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**Datasheet for the decision
of 19 July 2023**

Case Number: T 1488/22 - 3.2.07

Application Number: 14195688.8

Publication Number: 3028952

IPC: B65D17/00

Language of the proceedings: EN

Title of invention:

Closure for a container and a container provided therewith

Patent Proprietor:

Ardagh MP Group Netherlands B.V.

Opponent:

Crown Packaging Manufacturing UK Ltd.

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54(2), 83, 84, 123(2)
RPBA 2020 Art. 12(6), 15(1)

Keyword:

Novelty - public prior use (yes) - main request (no) -
auxiliary request VI (no)
Late-filed auxiliary requests - should have been submitted in
opposition proceedings (yes) - circumstances of appeal case
justify admittance (no) - admitted (no)
Late-filed auxiliary request V - admitted in opposition
proceedings (no) - error in exercise of discretion (no) -
admitted (no)
Claims - clarity - auxiliary request VII (no)
Late-filed objections - should have been submitted in first-
instance proceedings (yes) - admitted (no)
Objections submitted for a higher-ranked request -
circumstances of appeal case justify admittance (yes) -
admitted (yes)
Sufficiency of disclosure - patent as maintained by the
opposition division - (yes)
Amendments - patent as maintained by the opposition division-
intermediate generalisation (no) - extension beyond the
content of the application as filed (no)

Decisions cited:

Catchword:



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Case Number: T 1488/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 19 July 2023

Appellant: Ardagh MP Group Netherlands B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 April 2022 concerning maintenance of the
European Patent No. 3028952 in amended form.**

Composition of the Board:

Chairman G. Patton
Members: A. Cano Palmero
O. Loizou

Summary of Facts and Submissions

I. The patent proprietor and the opponent lodged appeals within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 3 028 952 in amended form on the basis of the then auxiliary request 4.

As both parties have the status of appellant and respondent they will continue to be referred to in the following as the "patent proprietor" and the "opponent", for ease of reading.

II. The opposition was filed against the patent in its entirety and was based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC (insufficiency of disclosure) and Article 100(c) EPC (unallowable amendments).

III. In preparation for oral proceedings, scheduled at 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, to which the parties responded in the substance with letters dated 19 June 2023 (patent proprietor) and 7 July 2023 (opponent).

IV. Oral proceedings before the board took place on 19 July 2023.

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

V. The patent proprietor requested

that the decision under appeal be set aside and that the patent be maintained as granted (main request);

or in the alternative,
that the patent be maintained in amended form according to the set of claims of one of the auxiliary requests filed with the patent proprietor's statement setting out the grounds of appeal, namely main request', main request'', main request''', auxiliary requests I to V, auxiliary requests I' to V', auxiliary requests I'' to IV'' and auxiliary requests I''' to IV''', whereby auxiliary request V corresponds to auxiliary request 1 filed during oral proceedings before the opposition division and discussed in the decision under appeal,

or in the alternative,
that the patent be maintained in amended form according to the set of claims of one of auxiliary requests VI and VII filed with the reply to the opponent's statement setting out the grounds of appeal, which correspond to auxiliary requests 2 and 3 filed during oral proceedings before the opposition division and discussed in the decision under appeal,

or in the alternative,
that the opponent's appeal be dismissed, *i.e.* that the patent be maintained in the amended form found by the opposition division to meet the requirements of the EPC according to the then auxiliary request 4 filed during oral proceedings before the opposition division.

VI. The opponent requested

that the decision under appeal be set aside
and that the patent be revoked.

VII. The following documents have been filed during the
opposition proceedings and are relied upon by the
parties in the present appeal proceedings:

- E1:** WO 2016/001562 A1;
- E2:** Application for the opposed patent as originally
filed, in particular figure 1;
- E3:** Inter-office Memorandum of 3 September 2013;
- E3.0:** Email of 09 September 2013 sending report
TW-1661;
- E3.1:** Expense Claim form of 2 September 2013;
- E3.2:** Copy of receipt no.3 front and back;
- E3.3:** Screenshot of Crown project software interface;
- E4:** Inter-office Memorandum of 28 October 2020.

VIII. The following documents have been filed by the opponent
for the first time with its statement setting out the
grounds of appeal:

- E5d1':** Invoice for 73SC Fixed Easylift of 9 January
2013 (reduced redaction);
- E5d2':** Invoice for 73SC Fixed Easylift of 9 December
2011 (reduced redaction);
- E5d1.1:** Delivery consignment relating to previously-
filed E5d1;
- E5d2.1:** Delivery consignment relating to previously-
filed E5d2;
- E5d3.1:** Engineering Standards for Manufacture of 73mm
can end of E5d1 and E5d2;
- E5d3.2:** Archive record for Engineering Standards for
Manufacture of E5d3.1;

- E5d4:** Witness Statement of Jason Hall;
- E15:** WO 2014/009195 A1; and
- E16:** EUIPO printout for RCD001764457-0001.

