dispute of common general knowledge and that the respondent could not be taken by surprise by the declarations of the inventor of the patent in suit as proof for this common general knowledge cannot amount to cogent reasons that could justify exceptional circumstances for the admittance of **Doc17** and **Doc18** into the appeal proceedings under **Article 13(2) RPBA 2020**.

4. *Document **Doc19***

The Board notes that the conclusions reached by the decision of the High Court of Justice **Doc19** are not directly binding to the Board, which shall decide solely in compliance with the provisions of the EPC. However, the Board took note of that decision in the course of deciding the case at hand.

5. *Main request - Sufficiency of disclosure, Article 83 EPC*

5.1 The appellant argued that the reference to at least 85% in the claimed subject-matter had to be understood as a reference to conventionally known APET constituted a squeeze scenario:

- either the material is known and the claims are directed to using generally known APET materials in the

construction of trays having an unremarkable general form (and hence cannot contribute to inventive step), - or the material is not known and there is no information as to what are its constituents and properties and the patent is not sufficiently disclosed in the sense of Article 83 EPC.

- 5.1.1 The Board cannot follow this argument of the appellant and is of the view that **the claimed invention is sufficiently disclosed**. According to the jurisprudence of the Boards of Appeal, an objection of lack of disclosure presupposes that there are serious doubts substantiated by verifiable facts. **The burden of proof is upon the opponent** to establish on the balance of probabilities that a person skilled in the art, using his common general knowledge, would be unable to carry out the invention (see Case Law of the Boards of Appeal of the European Patent Office [CLB], 9th edition, 2019, II.C.9, first two paragraphs, in particular in relation to T 19/90 and T 182/89).
- 5.1.2 The Board is convinced that the mere posing of a squeeze scenario such as the one proposed by the appellant cannot *per se* constitute serious doubts that can justify an objection on sufficiency of disclosure. Furthermore, as correctly found by the opposition division in point II.2) of the decision under appeal, the patent indicates at least in paragraphs [0019], [0060] and [0061] guidance for the skilled person for materials comprising at least 85% APET.
- 5.2 With its letter dated 2 June 2022 (*i.e.* after notification of the summons to oral proceedings before the Board), the appellant raised a further objection based on the statement **Doc17**, directed to the

insufficient disclosure of the adhesive referenced in claim 1 according to the main request.

- 5.2.1 This objection, apart from being based in a document which is not admitted by the Board (see points 3.4.4 and 3.4.6 above), constitutes itself an amendment of the appellant's appeal case and is subject to Article 13(2) RPBA 2020, which stipulates that such an amendment shall not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the appellant.
- 5.2.2 The appellant argued in this sense, referring to decision T 671/08 (CLB, *supra*, V.A.4.10.2), that an objection of a fundamental nature, such as the present one, should not be ignored by the Board despite being late filed and possibly causing adjournment of the oral proceedings. Since the appellant's objection cannot be disregarded without going against the spirit and purpose of the EPC, this amounts to exceptional circumstances in the sense of Article 13(2) RPBA 2020.
- 5.2.3 The Board disagrees. The fact that the case at hand is governed by different Rules of Procedure than the case referred to by the appellant (in particular Article 13(2) RPBA 2020 instead of Article 13(3) 2007). Furthermore, it must be underlined that the criterion of "*prima facie* relevance" or "fundamental objection" is absent in the Rules of Procedure with regard to the admittance of late filed objections. In the particular case of Article 13(2) RPBA 2020, only the existence of exceptional circumstances for such a late filing must be addressed (cf. explanatory notes to Article 13(2) RPBA 2020, Supplementary publication 2 - OJ EPO 2020, 46, 54).

5.2.4 In the Board's view, there are no such exceptional circumstances justified by cogent reasons that could have prevented the appellant to present this objection already with the statement of grounds of appeal, substantially for the same reasons as for documents **Doc17 and Doc18**. Consequently, **the objection on sufficiency of disclosure, filed with letter of 2 June 2022 and based on Doc17 is not admitted into the appeal proceedings under Article 13(2) RPBA 2020.**

6. *Main request - Novelty of claim 1 in view of **Doc12**, Article 54(3) EPC*

6.1 The following findings on novelty correspond to the view of the Board which had been communicated to the parties with the communication pursuant to Article 15(1) RPBA 2020 (see point 9 thereof). The parties have neither reacted nor objected to the opinion expressed in that communication. After having reconsidered all relevant legal and factual aspects of the case, the Board does not see any reason to deviate from its preliminary opinion. The subject-matter of claim 1 of the main request is thus considered new.

