

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 31 March 2021**

Case Number: T 2131/19 - 3.2.07

Application Number: 11876615.3

Publication Number: 2763905

IPC: B65D79/00

Language of the proceedings: EN

Title of invention:
EASY PULL BOTTLE CAP

Patent Proprietor:
Frishman, Abe

Opponent:
YANTAI YILADE PACKAGING TECHNOLOGY CO., LTD.

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 83, 84, 113, 116, 123(2)
EPC R. 103(4) (c)
RPBA 2020 Art. 12(2), 12(8), 15(1)

Keyword:

Decision in written proceedings without oral proceedings -
(yes)

Sufficiency of disclosure - (yes)

Oral proceedings - withdrawal of request for oral proceedings

Reimbursement of appeal fee - (no)

Decisions cited:

T 0019/90, T 0182/89

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 2131/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 31 March 2021

Appellant: Frishman, Abe
(Patent Proprietor) 2924 Cambridgeshire Drive
Carrollton, TX 75007 (US)

Representative: Mackert, Andreas
Rheinpatent
Kodron & Mackert GbR
Hindenburgplatz 3b
55118 Mainz (DE)

Respondent: YANTAI YILADE PACKAGING TECHNOLOGY CO., LTD.
(Opponent) No. 186, Zhongkai Road, Dayao Industrial Park,
Muping District
Yantai Shadong
264117 (CN)

Representative: Ponti & Partners, S.L.P.
C. de Consell de Cent 322
08007 Barcelona (ES)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 May 2019
revoking European patent No. 2763905 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Cano Palmero
B. Paul

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 the European patent No. 2 763 905.
- II. The opposition was filed on the grounds according to Article 100(a) to (c) EPC (lack of novelty and inventive step, insufficiency of disclosure and added subject-matter).
- III. The opposition division held
 - (a) that the ground for opposition pursuant to Article 100 (c) EPC prejudiced the maintenance of the patent as granted;
 - (b) that auxiliary request 1, filed during the oral proceedings before the opposition division, was not admitted in the opposition proceedings for being late filed and *prima facie* not allowable; and
 - (c) that auxiliary request 2, filed during the oral proceedings before the opposition division, did not meet the requirements of Article 83 EPC.
- IV. With its appeal, the appellant initially defended the patent to be maintained as granted or in amended form on the basis of one of two auxiliary requests.
- V. In preparation for oral proceedings, scheduled upon the appellant's request, 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 its preliminary opinion that the decision could be set aside and the patent could be maintained on the basis to the set of claims according to auxiliary request 2.

VI. With letter dated 17 March 2021, the appellant filed a complete set of claims, description and drawings in accordance with auxiliary request 2. The appellant withdrew its former request for oral proceedings and the previous main request and auxiliary request 1, thereby maintaining auxiliary request 2 as the sole request.

VII. Consequently, the appellant finally requested

that the decision be set aside and
that the patent be maintained on the basis of the
set of claims of auxiliary request 2 filed with
letter of 17 March 2021.

VIII. The respondent (opponent) neither made any substantive submission nor submitted any request in reply to the statement of grounds of appeal nor submitted any request at any time in the present appeal proceedings.

IX. The lines of arguments of the appellant, which are focused on the patentability requirements of the auxiliary request 2, including sufficiency of disclosure, are dealt with in detail in the reasons for the decision.

X. Independent **claim 1** reads:

"A crown cap (1) for a bottle opening, the crown cap comprising:
a crown cap body comprising:

a top portion having a center (15);
a skirt (7) surrounding the top portion, the skirt having angles (7c), wherein the angles terminate at a lower edge defined in a first horizontal plane;
an opener assembly (2, 3, 4, 5) mounted to the top portion;
a first scoring line (6d) extending from the center of the top portion to the lower edge of the skirt in a continuous radial direction; and
a second scoring line (6e, 6f) comprising:
 an upper radial segment (6e) extending in a substantially linear direction from the center of the top portion to the skirt along a radial axis;
 and,
 a lower annular segment (6f) extending circumferentially along the skirt in an annular direction and extending from a terminus of the upper radial segment, the lower annular segment defined in a second horizontal plane equidistant to the first horizontal plane associated with the lower edge of the skirt;
characterized in that the first and second scoring lines comprise moieties (6M, 6N) on either side of the scoring lines (6d, 6e, 6f), the moieties having curved edges in cross-section profile,
a seal formed by the scoring lines and the torn open score line (6) is resulting in one open crown (1) that forms two edges which are curved or rounded."

Reasons for the Decision

1. *Procedural aspects*

1.1 The case is ready for decision which is taken in written proceedings without holding oral proceedings, in accordance with Article 12(8) RPBA 2020 and with Articles 113 and 116 EPC.