IX. The lines of argument of the parties relevant for the present decision are dealt with in detail in the reasons for the decision.

X. **Claim 1** of the **main request** (*i.e.* according to the patent as granted) reads as follows:

"Closure (1, 19, 20, 21, 22, 29, 30, 31, 47, 48, 51) for a container, comprising, a tab (3) attached by rivet means (4) to a closure part (2) to be displaced for forming an opening in the closure, which opening (24) is at least partly defined by a score line (8) formed in the closure (1), the tab (3) comprises a tab body connected to the rivet means, a tab rear part for finger gripping, and a tab front part of which a tab nose (36) is located near or at the score line (8), such that during a closure opening procedure, comprising finger gripping the tab rear part, lifting the tab rear part thereby pressing the tab nose (36) against the closure (1) on or near the score line (8), popping the score line (8), and scoring the score line (8), an opening (24) is formed in the closure (1), **characterized in that** the score line comprises score line parts (8.2, 37.2, 38.2, 40.2-45.2, 49.2) separated by a popping score line part (8.1, 37.1, 38.1, 40.1-45.1, 49.1) to be popped by the tab nose (36), wherein the score line parts (8.2, 37.2, 38.2, 40.2-45.2, 49.2) have a residual thickness (r) which is greater than the residual thickness (rp) of the popping score line part (8.1, 37.1, 38.1, 40.1-45.1, 49.1), and by stiffening means (13) stiffening closure parts neighboring the stronger score line parts (8.2, 37.2,

38.2, 40.2-45.2, 49.2), and wherein the popping score line part (8.2, 37.2, 38.2, 40.2-45.2, 49.2) has a length in the range of 2 - 20 mm."

XI. The wording of the claims according to **the main request', main request'', main request''', auxiliary requests I to V, auxiliary requests I' to V', auxiliary requests I'' to IV'' and auxiliary requests I''' to IV'''** is not relevant for the present decision.

XII. **Claim 1 of auxiliary request VI** corresponds to claim 1 as granted, whereby the feature:

"..., wherein the stiffening means (13) comprise two or more elongated stiffening elements (14, 18, 26, 27, 28, 32, 33, 24, 35, 45, 50) at both sides of the rivet means (4)."

has been introduced at the end of the claim.

XIII. **Claim 1 of auxiliary request VII** corresponds to claim 1 of auxiliary request VI, whereby the feature:

"...; and wherein the stiffening means (32, 33, 34) contact or extend beyond the score line (8); or wherein the closure comprises a groove (11) extending radially inwardly along the score line (8), and the stiffening means (13) extend into or beyond the groove (11)."

has been introduced at the end of the claim.

XIV. **Claim 1 of auxiliary request VIII, i.e.** according to the form found allowable by the opposition division, corresponds to claim 1 of auxiliary request VI, whereby the feature:

"...; and wherein the stiffening means (32, 33, 34) contact or extend beyond the score line (8)."

has been introduced at the end of the claim.

- XV. **Claim 2 of auxiliary request VIII, i.e.** according to the form found allowable by the opposition division, corresponds to claim 1 of auxiliary request VI, whereby the feature:

"...; and wherein the closure comprises a groove (11) extending radially inwardly along the score line (8), and the stiffening means (13) extend into or beyond the groove (11)."

has been introduced at the end of the claim.

Reasons for the Decision

Patent proprietor's appeal

1. *Patent as granted (main request) - novelty in view of the public prior use E3, Articles 100(a) and 54(2) EPC*
- 1.1 Public availability of the closure described in E3
- 1.1.1 The patent proprietor contested the finding of the opposition division that the alleged public prior use according to the convolute of documents E3 (E3 together with E3.0, E3.1, E3.2 and E3.3) had not been sufficiently proven and asserted that it had been assessed using the wrong standard of proof. E3 therefore should not be considered as prior art according to Article 54(2) EPC.

1.1.2 In particular, since the alleged public prior use lays within the power and knowledge of the opponent, the standard of proof to be applied should have been the standard "beyond all reasonable doubt". This was the case for the convolute of documents E3 which was not accessible to the public, namely E3, which is an inter-office memorandum with regard to a prior use closure, E3.1 and E3.2, which show the purchase of closures and E3.3, which allegedly links two project numbers shown in one or more of the documents.