6.2 The appellant argued in points 12 and 13 of its statement of grounds of appeal that "it is accepted Case Law that for a feature to render a claim novel, that there must be a claimed feature that must make a technical contribution over the art." Since the technical contribution of the more than one layer of amorphous polyethylene terephthalate (APET) is not reflected in the language of claim 1 as maintained by the opposition division, its subject-matter is not technically distinguished over the prior art, in this case **Doc12**, which would then anticipate the rest of the features of the claim.

6.3 The Board cannot follow this reasoning and concurs in substance with the respondent that a claimed subject-matter lacks novelty unless it includes one technical feature which distinguishes it from the state of the art. In the particular case of a product claim, novelty can be given by the technical feature of a novel structure (in this case multiple layers with at least 85% of APET), regardless of the fact whether this technical contribution or feature has the one or the other technical effect.

6.4 Since **Doc12** fails to disclose more than one layer, where the material of each of the layers comprises at least 85% of APET, the subject-matter of claim 1 according to the main request is considered new.

7. *Main request - Inventive step of claim 1, Article 56 EPC*

7.1 **"Tray 1"** (APET tray) or **"Tray 2"** (APET-PE tray) as closest prior art in combination with the common general knowledge - Admittance, Article 12(4) RPBA 2007

7.1.1 In points 49 and 50 of the statement of grounds of appeal the appellant argued that the subject-matter of claim 1 according to the main request was not inventive in view of:

- an alleged acknowledged prior art of an APET only tray (**"Tray 1"**, paragraph [0010] of the patent in suit) as closest prior art in combination with the common general knowledge; or

- an alleged acknowledged prior art of APET-PE tray (**"Tray 2"**, paragraph [0008] of the patent in suit) as

closest prior art in combination with the common general knowledge.

- 7.1.2 As it was confirmed by the appellant, these lines of attack were not explicitly raised in opposition proceedings and, thus, have been substantiated as such for the first time in the statement of grounds of appeal.
- 7.1.3 The appellant argued that it was constrained of presenting these attacks in opposition proceedings, since it was taken by surprise during the oral proceedings before the opposition division when, due to the amendment of the main request from "one or more layers" to "more than one layer", the whole discussion on inventive step shifted towards the obviousness of the feature that each of the layers comprises at least 85% of APET. Due to the impossibility of reacting during said oral proceedings, the appellant was not in a position of presenting these new lines of attack. In the appellant's view however, these objections were implicitly referenced by the attacks based on **Doc1** and **Doc2**.
- 7.1.4 The Board is not persuaded by the arguments of the appellant. Firstly, it cannot be agreed that the relevance of "**Tray 1**" and "**Tray 2**" as promising starting points for an assessment on the inventive step of the subject-matter claimed could be affected by an alleged shift of discussion on the relevant features. In other words, the Board is convinced that the pieces of prior art "**Tray 1**" and "**Tray 2**" were of equal relevance for a container comprising "one or more layers" as for a container with "more than one layer", corresponding to maintained version according to the main request. It follows that inventive step attacks

based on those trays could have already been submitted by the appellant for the initial main request and then maintained for the amended main request, which was ultimately held by the opposition division to meet the requirements of the EPC.

7.1.5 In conclusion, since the lines of attack based on **"Tray 1"** and **"Tray 2"** could and should have been filed in opposition proceedings, their admittance into appeal proceedings is subject to the Board's discretion pursuant to Article 12(4) RPBA 2007.

7.1.6 The Board, considering that the main aim of appeal proceedings is that of reviewing the decisions of the administrative departments of the EPO (cf. Article 12(2) RPBA 2020), does not consider it appropriate that the appellant starts a complete fresh case in appeal, thereby avoiding having a decision from the competent EPO department, and exercising its discretion **under Article 12(4) RPBA 2007 does not admit the lines of attack based on "Tray 1" and "Tray 2" into the appeal proceedings.**

7.2 Document **Doc1/Doc1*** or **Doc6** as closest prior art in combination with the common general knowledge

7.2.1 With its letter of 2 June 2022 (see page 14) and during the oral proceedings before the Board, the appellant submitted a new line of interpretation of claim 1 of the main request when starting from document **Doc6**, in response to point 10.1.2 of the Board's communication according to Article 15(1) RPBA 2020, where the Board expressed its preliminary opinion that the sealing layers of **Doc6** were not provided *exclusively* to the sealing surface of the tray as required by claim 1 as maintained. In response to this allegedly new line of

interpretation, the appellant directed attention to paragraphs [0004] and [0026] of **Doc6**.

