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**Datasheet for the decision
of 17 May 2021**

Case Number: T 1194/19 - 3.2.07

Application Number: 13733696.2

Publication Number: 2800710

IPC: B65D41/04, B65D41/34

Language of the proceedings: EN

Title of invention:

LINERLESS CLOSURE

Patent Proprietor:

Closure Systems International Inc.

Opponent:

Obrist Closures Switzerland GmbH

Headword:

Relevant legal provisions:

EPC Art. 54, 56

RPBA Art. 12(4)

RPBA 2020 Art. 13(2), 15(1), 24, 25(1), 25(2)

Keyword:

Novelty - auxiliary requests (yes)

Inventive step - problem and solution approach - obvious
combination of known features - auxiliary requests (no)

Late-filed line of argument - submitted during oral
proceedings - admitted (no)

Late-filed requests - submitted with the statement of grounds
of appeal - request could have been filed in first instance
proceedings (yes) - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1194/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 17 May 2021

Appellant:

(Patent Proprietor)

Closure Systems International Inc.
7702 Woodland Drive, Suite 200
Indianapolis, IN 46278 (US)

Representative:

Algemeen Octrooi- en Merkenbureau B.V.
P.O. Box 645
5600 AP Eindhoven (NL)

Respondent:

(Opponent)

Obrist Closures Switzerland GmbH
Romerstrasse 83
4153 Reinach (CH)

Representative:

Bryers LLP
7 Gay Street
Bath, Bath and North East Somerset BA1 2PH (GB)

Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 14 February
2019 revoking European patent No. 2800710
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman

I. Beckedorf

Members:

A. Cano Palmero

S. Watson

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division revoking European patent No. 2 800 710.
- II. The opposition was filed on the grounds according to Article 100(a) EPC (lack of novelty and inventive step).
- III. The opposition division held, *inter alia*,
- (a) that the ground for opposition pursuant to Article 100(a) EPC (lack of novelty) prejudiced the maintenance of the patent as granted
 - (b) that the subject-matter of claim 1 of auxiliary request 1 was not new, and
 - (c) that the subject-matter of claim 1 of auxiliary request 5 was not inventive.
- IV. The appellant initially requested
- that the decision under appeal be set aside and that the patent be maintained as granted (main request)
- or, in the alternative,
- in the event that the Board found claim 1 of the patent as granted novel,
- that the case be remitted to the opposition division for further examination,
- or, in the further alternative,
- that the patent be maintained in amended form on the basis of one of the sets of claims filed as

auxiliary requests 1 to 6 with the statement setting out the grounds of appeal.

- V. 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, according to which the appeal was likely to be dismissed.
- VI. With letter of 21 December 2020, the appellant submitted additional arguments in favour of a remittal of the case to the opposition division and of the admittance of auxiliary requests 2 to 5 in appeal proceedings.
- VII. Oral proceedings before the Board were held on 17 May 2021. During the oral proceedings, the appellant withdrew its main request that the patent be maintained as granted. At the conclusion of the proceedings the decision was announced. For further details of the oral proceedings, in particular the issues discussed with the parties, reference is made to the minutes.
- VIII. The appellant's final requests were
- that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the sets of claims filed as auxiliary requests 1 to 6 with the statement setting out the grounds of appeal.
- IX. The final request of the respondent (opponent) was
- that the appeal be dismissed.

X. The lines of arguments of the parties, which are focused on the patentability requirements of auxiliary requests 1 and 6 as regards novelty and inventive step and the admittance of auxiliary requests 2 to 5 into the appeal proceedings, are dealt with in detail in the reasons for the decision.

XI. Independent claim 1 of **auxiliary request 1** reads:

"A linerless plastic closure (10) for a container (C), comprising;
a closure body having a top wall portion (12) and an annular skirt portion (14) depending from said top wall portion,
an outer seal element (24) depending from said top wall portion inwardly of said annular skirt portion, said outer seal element being generally annular, and defining a generally inwardly facing sealing surface for engagement with a generally outwardly facing sealing surface of said container, said closure being characterized in that it further comprises
a plurality of circumferentially spaced, seal reinforcement elements (28) on the inside surface of said skirt portion, adjacent said top wall portion, said reinforcement elements being engageable by said outer seal element to limit outward deflection of said outer seal element, to enhance sealing cooperation of said outer seal element with the associated container."

XII. Independent claim 1 of **auxiliary request 6** reads:

"A linerless plastic closure (10) for a container (C), comprising;
a closure body having a top wall portion (12) and an annular skirt portion (14) depending from said top wall portion,

an outer seal element (24) depending from said top wall portion inwardly of said annular skirt portion, said outer seal element being generally annular, and defining a generally inwardly facing sealing surface for engagement with a generally outwardly facing sealing surface of said container, said closure being characterized in that it further comprises a plurality of circumferentially spaced, seal reinforcement elements (28) on the inside surface of said skirt portion, adjacent said top wall portion, said reinforcement elements being engageable by said outer seal element to limit outward deflection of said outer seal element, to enhance sealing cooperation of said outer seal element with the associated container, said closure includes twelve of said seal reinforcement elements evenly spaced about the circumference of said closure."

- XIII. Since the wording of the claims of auxiliary requests 2 to 5 is not relevant for the present decision, there is no need 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 effect on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for 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 auxiliary requests 2 to 5, Article 12(4) RPBA 2007*

2.1 **Auxiliary requests 2 to 5** were submitted by the appellant for the first time with its statement setting out the grounds of appeal.

2.2 The appellant argues that as long as the requests filed with the statement of grounds of appeal relate to the case in appeal, as in the present case, they must be taken into account.

2.2.1 In particular, auxiliary request 2 claims the same subject-matter as auxiliary request 2 discussed during opposition proceedings, without the wording in claim 1 that led to the decision of the opposition division that the subject-matter lacked clarity.

2.2.2 As regards auxiliary requests 3 to 5, the appellant argues that it was taken by surprise by the novelty objection raised for the first time during the oral proceedings before the opposition division, so that it could not present these requests at that point of time.

2.2.3 Under the indicated special circumstances of the opposition proceedings, and taking into account the limited number of auxiliary requests, these should be admitted into the proceedings.

2.3 The Board is not persuaded by the justifications relied upon by the appellant, for the following reasons.

2.3.1 The fact that the present auxiliary request 2 attempts to overcome a clarity deficiency of the previous auxiliary request 2, which was filed and discussed during the oral proceedings before the opposition

division, does not amount to a valid justification as to why this request could not have been submitted during opposition proceedings. The discussion of clarity of the previous auxiliary request 2 dealt with a particular formulation of a specific feature of claim 1 (see point 8 of the decision under appeal). After the opposition division announced that the subject-matter of claim 1 of auxiliary request 2 is not clear (see minutes of the oral proceedings before the opposition division, page 2), the appellant should have been aware that the deletion of the feature which had been the focus of the previous discussion could overcome the clarity objection, and therefore could and should have submitted the present auxiliary request 2 in opposition proceedings.

- 2.3.2 As regards auxiliary requests 3 to 5, the Board is convinced that the finding of the opposition division, that the subject-matter of claim 1 as granted is not new in view of D7 (**DE 198 20 266 A1**), does not constitute a surprising event in the proceedings that could justify the filing of these requests for the first time in appeal proceedings.

In the first place, the disclosure of D7 was already known by the appellant not only from the outset of opposition proceedings, but also from the proceedings that resulted in the grant of a European patent. Moreover, the respondent already argued in point 2.2 of its letter dated 13 September 2018 that "D7 anticipates all the structural features of claim 1.". Therefore, the opposition division merely based its findings of the decision under appeal following an argument which the appellant was aware of prior to the oral proceedings before the opposition division.

The Board is thus of the view that the appellant was not faced with an unforeseeable development of the case during the oral proceedings before the opposition division.

2.4 The Board thus concludes that auxiliary requests 2 to 5 not only could but should have been filed in opposition proceedings. Their admittance into appeal proceedings is thus subject to the Board's discretion pursuant to Article 12(4) RPBA 2007, which is applicable in this case according to Article 25(2) RPBA 2020.

2.5 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 completely fresh case in appeal, thereby avoiding having a decision from the opposition division on these requests.

2.6 Consequently, the Board, exercising its discretion pursuant to Article 12(4) RPBA 2007, does **not admit auxiliary requests 2 to 5 into the proceedings.**

3. *Novelty - claim 1 according to auxiliary requests 1 and 6 in view of D7 (DE 198 20 266 A1), Article 54 EPC*

3.1 Claim 1 according to the auxiliary request 1 corresponds to claim 1 as granted with the additional feature that the closure is a linerless plastic closure.

3.2 The opposition division found in point 5.3 together with point 3.2 of the decision under appeal that document D7 discloses a linerless closure anticipating

all features according to claim 1 of auxiliary request 1, including the feature of a **plurality** of circumferentially spaced seal reinforcement elements.

3.3 Document D7 discloses in claim 3 and in column 2, lines 15-18, a seal reinforcement element ("Haltenocke" 9) with a recess ("Aussparung" 12) at **at least one location**. Thus, D7 discloses a seal reinforcement element with multiple recesses.

3.3.1 In a first line of reasoning, the opposition division (see third paragraph of point 3.2.12 of the reasons of decision under appeal) finds that the term "spaced seal reinforcement element" in claim 1 as granted and according to auxiliary request 1 does not necessarily imply that said elements need be completely detached from one another. The opposition division reasoned further that even if D7 were considered to disclose one single seal reinforcement element provided with multiple recesses in the form of "cove-like" recesses (or indentations), there would be "recognizable elements along the circumference of the closure (e.g. due to thicker material, different shape, etc.)" that can be seen as "spaced" in the sense of claim 1, thereby anticipating its subject-matter. In this respect, the respondent notes that the patent indicates in paragraph [0019] that the closure is a unitary one-piece closure which would allow an interpretation of the elements of D7 as seal reinforcement elements in the sense of claim 1.

3.3.2 The Board does not share the interpretation of the subject-matter of claim 1 made by the opposition division and the respondent. Apart from the question whether the skilled reader could consider interconnected elements as circumferentially separate

elements at all, it must be noted that claim 1 requires that the closure comprises a plurality of circumferentially spaced seal reinforcement elements **on the inside surface of the skirt portion of the closure**, which is a recognisable part of the closure, irrespective of whether the closure is made of one piece or not. Contrary to the finding of the opposition division, the Board is of the view that the skilled reader understands that this requires that the circumferential spacing between the seal reinforcement elements is on the inside surface of the skirt portion. In other words, it is required that sectors of the skirt portion are free of such elements. Consequently, in the hypothetical case presented by the opposition division, the Board is of the view that the provision of "cove-like" recesses on the "Haltenocke" 9 cannot result in circumferentially separated seal reinforcement elements on the inside surface of the skirt portion as required by the claim.

- 3.4 In a second line of reasoning, which is also shared by the respondent, the opposition division maintains (see fourth paragraph of point 3.2.12 of the decision under appeal) that, since the text of the description of D7 does not specify the form or the shape of the recesses, the skilled person would recognise, in view of figure 2, that the recess ("Aussparung" 12) is to be understood as an interruption of the seal reinforcement element ("Haltenocke" 9). This interpretation is also reinforced in D7, column 3, lines 5 to 12, where it is required that the recesses have rounded edges in order to avoid damage on the sealing. The provision of these rounded edges in the recesses results in an interruption between the seal reinforcement zones. Consequently, a **plurality** of such recesses in the form of a complete interruption would **inevitably** lead to

fully separate seal reinforcement elements, thereby anticipating the subject-matter of claim 1 as granted and according to auxiliary request 1.

- 3.4.1 The Board is not persuaded by this argument either.
- 3.4.2 It can be acknowledged that D7 discloses a seal reinforcement element and multiple recesses. It can also be acknowledged that the (single) recess shown in the embodiment of figure 2 is to be understood as a full (circumferential) separation.
- 3.4.3 The Board is however of the view that a recess ("Aussparung") in the sense of D7 can be interpreted by the skilled reader in multiple ways: not only as a complete separation as in figure 2, but also as any removal of material such as, for example, an indentation. The fact that the embodiment of figure 2 (with only one recess and one seal reinforcement element) is realised as a complete separation does not necessarily mean that the skilled reader, when considering an embodiment with a recess at more than one location, immediately extrapolates that all these recesses must be embodied as completely separated. The Board is also of the view that the requirement mentioned in column 3, lines 5-12, of D7 that the recesses are provided with rounded edges does not necessarily result in a recess in the form of a complete interruption, but could also have a "cove-like" form which, as already discussed in point 3.3.2 above, does not lead to circumferentially separated seal reinforcement elements on the inside surface of the skirt portion.
- 3.4.4 On the other hand, all embodiments of document D7 disclose only one single seal reinforcement element in

an **explicit** manner (die "Haltenocke" 9), in other words, no explicit disclosure of a plurality of seal reinforcement elements is apparent. In the absence of an explicit disclosure of a plurality of seal reinforcement elements, it has to be assessed if this feature can be considered as implicitly disclosed, in other words, if it is immediately apparent to the skilled person that **nothing other** than the alleged implicit feature forms part of the subject-matter disclosed.

3.4.5 In the Board's view this is not the case here. Indeed, a single seal reinforcement element with multiple recesses in the form of indentations is encompassed in the disclosure of D7. Furthermore, as correctly indicated by the appellant on page 4 of its statement of grounds of appeal, this alternative is technically feasible since it provides a protuberance configured for venting/discharging in a high pressure situation an amount of gas for regulating the maximum pressure inside the bottle as required for an overpressure valve as disclosed in D7. Therefore, it cannot be concluded that in the case of multiple recesses (or recesses at more than one location) D7 inevitably shows a plurality of seal reinforcement elements as required by the claim.