1.1.3 The patent proprietor argued that the different project numbers (TW-1661 and Z1879) and the various dates in the documents forming the alleged public prior use of E3, showed that the opponent had not proven the public availability of the closure according to E3.

The patent proprietor acknowledged that twenty-two sweetcorn cans were publicly purchased in Oxfordshire on 31 July 2013, and that the reimbursement of that purchase was claimed by Mr Hall on 3 September 2023 under the project number Z1879 (documents E3.1 and E3.2).

Although the two project numbers TW-1661 and Z1879 appear in document E3.3, this does not show a direct relationship between them, since there is no description of any connection and they are linked to different dates. Also, document E3.3 shows that the tests corresponding to the evaluation TW-1661 were created and completed at the Crown facilities in Neath on 22 July 2013 (*i.e.* before the purchase of the cans in question). In addition, according to E3.2 only one trip to Neath had been claimed on 30 July 2013, also before the purchase date of the cans. Furthermore, as shown in the table on page 2 of E3, a total of 40

samples were tested, whereas only 22 cans were bought and allegedly available. It follows that the evaluation resulting in the inter-office memorandum E3 could not have dealt with the samples purchased on 31 July 2013 and that the evaluation of facts were established by the opposition division in an erroneous way such that the alleged public prior use formed by the convolute of documents E3 could not be prior art in the sense of Article 54(2) EPC.

- 1.1.4 The board is not persuaded by the arguments of the patent proprietor, for the following reasons.
- 1.1.5 It is to be noted that the alleged public prior use does not concern the inter-office memorandum E3, but instead the closures that were allegedly purchased before the priority date at a supermarket as being part of sweet corn cans. The relevant fact to be assessed is whether the cans purchased were the ones on which the inter-office memorandum E3 is based.
- 1.1.6 In this respect, the board is not convinced that the opposition division failed to take into account material considerations, or that it included erroneous considerations or made errors of logic or contradictions in its reasoning, so that the fact-finding process followed by the opposition division did not contain any errors. In addition, the board is also satisfied with the opposition division's establishment of fact made in point 14.7 of the reasons for the decision under appeal that the cans purchased on 31 July 2013 (project number Z2189) were the ones referred to in memorandum E3 (project number TW-1661), for the following reasons.

- 1.1.7 The board concurs with the opponent and with the opposition division that both project numbers (TW-1661 and Z1879) are linked by document E3.3. The fact that the word "completed" appears in this document does not necessarily mean that the project was completed by the date of 22 July 2013, but rather, as indicated by the opponent, that the project had the "completed" status when the snapshot was taken. Contrary to the allegation of the patent proprietor, the board is convinced that the projects TW-1661 and Z1879 were indeed initiated on 22 July 2013 but not necessarily completed on the same date, especially when taking into account that the due date for completing the task as reflected in this document was given as 10 August 2013.
- 1.1.8 The undisputed purchase of the cans on 31 July 2013 is thus not in contradiction with the dates reflected in E3.3 and with the date of the memorandum of E3 (3 September 2013). The absence of evidence relating to a trip to Neath after the purchase date does not convince the board that the purchased cans were not the ones subject to the tests referred to in memorandum E3. Finally, the board concurs with the opponent that the number of 40 cans reflected in the table on the second page of E3 must be an error, especially taking into account that the last two lines on page 1 and the table on page 4, state that 20 cans in total (of the 22 purchased) were tested on the runs AR1 and AR2.
- 1.1.9 In view of the above, the board considers that the patent proprietor's argument on the alleged standard of proof applied is irrelevant, taking also into account the absence in the decision under appeal of any reference to a particular standard of proof.

1.1.10 In sum, the board does not consider that the opposition division erred when establishing the facts and in its finding that the closure of E3 was to be considered part of the prior art in the sense of Article 54(2) EPC and concurs that there is a causal link among the convolute of documents E3, which relate to the publicly available cans of sweet corn purchased on 31 July 2013.

1.2 Disclosure of E3

1.2.1 The patent proprietor argued that E3 does not disclose, directly and unambiguously, the features of claim 1 of the patent as granted. In particular there was no disclosure of score line parts separated by a popping score line part, but rather a score line with Anti-Implosion points (AIPs) that are positioned on a continuous score line of substantially continuous depth. The patent proprietor additionally argued that E3 itself disclosed that "[s]core sections were found to be unreliable for measuring residual" so that the outcome of the measuring is unreliable.