7.2.2 The Board is not convinced that it interpreted the wording of claim 1 in a new way in its preliminary opinion, such that this alleged new interpretation could justify the submission of new references to **Doc6** made by the appellant after the notification of the summons to oral proceedings before the Board. While the appellant seems to focus on the word *exclusively* used by the Board, it is repeatedly stated in the preliminary opinion that claim 1 as maintained by the opposition division requires that the sealing surface is provided with a layer of adhesive (see second and fifth paragraphs of point 10.1.2 of the communication under Article 15(1) RPBA 2020), so that the Board clearly **relied on the exact wording of the claim** in its assessment of inventive step. In view of this, and in the absence of any exceptional circumstances, the Board does not admit this new line of interpretation and the corresponding new references to **Doc6** under Article 13(2) RPBA 2020.

7.2.3 The appellant argued in point 45 of the statement of grounds of appeal that the subject-matter of claim 1 as maintained differs from the known containers of documents **Doc1/Doc1*** or **Doc6** in that the tray is formed of **more than one layer**, and in that each of the layers comprises **at least 85% of APET**.

According to the appellant, these features solve two partial problems:

- (a) the first partial problem solved by the feature that each of the layers comprise at least 85% of APET is to reduce waste and improve recyclability

(see point 45 of the statement of grounds of appeal). Following the squeeze argument of the appellant that if the material is sufficiently disclosed, then the specification that each of the layers comprises at least 85% of APET is not relevant as the skilled person takes this as a reference to conventionally known APET, there would be thus no impediment or reason why the skilled person would not consider using an admitted prior art of APET only trays with the adhesive arrangement of the prior art documents above to solve this technical problem (point 46 of the statement of grounds of appeal);

- (b) by providing more than one layer, the appellant argues in point 47 of the statement of grounds of appeal that there could be other hypothetical partial problems to be solved, but only in the case in which the layers are **three** as described in paragraph [0060] of the patent. Since the claim is not directed to this particular case of three layers, but in general to more than one layer, this effect is not achieved. The general problem solved by providing more than one layer is rather, so the appellant, not to increase the recyclability, as posed by the opposition division (see point 43 of the statement of grounds of appeal) but how to provide a tray structure with modified localised properties. According to the appellant this is however common place through the conventional use of ABA structures (see points 22 to 38 of the statement of grounds of appeal, in particular point 34 "common general knowledge") as would be evident to the skilled person, see point 36 of the statement of grounds of appeal. The testimony of Mr. Thomas McCaffrey was offered to the Board in

order to provide further evidence of such general technical knowledge.

- 7.2.4 The Board is not persuaded by these arguments and follows substantially the view of the respondent and the conclusion of the opposition division that the subject-matter of claim 1 as maintained is inventive starting from **Doc1/Doc1*** or **Doc6** as closest prior art.
- 7.2.5 As correctly found by the opposition division there is not a clear teaching for providing a container with multiple layers in which all layers are APET-based at a percentage of 85%. Document **Doc1/Doc1*** deals with PET materials in general and **Doc6** foresees a central EVOH-type barrier layer within multiple APET layers. The alleged fact that APET materials are generally known, cannot justify *per se*, specially in the absence of any hint or motivation, that the skilled person would chose APET as the only material for the multiple PET layers of **Doc1/Doc1***. The same lack of hint or motivation applies to **Doc6**. In addition, as correctly found by the opposition division, even in the case that the skilled person was forced to replace the EVOH-layer of **Doc6** through an APET layer, the skilled person would still have to face additional design choices in order to select an appropriate dimension for the new APET layer without losing the barrier effect delivered by the replaced EVOH-layer.
- 7.2.6 Alone for these reasons, the Board is convinced that starting from any of **Doc1/Doc1*** or **Doc6** as closest prior art, the skilled person would not arrive in an obvious manner at a container with more than one layer, where the material of each of the layers comprises at least 85 % of APET.

- 7.2.7 Furthermore, as correctly put forward by the respondent, the subject-matter of claim 1 as maintained does not only differ from the containers of both **Doc1/Doc1*** and **Doc6** in that each of the more than one layer of the material comprises at least 85% of APET, but also in that in addition to the material from which the tray is made, the sealing surface is provided with a layer of an adhesive along the full circumference of the tray.
- 7.2.8 In contrast, the sealing layer of document **Doc1/Doc1*** is an integrated layer within the multi-layer film (see **Doc1/Doc1***, claims 5 and 7) and therefore not provided to the sealing surface of the tray as required by claim 1 as maintained.
- 7.2.9 In the case of **Doc6**, even if the new references to this document could be taken into account (see point 7.2.2 above), the Board additionally notes that while it could be agreed with the appellant that **Doc6** foresees the use of adhesive in paragraphs [0004] and [0026] as an alternative to sealing by melting portions of the flanges together, the respondent correctly pointed out that it is still not directly and unambiguously disclosed in **Doc6** that the sealing surface is provided with a layer of this adhesive **along the full circumference of the tray**. Indeed, in case that an adhesive was to be used as an alternative to replace the melting portions of the flanges, it would be logical to apply such adhesive at the same portions of the sealing surface, and not necessarily along the full circumference of the tray.
- 7.2.10 Taking into account all distinguishing features, the achieved technical effect is the provision of a multilayered tray with good transparency and a strong

seal. The Board concurs with the respondent that the problem to be solved can be seen as how to provide containers with good quality without sacrificing the advantages of the container being suitable for storage of foodstuff due to both high transparency and high impermeability to oxygen.

- 7.2.11 In sum, the Board is not convinced that the skilled person, starting from any of **Doc1/Doc1*** or **Doc6** as closest prior art, would be hinted or motivated in view of the objective problem posed to replace the sandwich-type multi-layer films disclosed in these documents and perform the step of replacing or selecting all layers to contain at least 85% of APET; and furthermore removing the integral sealing layer of **Doc1/Doc1*** or adapting the adhesive configuration of **Doc6** to provide an adhesive layer along the full circumference of the tray at the sealing surface, thereby arriving at the subject-matter claimed.
- 7.2.12 The Board thus concludes that the skilled person, starting from these documents as closest prior art, would only arrive at the subject-matter of claim 1 according to the main request as the result of an *ex post facto* analysis. This finding would also hold in the situation that the offered testimony of Mr McCaffrey as witness could confirm the allegation that it would be within the skilled person's common general knowledge to incorporate an anti-block agent in the outermost, or skin, layer to avoid the sticking of one tray to another (points 35 and 37 of the statement of grounds of appeal).

7.3 Document **Doc2/Doc2*** as closest prior art in combination with the common general knowledge

7.3.1 According to the appellant (point 51 of the statement of grounds of appeal) the subject-matter of claim 1 as maintained differs from the known container of **Doc2** in the choice of APET as the polyester (see point 51).

Starting from **Doc2/Doc2*** and facing the problem of forming a transparent container, the selection of APET as the polyester is a mere material selection which does not involve an inventive step, so the appellant.

7.3.2 The Board cannot share this view. As the respondent correctly states, the skilled person, starting from **Doc2/Doc2*** would be taught away from replacing the known package material (such as polyester) by APET, since the container is intended to be used at temperatures above 120°C in which the APET loses its structural properties.

7.3.3 The appellant argued in first place that paragraph [0005] of the patent in suit concedes that APET can be exposed to temperatures of 180 °C. Moreover, the appellant put forward that, under a skilled reading of **Doc2/Doc2*** including its claims, it cannot be concluded that the method for making and sealing a container set out in **Doc2/Doc2*** need to be sterilized (and therefore subjected to high temperatures) by autoclaving after sealing.

7.3.4 The Board is not persuaded by the appellant's arguments. While it is true that APET can in principle be exposed to temperatures of 180 °C, it is also true that at high temperatures (e.g. over 120°C) APET loses its structural properties, which means that a container

made of APET would deform at those temperatures losing its primary purpose. Furthermore, **Doc2/Doc2*** presents at several instances (see page 1a, lines 10 to 18 and page 6, lines 19 to 21 of **Doc2***) as an essential feature that the container should be suitable for sterilisation for one hour at 121 °C.

- 7.3.5 The Board thus concludes that the subject-matter of claim 1 as maintained is inventive in view of **Doc2/Doc2*** and the common general technical knowledge.
- 7.4 Documents **Doc5, Doc7, Doc8 and declaration/opinion Doc11/Doc10** as closest prior art in combination with the common general knowledge
- 7.4.1 The following findings correspond to the view of the Board which had been communicated to the parties with the communication pursuant to Article 15(1) RPBA 2020 (see point 10.3 thereof). The parties have neither reacted nor objected to the opinion expressed in that communication. After having reconsidered all the legal and factual aspects of the case the Board does not see any reason to deviate from its preliminary opinion.
- 7.4.2 The decision under appeal considers documents **Doc5, Doc7, Doc8** and the declaration/opinion **Doc11/Doc10** as possible starting points for the assessment of inventive step.
- 7.4.3 The Board is of the view that each of these documents fails to disclose (at least)
- the more than one layer of the material comprising at least 85% of APET, and
 - that in addition to the material from which the tray is made, the sealing surface is provided with a layer of an adhesive.

- 7.4.4 Since these distinguishing features are at least the same as for document **Doc1/Doc1***, and in the absence of any further arguments from the appellant, the Board is of the view that the same findings as in point 7.2 above apply *mutatis mutandis*. The subject-matter of claim 1 as maintained is thus considered inventive in view of any of documents **Doc5, Doc7, Doc8** or the declaration/opinion **Doc11/Doc10** in combination with the common general technical knowledge.
- 7.5 Document **Doc15** as closest prior art in combination with the common general knowledge
- 7.5.1 The following findings correspond to the view of the Board which had been communicated to the parties with the communication pursuant to Article 15(1) RPBA 2020 (see point 10.4 thereof). The parties have neither reacted nor objected to the opinion expressed in that communication. After having reconsidered all the legal and factual aspects of the case the Board does not see any reason to deviate from its preliminary opinion.
- 7.5.2 The opposition division did not admit document **Doc15** in the opposition proceedings. In point I.10) of the decision under appeal, the opposition division merely states that "all of the (said) late-filed further evidence documents of opponent 1 have been considered *prima facie* not relevant and, consequently, excluded from the decision to be taken." The minutes of the oral proceedings before the opposition division show that the admittance **Doc15** into the opposition proceedings was discussed and that this document was "not allowed into the proceedings" (see points 5.3 and 5.3.1 of the minutes).

- 7.5.3 The Board concurs with the opposition division that document **Doc15** had indeed been filed late. Pursuant to Article 114 EPC, the opposition division therefore had a discretion to admit this document or to disregard it.
- 7.5.4 Such a discretionary decision should only be overruled in appeal if the discretion has been exercised according to the wrong principles, or without taking into account the right principles, or in an unreasonable way (see CLB, *supra*, V.A.3.5.1 and G 7/93, point 2.6 of the Reasons; T 1119/05, point 3.2 of the Reasons).
- 7.5.5 In the present case, the opposition division based its decision not to admit the late-filed document **Doc15** on the sole ground that this document was not *prima facie* relevant but without any further reasoning, *i.e.*, as to why the document was not *prima facie* relevant. The Board cannot consider a mere assertion of lack of *prima facie* relevance as sufficient reasoning (see also CLB, *supra*, IV.C.4.2 and decision T 544/12). Since the opposition division has not given sufficient reasons for not admitting the late-filed document, the discretionary decision of the opposition division could in principle be overruled and the Board could exercise its own discretion to admit document **Doc15** in the proceedings.
- 7.5.6 The Board however notes that, the subject-matter of claim 1 differs from the known container of **Doc15** at least in that each of the more than one layer of the material comprises at least 85% of APET. As the respondent states, similarly to **Doc2** (see point 7.3 above), the container of **Doc15** is intended to be thermally stable at high cooking temperatures (up to about 205 °C, see page 1, lines 30-37), which makes the

use of APET unsuitable. It follows that, **even if document Doc15 would be admitted into the proceedings by the Board**, the subject-matter of claim 1 according to the main request is still inventive in view of this document.

8. *Main request - Claim 18*

The Board is of the view that the above considerations apply *mutatis mutandis* to the subject-matter of the corresponding independent method **claim 18** according to the main request, which is therefore considered to meet the requirements of the EPC.

9. *Conclusion*

It follows from the above that the appellant has not submitted admissible and convincing arguments that could demonstrate the incorrectness of the decision under appeal. The appeal is 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