1.2 The principle of the right to be heard pursuant to Article 113(1) EPC is observed since the appellant's submissions are fully taken into account. The respondent has made no written submissions or requests in the appeal proceedings.

1.3 With letter dated 17 March 2021, the appellant withdrew its original request for oral proceedings, to which the parties had been duly summoned. Since this withdrawal was not declared within the period provided for in Rule 103(4)(c) EPC, the appellant cannot benefit from a reimbursement of the appeal fee at 25%.

1.4 The appeal is thus ready for decision on the basis of the contested decision to be reviewed and the extensive written submissions of the appellant (Article 15(3) RPBA 2020), while preserving their rights under Articles 113 and 116 EPC, so that the oral proceedings are herewith cancelled.

2. *Auxiliary request 2 - Sufficiency of disclosure, Article 83 EPC*

Claim 1 of auxiliary request 2 filed on 17 March 2021 corresponds to claim 1 of auxiliary request 2 filed during the oral proceedings before the opposition

division. Claims 2 to 10 of the auxiliary request 2 filed on 17 March 2021 of the auxiliary request 2 correspond to claims 3 to 11 as granted.

- 2.1 The opposition division found that the invention according to claim 1 of auxiliary request 2 did not meet the requirements of Article 83 EPC. In point 14.2.3.1 of the reasons of the decision under appeal, the opposition division held that the proprietor had failed to provide proof that the knowledge needed to perform the invention is common and general knowledge. According to the opposition division, the scoring line presents some residual thickness, which will be broken upon the opening the crown cap. The opposition division further found in point 14.2.3.3 of the reasons that the skilled person might indeed devise a tool for forming a score line with rounded edges, however, in order to meet the specific requirements for the crown cap, the skilled person would have to employ non-obvious measures in order to carry out the invention.
- 2.2 In reviewing this finding pursuant to Article 12(2) RPBA 2020, the Board comes to the conclusion that the invention according to the subject-matter of claim 1 is sufficiently disclosed.
- 2.2.1 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. Contrary to the assumptions of the opposition division, **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 the Case Law of the Boards of Appeal, 9th edition, 2019,

II.C.9, first two paragraphs, in particular with reference to T 19/90 and T 182/89).

- 2.2.2 The Board notes that in this particular case, the opposition division acknowledges in point 14.2.3.3 that the skilled person would be capable of forming a score line with rounded edges, as shown in figure 24. As correctly argued by the appellant in point 5 of the statement of grounds of appeal, the claim merely states that the first and second scoring lines comprise moieties on either side of the scoring lines having curved edges in cross-section profile, that the scoring lines form a seal and that the torn open score line is resulting in one open crown that forms two edges which are curved (see also paragraph [0047] of the patent specification). The Board concurs with the appellant, that the skilled person is, **without undue burden**, capable of producing and embossing in a metal sheet with a cross section falling within the invention as depicted by the subject-matter of claim 1, irrespective of whether that crown cap in its further use meets the alleged requirements or expectations pointed out by the opposition division.
- 2.3 The points 2.1 and 2.2 above correspond to point 7.2 of the preliminary opinion issued with the communication according to Article 15(1) RPBA 2020. This preliminary finding of the Board has not been commented on nor has it been contested by the parties during the appeal proceedings.
- 2.4 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issues - sees no reason to deviate from its above-mentioned finding.

2.5 It follows that the appellant has demonstrated in a convincing manner that the essential considerations underpinning the decision under appeal with respect to sufficiency of disclosure of auxiliary request 2 do not withstand a review in appeal. Thus, the decision under appeal is to be set aside.

3. *Auxiliary request 2 - other patentability requirements*

3.1 The Board, taking into consideration all relevant aspects concerning clarity and added subject-matter, concurs with the findings of the opposition division of point 14.1.2 of the reasons that auxiliary request 2 meets the requirements of Articles 84 and 123(2) EPC.

3.2 The Board also does not see any reason to deviate from the opposition division's *obiter dictum* in point 15 of the reasons that the subject-matter of claim 1 of the patent as granted is new and inventive. Since the subject-matter of claim 1 of auxiliary request 2 is narrower than the subject-matter of claim 1 of the patent as granted, the Board is of the view that the requirements of novelty and inventive step are also met by auxiliary request 2 at least for the same reasons that apply for the main request.

4. *Conclusion*

It follows that auxiliary request 2 meets the requirements of the EPC. The case is thus to be remitted to the opposition division with the order to maintain the patent according to auxiliary request 2.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Description:

Pages 1 to 7 filed with letter of 17 March 2021
(auxiliary request 2);

Claims:

No. 1 to 10 filed with letter of 17 March 2021
(auxiliary request 2);

Drawings:

Figures 1 to 24 filed with letter of 17 March 2021
(auxiliary request 2).

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated