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**Datasheet for the decision
of 4 May 2023**

Case Number: T 2013/21 - 3.2.07

Application Number: 16709543.9

Publication Number: 3268289

IPC: B65D6/34, B65D43/02

Language of the proceedings: EN

Title of invention:
RINGLESS METAL CANS AND METHOD

Patent Proprietor:
Crown Packaging Technology, Inc.

Opponent:
Trivium Packaging Group Netherlands B.V.

Relevant legal provisions:
EPC Art. 100(a), 54
RPBA 2020 Art. 12(3), 12(5), 13(2), 15(1)

Keyword:
Novelty - (no)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no)
Amendment after summons - exceptional circumstances (no) -
cogent reasons (no) - taken into account (no)

Decisions cited:

T 0743/20, T 1041/21



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Case Number: T 2013/21 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 4 May 2023

Appellant: Crown Packaging Technology, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 September 2021 concerning maintenance of the
European Patent No. 3268289 in amended form.**

Composition of the Board:

Chairwoman A. Beckman
Members: A. Cano Palmero
R. Cramer

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 to maintain European patent No. 3 268 289 in amended form on the basis of the then auxiliary request 4.
- II. The opposition was directed against the patent in its entirety and based on the grounds for opposition pursuant to Articles 100(a) and (c) EPC (novelty, inventive step and added subject-matter).
- III. In preparation for oral proceedings, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020, to which both parties responded on the merits: the opponent (respondent) with letter dated 5 April 2023 and the appellant with letter dated 25 April 2023.
- IV. Oral proceedings before the Board took place on 4 May 2023.

At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

- V. The final requests of the parties were as follows,
for the appellant

that the decision be set aside and
the patent be maintained as granted (main request),
or alternatively be maintained in amended form on

the basis of the claims of one of auxiliary requests 1 to 3 filed with letter of 23 April 2021 before the opposition division,

for the respondent

that the appeal be dismissed.

VI. The lines of argument of the parties relevant for the present decision, which address the issues of novelty of the subject-matter of claim 1 as granted and the admittance of the amendments to the appellant's appeal case as well as of the auxiliary requests, are dealt with in detail in the reasons for the decision.

VII. Claim 1 of the patent as granted reads as follows:

"A can comprising:

a cylindrical can body (10) comprising only a single homogeneous piece of material and having a curled edge (11) defining a top opening into the body, the body further comprising an inwardly directed bead (23) pressed into and extending around the body adjacent to said edge, and a lid (4);

characterised in that the bead defines a radially inwardly facing sealing surface which is flat in cross-section and has a circular cross-section when viewed axially, and the lid defines an outwardly directed sealing surface (24) abutting the inwardly facing sealing surface presented by the bead in order to seal the lid to the can body."

Reasons for the Decision

1. *Patent as granted, novelty of claim 1 in view of document D1 (US 5,289,938 A) - Articles 100(a) and 54 EPC*
- 1.1 The appellant contested the reasoned finding of the opposition division in point 15.1.3.3 of the reasons for the decision under appeal that D1 anticipates a can in accordance with the subject-matter of claim 1 as granted.
- 1.2 The appellant argued in the first place that D1 discloses a **folded** rim structure 4 which results in localised work hardened areas with a propensity for stress fractures, whereas claim 1 according to the patent as granted requires that the bead is **pressed**, which results in a can structure with minimised work hardening. In its argumentation the appellant submitted that the skilled person would understand the rim structure in D1 to be formed by the sequence steps as detailed in the drawing on page 3 of the statement of grounds of appeal.
- 1.2.1 The Board is not persuaded by the arguments of the appellant. While it can be agreed with the appellant (see statement of grounds of appeal, page 4, second paragraph) that the feature "pressed into" requires that the can is formed of a material capable of being pressed, the Board is not convinced that it could be recognised at all from the can as such that a bead or a rim structure has been manufactured by a folding or a pressing process, especially not whether a metallic rim structure has been manufactured by the process as described in D1 or by the bead forming station 13 of figure 4 of the patent in suit.

1.2.2 In addition, the Board concurs with the view of the respondent in points 39 to 42 of the reply to the statement of grounds of appeal that there are serious doubts whether the hypothetical forming process of D1 presented by the appellant is technically feasible at all. Indeed, it would seem that a bending process between steps 3 and 4 (see drawing on page 3 of the statement of grounds of appeal) cannot be carried out, since there is no space for a holding tool. As a consequence, it cannot be agreed with the appellant that the skilled person inevitably understands the process of D1 as proposed on page 3 of the statement of grounds of appeal.

1.2.3 With letter dated 25 April 2023, the appellant submitted the following as evidence in form of YouTube videos for the first time in the proceedings:

- How Ardagh Group beverage cans are made - YouTube (<https://www.youtube.com/watch?v=8L8ecWxhfrs>, see 1:46 - 1:53);
- Part 10: Flanging - YouTube (<https://www.youtube.com/watch?v=aLx-I6Umkc8>, see whole clip);
- How it's made - aluminum cans (Flanging) - YouTube (<https://www.youtube.com/watch?v=ZNRveGek-ys>, see whole clip);
- Full automatic tin can flanging machine manufacturer, metal tin tube flanger equipment factory - YouTube (<https://www.youtube.com/watch?v=xDUJmkgHeOM>, see whole clip).

1.2.4 The filing of these videos amounts to an amendment to the appellant's appeal case. According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings

shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 1.2.5 The appellant argued that these videos were filed as a reaction to the Board's preliminary opinion reflected in point 5.2.3 of the communication under Article 15(1) RPBA 2020.
- 1.2.6 The Board is however not convinced that its preliminary opinion, which followed the respondent's view, can amount to cogent reasons that can justify exceptional circumstances to admit this amendment. On the contrary, the Board is convinced that the appellant could and should have filed this evidence at least when substantiating its appeal case, specifically when arguing that the rim structure in D1 had to be formed by the sequence steps as detailed in the drawing on page 3 of the statement of grounds of appeal. In this light, the videos submitted by the appellant with its letter dated 25 April 2023 are not taken into account under Article 13(2) RPBA 2020.
- 1.2.7 In addition, the Board notes that even if these videos could be taken into account, they would still not clearly and unambiguously demonstrate that the manufacturing processes to produce the can of D1 would leave a footprint on the final product, which could result in that the can according to subject-matter of claim 1 as granted is not anticipated by the known can of D1.
- 1.2.8 In sum, the Board concludes that the appellant has not convincingly demonstrated that the distinct manufacturing processes of pressing and folding to obtain a rim structure result in recognisable technical

features with respect to the bead in the final product, and rather concurs with the respondent in point 26 of the reply to the statement of grounds of appeal, that taking into account that D1 discloses a metallic can, the feature "pressed into" does not further distinguish the subject-matter of product claim 1 as granted from the known can of D1.

- 1.3 The appellant further argued (see page 4, last paragraph, of the statement of grounds of appeal) that in any case the folding in D1 would result in a radially **outwardly** formed rim structure, whereas claim 1 as granted refers to an **inwardly** directed bead.
- 1.3.1 The Board disagrees. As correctly indicated by the respondent in point 27 of the reply to the statement of grounds of appeal, D1 discloses in column 1, lines 41 to 48, and also in figure 4 that the surface 15 as part of the rim structure is clearly an inwardly facing sealing surface with respect to the the body, as required by the subject-matter of claim 1 as granted.
- 1.4 With its letter dated 25 April 2023 (see page 8, third and fourth paragraphs), the appellant further argued that, while the rim structure of D1 was formed on the **top end** of a cylindrical body, the bead according to claim 1 as granted was required to be pressed **into the cylindrical body**. Consequently, nothing was pressed into a cylindrical body according to the disclosure of D1.
- 1.4.1 The appellant further argued that this argument was not an amendment to its appeal case since it had already been put forward in its statement setting out the grounds of appeal, on page 5, first paragraph.

- 1.4.2 The Board disagrees. Apart from the fact that the first paragraph on page 5 of the statement setting out the grounds of appeal dealt with the question whether the bead of D1 extended inwardly or outwardly of the can body, the appellant also stated in this context that it was *"plain to see that the inner wall 15 of the mentioned triangle in D1 forms part of the substantially continuous cylindrical sidewall 2 of the can body"*, which even contradicts the argument on page 8, third paragraph, of the letter dated 25 April 2023, that the rim structure of D1 was not formed into the cylindrical can body. The Board thus sees this last argument as an amendment to the appellant's appeal case, the admittance of which being subject to Article 13(2) RPBA 2020.
- 1.4.3 In the absence of cogent reasons that can justify to admit this amendment, the argument relating to the bead being pressured into the cylindrical can body is not taken into account under Article 13(2) RPBA 2020.
- 1.4.4 In addition, the Board notes that even if this argument could be taken into account, it would still not amount to a convincing one, since the Board is persuaded that the skilled person would directly and unambiguously understand that the bead structure of figure 4 of D1 is formed into the cylindrical can body.
- 1.5 Finally, the appellant disputed that the skilled person would ever accept that the term "bead" includes the triangular structure identified in D1 with the references 13 to 18 of figure 4. According to the appellant this would be an artificial interpretation of the prior art into the terminology of the granted claim.

1.5.1 The Board again disagrees and concurs with the findings of the opposition division in point 15.1.3.2 of the reasons for the decision under appeal that the structure in question of a triangular cross-section can be seen as a "bead" in the sense of claim 1 as granted. In particular, the Board believes that the structure with a triangular cross-section fits within the definition given by the appellant that "a bead is a protrusion or indentation of material pressed formed into the sheet material of a can or can end".

2. *Auxiliary requests 1 to 3, admittance - Articles 12(3), 12(5) and 13(2) RPBA 2020*

2.1 With the statement setting out the grounds of appeal, the appellant merely substantiated the allowability of auxiliary requests 1 to 3 by referring to a submission in opposition proceedings and to the reasons given for claims 1 and 17 according to the patent as granted (see point 3 of the statement of grounds of appeal).

2.2 The appellant argued with its letter dated 25 April 2023 that it had substantiated its appeal case in respect of these auxiliary requests. Firstly, the requests were on file in writing and as such substantiated. Secondly, it was explicitly stated with the statement setting out the grounds of appeal that the arguments presented for the main request were applicable to auxiliary requests 1 to 3. Thirdly, the arguments presented in opposition proceedings were the subject of explicit references and remained applicable. The arguments presented during opposition proceedings were then reproduced in points 2.1 to 2.3 of the appellant's letter dated 25 April 2023.

2.3 As for the appellant's first argument, the board agrees with the appellant that auxiliary requests 1 to 3 were admissibly filed during opposition proceedings and as such form part of the appellant's appeal case in the sense of Article 12(2) RPBA 2020. Moreover they do not have to be re-submitted in the appeal proceedings (Article 12(3)(a) RPBA 2020). As clearly stated in this provision it only applies to the requests (and documents) themselves. The mere filing or reference to a request forming part of the opposition proceedings does however not mean that such request has been duly substantiated.

2.4 The argument made in the statement setting out the grounds of appeal that auxiliary requests 1 to 3 were allowable for the same reasons as those given for the main request (*i.e.* that their subject-matter was novel over D1) is also not sufficient to provide a complete substantiation of these requests. According to Article 12(3) RPBA 2020, the statement setting out the grounds of appeal shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed. In this sense, the appellant did not provide with its statement setting out the grounds of appeal any arguments that could show the incorrectness of the particular reasoned findings of the decision under appeal directed specifically to the additional features of the claims of the auxiliary requests, namely:

- points 18.6 to 18.8 of the reasons of the decision under appeal (lack of novelty of claim 1 of auxiliary request 1);
- points 20.3 and 20.4 of the reasons of the decision under appeal (lack of novelty of claim 1 of auxiliary request 2);

- points 23 and 24 of the reasons of the decision under appeal (lack of inventive step of auxiliary request 3).

The requirements of Article 12(3) RPBA 2020 have thus not been met with respect to auxiliary requests 1 to 3.

2.5 The mere reference to the arguments presented in the opposition proceedings does also not amount to a substantiation of these requests. It is neither the duty of the Board nor the duty of the other party to investigate which parts of the submissions made during the proceedings leading to the decision under appeal should be taken into account so as to form part of the appeal. In this regard, the Board draws the appellant's attention to the discretion conferred by Article 12(5) RPBA 2020, to the explanatory notes on this provision (see Supplementary publication 2 - OJ EPO 2020, 57) and to the case law (see e.g. T 0743/20 and T 1041/21). In this light, the Board, exercising its discretion under Article 12(5) RPBA 2020, does not admit auxiliary requests 1 to 3 as submitted with the statement setting out the grounds of appeal into the proceedings.

2.6 Finally, the substantiation of auxiliary requests 1 to 3 provided in point 2 of the letter dated 25 April 2023 constitutes an amendment to the appellant's case which has been filed after notification of the summons to oral proceedings. Since the appellant could and should have filed a complete substantiation of auxiliary requests 1 to 3 with its statement setting out the grounds of appeal, there are no cogent reasons that would justify the admittance of this amendment because of exceptional circumstances. Therefore, the Board does not take this amendment of the appellant's appeal case into the appeal proceedings into account under the provisions of Article 13(2) RPBA 2020.

3. *Conclusions*

In sum, the Board concludes that the appellant has not provided admissible and convincing arguments that could demonstrate the incorrectness of the decision under appeal, that the ground for opposition under Article 100(a) EPC (novelty) prejudices the maintenance of the patent as granted. In the absence of any admissible or in its substance allowable request, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



S. Lichtenvort

A. Beckman

Decision electronically authenticated