3.5 The Board thus concludes that the subject-matter of claim 1 according to auxiliary request 1 differs from the known closure of D7 through

a plurality of circumferentially spaced, seal reinforcement elements on the inside surface of said skirt portion, adjacent said top wall portion, said reinforcement elements being engageable by said outer seal element to limit outward deflection of said outer

seal element, to enhance sealing cooperation of said outer seal element with the associated container.

- 3.6 The subject-matter of claim 1 according to auxiliary request 6 **additionally** differs from the known closure of D7 in that

said closure includes twelve of said seal reinforcement elements evenly spaced about the circumference of said closure.

4. *Inventive step - claim 1 according to auxiliary requests 1 and 6 in view of **D7 (DE 198 20 266 A1)** as closest prior art in combination with the teaching of **D16 (US 4,997,097)**, Article 56 EPC*

- 4.1 Document D7 as closest prior art

- 4.1.1 The appellant contests, in point 4.1 of the statement of grounds of appeal, that D7 is considered as closest prior art for the assessment of inventive step, since this document is not directed to a similar purpose or effect as the patent in suit. While the patent seeks to improve the sealing performance of the closure, the objective of D7 is to provide a closure wherein exceeding a prescribed maximum pressure in a bottle is prevented in a reliable manner.

- 4.1.2 The Board disagrees. As correctly put forward by the respondent in point 4.1.1 of its reply to the statement of grounds of appeal, the closure of D7 provides sealing (see column 2, lines 19-23) that can act as an outlet valve under certain circumstances. The Board is convinced that the fact that the closure is provided with this venting ability does not necessarily have a negative effect on the sealing performance, which is

actually improved by avoiding overall damage of the closure in overpressure conditions. In other words, it can be concluded that D7 is also directed to the same objective technical problem posed in the patent in suit and is considered to be a valid starting point for the assessment of inventive step under the problem-solution approach.

4.2 Distinguishing features

As already concluded in points 3.5 and 3.6 above, the Board does not see in D7 a direct and unambiguous disclosure of a plurality of circumferentially spaced, seal reinforcement elements on the inside surface of the skirt portion, adjacent said top wall portion, said reinforcement elements being engageable by said outer seal element to limit outward deflection of said outer seal element, to enhance sealing cooperation of said outer seal element with the associated container as required by claim 1 of auxiliary request 1, let alone **twelve of these seal reinforcement elements evenly spaced about the circumference** of said closure as additionally required by **auxiliary request 6**.

4.3 Objective problem to be solved

- 4.3.1 The appellant objects in point 4.7 of its statement of grounds of appeal to an alleged change of the objective technical problem. According to the appellant, the objective technical problem of the current invention of enhancing sealing performance while at the same time making efficient use of the polymeric material from which such closures are formed (weight reduction) (see paragraph [0003] of the patent in suit), is clear and may not be changed in the way proposed by the

opposition division, *i.e.* by defining a new objective technical problem after reading D7 and D16.

- 4.3.2 The Board substantially concurs with the opposition division that the distinguishing feature of a plurality of circumferentially spaced, seal reinforcement elements provides one of the possible ways of providing multiple areas around the circumference of the closure toward which the seal element can elastically deform in overpressure conditions (as required by D7, see column 2, lines 38-42) while guaranteeing a balanced sealing in normal conditions. The Board is further of the view that this distinguishing feature additionally solves the problem posed in paragraph [0003] of the patent, that the seal performance is enhanced while reducing the overall weight of the closure, since the only way of providing such distinguishing multiple seal reinforcement elements in D7 is by removing material from the "Haltenocke". The Board is thus not persuaded by the arguments of the appellant and is of the view that the objective technical problem is unchanged and even involves the additional effect of avoiding damage in overpressure conditions. The problem to be solved can be thus seen as **providing a closure which presents an improved sealing performance and reduced weight while additionally avoiding damage in overpressure conditions.**

4.4 Obviousness of the solution

- 4.4.1 The appellant is of the view that according to the "could-would" approach applied by the EPO, the point is not whether the skilled person could have arrived at the invention by modifying the prior art, but rather whether, in expectation of the advantages (weight reduction in combination with enhanced sealing

performance) actually achieved by the invention as specified in the main claim, the person skilled in the art would have done so because of prompting in the prior art. As discussed above, the Board sees that the expected advantages achieved by the invention include the avoidance of damage in overpressure conditions in combination with an enhanced sealing performance and weight reduction.

- 4.4.2 As correctly assessed by the opposition division in point 15.3 of the decision under appeal, the skilled person, starting from D7 and in view of the problem posed of providing a closure which presents an improved sealing performance while reducing weight of the closure and avoiding damage in overpressure conditions, would be aware of the teaching of **D16** which deals with the same problem (see column 1, lines 30-43) and shows an advantageous solution to the same problem solved through a configuration of **twelve seal reinforcement elements evenly spaced about the circumference**, (see column 2, lines 7-33) and which inherently results in an overall weight reduction of the closure. These twelve circumferentially spaced, seal reinforcement elements are arranged on the inside surface of a skirt portion, adjacent a top wall portion, and are functionally engageable with an outer seal element to limit outward deflection of said outer seal element, to enhance sealing cooperation of said outer seal element with the associated container, as further required by the subject-matter of claim 1 according to auxiliary requests 1 and 6.
- 4.4.3 The appellant argues that the skilled person, starting from a linerless closure such as disclosed in D7, would not look for ways of implementing the seal reinforcement elements in closures where the sealing

element is a separate element, such as D16. Therefore the skilled person would not combine the teachings of D7 and D16 without exercising an inventive skill.

- 4.4.4 The Board disagrees. In line with the opposition division, the Board is of the view that although in D16 the elastic seal is a separate liner, the technical effect sought by the configuration of the seal reinforcement elements is independent of the sealing element being a separate liner or an integral part of the closure, so that the skilled person would not be prevented from seeking solutions to carry out the seal reinforcement only in linerless closures.
- 4.4.5 The appellant further argued that starting from D7 and in view of the objective technical problem, the skilled person would have no motivation to look for a solution in the prior art in general, since the embodiment according to figure 2 of D7 already solves the problem of avoiding damage in overpressure conditions.
- 4.4.6 The Board again disagrees and is of the view that the skilled person, starting from D7 not only could but also would look for a way to implement the multiple recesses as required by the preferred embodiment of claim 3 and thereby he would consider the teaching of D16, especially when facing the problem of reducing the overall weight of the closure while improving the sealing performance and preventing damage in overpressure conditions.
- 4.4.7 The appellant argued for the first time during the oral proceedings before the Board that even if the skilled person considered the combination of the closure of D7 with the teaching of D16, they would have no incentive to apply the first solution taught by D16 that could

eventually lead to the subject-matter of claim 1, but rather apply the teaching according to **a second solution** and by doing so, the skilled person would not arrive at the subject-matter of the claim.

- 4.4.8 The respondent contested the admittance of this new line of argument into the appeal proceedings, arguing that it was an amendment to the case of the appellant and that no exceptional circumstances were present, as required under Article 13(2) RPBA 2020, in order for amendments made at this stage to be considered.
- 4.4.9 The appellant argued that this line of argument does not constitute an amendment of its appeal case since it is a further development of the defence of non-obviousness of the claims, and that even if the line of argument were to be regarded as an amendment to its case, it was submitted in reaction to the preliminary opinion of the Board issued in accordance with Article 15(1) RPBA 2020.
- 4.4.10 The Board finds that the new line of argument does indeed constitute an amendment to the appellant's case. Although the line of argument is made under the same legal provision of inventive step, it is a line of argument that was neither dealt with in the contested decision nor raised in the statement of grounds of appeal. The Board further finds that the preliminary opinion of the Board as regards inventive step followed substantially the reasoned findings of the opposition division given in the decision under appeal, and as such cannot trigger an amendment to the case of the appellant, let alone amount to exceptional circumstances as required under Article 13(2) RPBA 2020.

Thus, the Board does not take the newly raised line of argument into account.

- 4.5 For the reasons given above, the Board concludes that the skilled person would arrive at **the subject-matter of claim 1 of auxiliary request 6** starting from D7 as closest prior art in view of the teaching of D16 without exercising any inventive skill.

The above conclusion applies *mutatis mutandis* to the the subject-matter of claim 1 of auxiliary request 1.

5. In view of the above conclusions, the admittance into the proceedings of the objection against auxiliary request 6 under Article 84 EPC or Article 123(2) EPC raised by the respondent during the oral proceedings before the Board lacks relevance for the present decision.
6. It follows that the appellant has not provided convincing and/or admissible arguments that would demonstrate the incorrectness of the decision under appeal and that auxiliary request 6, and therefore also auxiliary request 1, do not meet the requirements of Article 56 EPC. In the absence of any admissible or in its substance allowable request, the appeal must 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