1.2.2 The board disagrees. In view of the figures on page 3 of document E3, the board is of the view that a popping score line part with a length of 11.91 mm (*i.e.* as required by claim 1 as granted) and a measured score residual of 56 μm is clearly and unambiguously disclosed. This popping score line part is surrounded on the left and on the right side by two score line parts (depicted as AIPs) that have a length of 1.1 mm and a measured score residual of 76 μm and 74 μm . The board is convinced that, in view of this data, even considering the addition of 5 μm to compensate for the delacquering, the feature that the score line parts have a residual thickness (r) which is greater than the residual thickness (r_p) of the popping score line part

is anticipated by the closure of E3, as correctly found by the opposition division in point 14.8.2 of the reasons for the decision under appeal with respect to the then auxiliary request 2, which applies a *fortiori* to the subject-matter of claim 1 as granted.

Furthermore, contrary to the patent proprietor's allegation, the picture of the tested can on page 1 of E3 also clearly and unambiguously discloses stiffening means on the closure, *i.e.* the part around the tab in the form of a "moustache" or "eyebrow", neighboring the stronger score line parts (the AIP portions, see figures on page 3 of E3). The word "neighbouring", used for this feature in claim 1, is seen as encompassing a broad meaning.

1.2.3 The patent proprietor has not argued that E3 does not anticipate the other features of the subject-matter of claim 1 as granted. The board thus concludes that the subject-matter of claim 1 as granted is anticipated by the public prior use E3.

2. *Auxiliary requests filed with the patent proprietor's statement setting out the grounds of appeal - admittance, Article 12(6) RPBA 2020*

2.1 The patent proprietor filed with its statement setting out the grounds of appeal main request', main request'', main request''', auxiliary requests I to V, auxiliary requests I' to V', auxiliary requests I'' to IV'' and auxiliary requests I''' to IV'''.

2.2 The board notes that, with the exception of auxiliary request V, which corresponds to auxiliary request 1 filed during opposition proceedings, all these requests were either filed for the first time in appeal

proceedings or were no longer maintained in opposition proceedings.

- 2.2.1 According to Article 12(6), second sentence, RPBA 2020, the board shall not admit requests which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.
- 2.2.2 The patent proprietor indicated that some of these requests were filed as a precautionary measure only, in the event that the board would decide that the objections of insufficiency of disclosure, added subject-matter and/or lack of novelty in view of E1 prejudiced the maintenance of the patent as granted. Since the opposition division expressed its preliminary opinion that none of these grounds would prejudice the maintenance of the patent as granted, there was no need to file those auxiliary requests directed to those objections during opposition proceedings. Other requests such as main request', auxiliary request I and auxiliary request I' were mentioned in the reply to the notice of opposition and could not be considered surprising.
- 2.2.3 The board does not find the above arguments as amounting to justifying circumstances for the admittance of these requests into the appeal proceedings. Indeed, the objections on insufficiency, added subject-matter and lack of novelty in view of E1 were known to the patent proprietor from the outset of opposition proceedings. The board is therefore convinced that the patent proprietor would have been in a position to submit or at least maintain the corresponding requests in oral proceedings, especially

in the event that the opposition division's preliminary opinion changed during the oral proceedings in those matters.

- 2.2.4 A favourable preliminary non-binding opinion of any deciding organ of the EPO, in this case the opposition division, cannot generally justify that a patent proprietor is relieved from its duty to address the still pending objections raised by the opponent in a timely manner.
- 2.2.5 With respect to main request', auxiliary request I and auxiliary request I', the board notes that the mere reference to the subject-matter of the independent claims of these requests (see proprietor's letters dated 24 March 2021 and 24 February 2022) cannot be accepted as a proper filing of requests, even if they have been substantiated. In the case at hand, the chair of the opposition division indicated at the outset of the oral proceedings that these requests were not deemed to have been filed. At that stage the patent proprietor did not request to file the missing requests.

The patent proprietor argued before the board that after the discussion of the main request, it refrained from filing these requests for the sake of procedural economy, since the foreseeable outcome would have been that the opposition division would have found these requests inadmissible and/or not allowable. Therefore, the due time for filing these requests was with the statement setting out the grounds of appeal.

- 2.2.6 These arguments can also not be followed. Indeed, the board is convinced that the patent proprietor, after the indication of the opposition division that these

requests had not been duly filed, had an opportunity to submit them at that point of time at the oral proceedings. However, it refrained *motu proprio* from doing so and due to this course of action, the opposition division could not decide on any of these requests.

In this respect, the board notes that it is the duty of the opposition division to clarify the requests which are on file at the very beginning of the oral proceedings. By the same token, it is the duty of the parties' representatives to state whether the requests are correct, and where applicable add further requests and/or indicate which requests are no longer maintained. In the present case the patent proprietor did not react, despite having been informed that the requests were not on file (see minutes, first page, third paragraph). Hence, the requests are considered as having not been filed in the opposition proceedings.

It is also noted that the opposition division does not bear the burden to check all parties' written submissions in order to detect and inform the parties of any possible missing supporting evidence or annexes. The parties bear the full responsibility of their own submissions and are expected to react and provide a remedy as soon as they become aware of such missing supporting evidence or annexes, i.e. in the present case at the beginning of the oral proceedings before the opposition division.

2.2.7 Consequently, in the absence of any justifying circumstances submitted by the patent proprietor, main request', main request'', main request''', auxiliary requests I to IV, auxiliary requests I' to V', auxiliary requests I'' to IV'' and auxiliary requests

I''' to IV''' are not admitted into the appeal proceedings under to Article 12(6), second sentence, RPBA 2020.

- 2.3 With regard to auxiliary request V, which corresponds to auxiliary request 1 decided upon in opposition proceedings, the board notes that this request was not admitted by the opposition division (see point 13 of the reasons for the decision under appeal).
- 2.3.1 According to Article 12(6), first sentence, RPBA 2020, the board shall not admit requests which were not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit them suffered from an error in the exercise of discretion or unless the circumstances of the appeal case justify their admittance.
- 2.3.2 As correctly indicated by the opponent, there is no apparent objection made by the patent proprietor that the discretion applied by the opposition division was not based on the correct principles; the patent proprietor's arguments differ in opinion regarding the compliance in view of Articles 84 and 123(2) EPC with the consequence that the discretion was exercised "unreasonably".
- 2.3.3 The board notes that according to established case law, which is now incorporated in Article 12(6), first sentence, RPBA 2020, an exercise of discretion should only be overruled in the event that it suffered from an error, *i.e.* if the opposition division exercised its discretion according to the wrong principles, or without taking into account the right principles, or in an unreasonable way (see Case Law of the Boards of Appeal, 10th edition 2022, V.A.3.4.1.b) or unless the

circumstances of the appeal case justify their admittance. It is not the duty of the board to review all the facts and circumstances of the case as if it were in the opposition division's place and decide whether or not it would have exercised discretion in the same way.

2.3.4 Auxiliary request 1 was late-filed, namely after the time limit set by Rule 116(2) EPC and the principle of "clear allowability" of this request was correctly applied and assessed with reasons, so that no error in the use of the discretion is apparent to the board (see also minutes of the oral proceedings before the opposition division, page 4).

2.3.5 Therefore, in the absence of any apparent error in the use of the opposition division's discretion and in the absence of any justifying circumstances, the board does not overrule the opposition division's exercise of discretion and does not admit auxiliary request V into the proceedings under to Article 12(6), first sentence, RPBA 2020.

3. *Auxiliary request VI - novelty in view of the public prior use E3, Article 54(2) EPC*

3.1 Auxiliary request VI corresponds to auxiliary request 2 decided upon in the opposition proceedings. Claim 1 of this request is the combination of claim 1 as granted with the feature of claim 6 that the stiffening means comprise two or more elongated stiffening elements at both sides of the rivet means.

3.2 The patent proprietor disputed that E3 disclosed two or more elongated stiffening elements, and argued that E3 shows merely a single element, contrary to the findings

of point 14.8.3 of the reasons for the decision under appeal, which were directed to auxiliary request VI.

3.3 The board is not persuaded by the arguments of the patent proprietor and rather concurs with the opponent that E3 discloses two elongate stiffening elements at both sides of the rivet in the form of eyebrow- or moustache-shaped elongate stiffening means. Indeed, as correctly argued by the opponent during the oral proceedings, even in the case that the bead of E3 was a continuous one running underneath the tab of the closure, this bead can be considered to be the stiffening means which comprises elongated stiffening elements at its ends, which are located at both sides of the rivet means, as required by the subject-matter of claim of auxiliary request VI. The board follows the opponent in that claim 1 does not require that the two or more stiffening elements of the stiffening means are separated. It is sufficient to be able to distinguishing such elements in the "eyebrow" or "moustache" of E3.

3.4 Since the further features of claim 1 according to auxiliary request VI, corresponding to claim 1 as granted, are already anticipated by E3 (see point 1.2.3 above), the subject-matter of claim 1 of auxiliary request VI is not novel.

4. *Auxiliary request VII - clarity, Article 84 EPC*

4.1 Auxiliary request VII corresponds to auxiliary request 3 decided upon opposition proceedings.

4.2 The patent proprietor contested the decision of the opposition division (see point 15 of the reasons of the decision under appeal) that claim 1 of the then

auxiliary request 3 lacked clarity under Article 84 EPC.

- 4.2.1 In the patent proprietor's view, claim 1 of the then auxiliary request 3 is based on a combination of granted claims so that clarity cannot be examined (G 3/14) and that the claim clearly separate, by its wording, the two alternatives.
- 4.3 The board disagrees for the following reasons.
 - 4.3.1 Contrary to the arguments of the patent proprietor, the amendments carried out in claim 1 of auxiliary request VII are not the result of a combination of granted claims. Indeed, granted claims 12 and 13 depend separately on claim 1, but are not dependent on each other. It follows that the amendments carried out in claim 1 according to auxiliary request VII result in a combination of features which is not covered by the claims as granted, and as such is subject to examination for compliance with the requirements of Article 84 EPC.
 - 4.3.2 The board further concurs with the findings of the opposition division (see point 15.4 of the reasons for the decision under appeal) that a lack of clarity has been introduced by the amendment, namely that it is not clear in the second alternative presented at the end of claim 1 whether stiffening means extending into or beyond the groove are required to be two or more elongated stiffening means or not.
 - 4.3.3 In sum, the board concurs with the opposition division that the subject-matter of claim 1 of auxiliary request VII lacks clarity in the sense of Article 84 EPC.

Opponent's appeal

5. *Patent as maintained by the opposition division, admittance of objections on inventive step, Article 12(6) RPBA 2020*
- 5.1 The opponent argued that the subject-matter of claims 1 and 2 of the maintained version of the patent (*i.e.* auxiliary request 4 in opposition proceedings) lacked inventive step starting from document E3 as closest prior art in combination with the teachings of E15, E16 or E4 (as evidenced by E5d1', E5d2', E5d1.1, E5d2.1, E5d3.1, E5d3.2 and E5d4).
- 5.2 The board notes that these objections have been filed for the first time in appeal proceedings and did not form part of the opposition proceedings.
- 5.3 According to Article 12(6), second sentence, RPBA 2020, the board shall not admit objections which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.
- 5.4 The opponent argues that although the then auxiliary request 4 resulted from the combination of granted claims, the features of granted claims 12 and 13 had not been made the focus of written proceedings before the opposition division.
 - 5.4.1 According to the opponent, the subject-matter of granted claims 12 and 13 became relevant only in the context of the then auxiliary requests 3 and 4 submitted for the first time during the oral proceedings before the opposition division. The

opponent was denied an appropriate opportunity to consider these requests in detail or to establish detailed objections against the amended claims.

5.5 The board disagrees for the following reasons.

5.5.1 As correctly argued by the patent proprietor, the opponent was familiar with the subject-matter of claims 12 and 13 as granted in unamended form from the outset of opposition proceedings and the opponent mentioned objections in the notice of opposition in their respect. Therefore the opponent had the opportunity to consider the claims on which the requests are based. The board also finds that the opponent was in a position to submit objections against the subject-matter of claims 1 and 2 of the then auxiliary request 4 during the oral proceedings before the opposition division. The opponent refrained from doing so as reflected in point 16.2 of the reasons for the decision under appeal, and the minutes of the oral proceedings before the opposition division (page 7, last paragraph). The opponent, although explicitly asked by the opposition division, **did not present any objections** against the claims of the then auxiliary request 4, and did not request a break in the oral proceedings or a postponement. The allegation that they were denied an appropriate opportunity to consider these requests does not hold true.

5.5.2 In this light, and in the absence of any justifying circumstances submitted by the opponent, the board does not admit the above objections on inventive step into the proceedings under to Article 12(6), second sentence, RPBA 2020.

6. *Admittance of objections raised against the patent as granted that allegedly apply to the patent as maintained by the opposition division, Article 12(6) RPBA 2020*

6.1 The patent proprietor argued that according to the minutes of the oral proceedings before the opposition division (page 7, last paragraph), the opponent, although explicitly asked by the opposition division, **did not present any objections** against the claims of the then auxiliary request 4. The objections against the then auxiliary request 4 on added subject-matter, sufficiency and novelty in view of E2 should be considered as not having been raised during the opposition proceedings, and should not be admitted in appeal proceedings under Article 12(6) RPBA 2020. Furthermore, the subject-matter of claims 1 and 2 of the maintained version result, respectively, from a combination of claims 1, 6 and 11 and 1, 6 and 12, so that the novelty objection in view of E2 against claim 1 as granted could not be automatically translated to the independent claims of the maintained version.

6.2 According to the opponent, the objections raised with its notice of opposition in relation to added subject-matter, sufficiency of disclosure and lack of novelty over E2, which were discussed with regard to earlier-ranking requests, applied equally to the maintained version. In particular, the assessment of lack of novelty in view of E2 was also directed to the relevant dependent claims.

6.2.1 Furthermore, the above-stated objections were raised again with the opponent's statement setting out the grounds of appeal, which could only be logically directed to the maintained version.

6.2.2 In addition, the opponent further argued that the content of the minutes of the oral proceedings before the opposition division was inaccurate since it states that "[t]he opponent does not present any objections to the claims of auxiliary request 4". Indeed, after the opposition division announced during the oral proceedings that none of the objections above prejudiced the maintenance of the patent as granted, these objections were obviously not discussed once more when dealing with the auxiliary requests, but were not withdrawn or abandoned. The minutes should have obviously reflected that the opponent did not have any **further** objections to the request.

6.3 The board is of the following view.

6.3.1 According to Article 12(1)(a) RPBA 2020, the appeal proceedings are based, *inter alia*, on the decision under appeal and on the minutes of any oral proceedings before the department having issued that decision.

6.3.2 In the event that a party is of the opinion that the minutes are incorrect or incomplete, that party should request a correction of the minutes in order to preserve its rights. The importance of checking the accuracy of the minutes and, where appropriate, requesting a correction should therefore not be underestimated. In fact, in the absence of any request for correction of the minutes, the board has to assume that the statements reflected therein are correct and accurate. In the present case, for the board, in view of the minutes and the decision under appeal, it is established that these objections were neither raised nor maintained against the then auxiliary request 4.

6.3.3 The board however, concurs with the opponent that, even in the case that these objections were not presented or no longer maintained specifically against auxiliary request 4, the present circumstances of the appeal case can justify their admittance into the appeal proceedings under Article 12(6) RPBA 2020, for the following reasons.

6.3.4 It is indeed true and uncontested that, in the case at hand, the objections on sufficiency and added subject-matter made for the patent as granted apply to the patent as maintained by the opposition division. Also the objection of lack of novelty in view of E2, which was also made with regard to the subject-matter of dependent claims 6, 11 and 12 can be applied without modification to the subject-matter of claims 1 and 2 of the maintained version. These objections were also decided upon in the decision under appeal within the substantive framework of the patent as granted and have been dealt with by the parties in their respective submissions in appeal proceedings, so that a review of these findings in appeal proceedings can be performed according to Article 12(2) RPBA 2020.

6.3.5 In this light, the board, exercising its discretion under Article 12(6) RPBA 2020, admits these objections raised with the opponent's statement setting out the grounds of appeal against the maintained version of the patent into the appeal procedure.

7. *Patent as maintained by the opposition division - Sufficiency of disclosure, Article 83 EPC*

7.1 The opponent argued that the patent in suit fails to disclose how to put the claimed invention into effect, and specifically fails to disclose at least one way to

carry out the invention. In particular, the opponent indicated that there are many possibilities to provide "stronger" score lines with respect to the popping score line, namely by different shapes of the scoring lines, different metallurgical compositions or different residual thicknesses. In this respect, the contested patent did not indicate under what circumstances, *i.e.* which testing method, the strength of the parts of the score line shall be determined, nor how, so that the skilled person, in their attempt to reproduce the invention would have no certainty whether a closure within the scope of protection conferred by the patent had been achieved or not.

7.2 The board disagrees. As correctly indicated by the patent proprietor, claim 1 of the patent as granted (and of the maintained version) allows no other technical interpretation than the different scoring lines being provided with different residual thicknesses, thereby directly resulting in score lines with different strengths. Although it could be agreed with the opponent that other ways of providing varying strength on the score lines are theoretically possible, the board is convinced that the skilled reader would only consider that the breadth of the claim is restricted to achieve these stronger score lines by providing them with a residual thickness greater than the residual thickness of the popping score line.

7.3 The fact that the skilled person is able to provide score lines with different residual thicknesses has not been contested by the opponent. In sum, the patent provides at least one way to carry out the invention according to claim 1 over its whole breadth, namely by providing the score lines with different thicknesses and, hence, is sufficiently disclosed.

8. *Patent as maintained by the opposition division - Added subject-matter, Article 123(2) EPC*

8.1 The opponent argued that the omission of the feature "*which score line parts are stronger than the popping score line part*" in claim 1 as granted and according to the maintained version results in an extension of subject-matter.

8.1.1 By omitting this feature, the claim as amended now covers the possibility, under its broadest reasonable interpretation, that the "stronger score line parts" are different parts than the earlier-cited "score line parts". This is a reasonable technical interpretation in consideration of the ability to adjust the strength and/or thickness of the score line around the circumference of the closure and by different means of strength adjustment. It follows that the claim now covers other embodiments with no limitation as to where the stiffening means are located, which results in an extension beyond the original disclosure.

8.1.2 The board disagrees, for the following reasons. The claim as amended firstly defines "*score line parts separated by a popping score line part*". Thereafter, the residual thicknesses of the score line parts is defined to be greater than the residual thickness of the popping score line. Finally, the stiffening means are defined as the stiffening closure parts neighboring "*the stronger score line parts*". As correctly found by the opposition division in point 12.1.2 of the reasons for the decision under appeal, the skilled reader immediately understand that, in the absence of any other definition of score line parts, "the" stronger score line parts must be the previously defined score

line parts with greater residual thickness. Therefore, the skilled person is not presented with new technical information by the omission of the feature that the score line parts are stronger than the popping score line part so that no extension of subject-matter results from this omission.

8.2 The opponent was also of the view that the introduction of the feature that "*the popping score line part has a length in the range 2-20 mm*" in claim 1 as granted (and according to the maintained version) results in an unallowable intermediate generalisation.

8.2.1 Indeed, this feature has been extracted from page 3, line 39 to page 4, line 14 of the application as originally filed, where, according to the appellant, it was present in combination with other values, such as the diameter of the closure and the cross-sectional shape of the container. There was no indication that these values were independent from one another; indeed, it was clear that they were inextricably and closely inter-related and mutually dependent on one another. The extraction of the feature relating to the length of the popping score line part alone, without the other characteristics resulted in an unallowable intermediate generalisation, contrary to the requirements of Article 123(2) EPC.

8.2.2 The board is not persuaded by the arguments of the opponent and rather concurs with the patent proprietor and with the findings of the opposition division in point 12.1.5 of the reasons for the decision under appeal, that the claimed length of the popping score line part is presented as an example or a preferred embodiment independent from the other parameters. As stated on page 4 of the application as originally

filed, the skilled person would realise that, for containers with different diameters and shape in cross section, different residual thicknesses and length may be selected. Contrary to the opponent's argument, there is no pointer in the original description indicating that the different parameters are dependent on each other. In contrast, the use of the words, "for instance", "may have" and "preferred", makes it clear for the skilled reader that the values are optional and that no direct link can be derived with the rest of the parameters. Therefore, the skilled person is not presented with new technical information by the extraction of the feature of the popping score line length from that passage of the description.

- 8.3 Finally, the opponent argued that, the original description indicated on page 7, line 16 that figure 1 showed a state of the art closure. This was amended in the patent as granted to indicate that figure 1 depicted a closure according to the invention. This results in an infringement of Article 123(2) EPC.
- 8.3.1 Although the amendment was carried out as a correction of an obvious mistake, the opponent argued that the correction made was unallowable, thereby resulting in added subject-matter. According to the opponent, although there were inconsistencies in the originally-filed description and an error was thereby obvious, it was not clear which of the inconsistencies was the actual error and how it had to be corrected. In other words, it was not immediately evident that nothing else would have been intended than what was finally presented as a correction.
- 8.3.2 The board is not convinced by the opponent's view. Indeed, as correctly indicated by the patent

proprietor, with the exception of page 7, line 16, the originally filed application consistently describes that all figures 2 to 17 unmistakably deal with embodiments according to the invention and that all these figures refer back to the closure of figure 1, which is also explicitly presented as a closure according to the invention on page 6, line 44. The board is of the view that nothing else was intended than to identify the closure of figure 1 as an embodiment of the invention. In this light, the board concurs with the finding of the opposition division in point 12.1.7 of the decision under appeal that the amendment in question was the correction of an obvious mistake, which was allowable, and that no extension of subject-matter arises from this correction.

9. *Patent as maintained by the opposition division - Novelty in view of E2, Article 54(2) EPC*

9.1 The opponent identified the closure shown in figure 1 of the application as originally filed of the patent in suit as E2. According to the opponent, E2 formed part of the prior art in the sense of Article 54(2) EPC, since it was acknowledged as such on page 7, line 16 of the original description. E2 anticipated all features of claims 1, 6, 11 and 12 according to the patent as granted, thereby anticipating also the subject-matter of claims 1 and 2 of the patent as maintained by the opposition division.

9.2 The board disagrees. As already discussed in point 8.3.2 above, the board is convinced that the identification of the closure of figure 1 as prior art was an obviously incorrect statement, which was permissibly corrected in examination proceedings. Therefore, E2 does not form part of the prior art in

the sense of Article 54(2) EPC, so that it cannot be prejudicial to novelty of claims 1 and 2 of the patent as maintained by the opposition division.

10. *Conclusions*

10.1 It follows from the above that the opponent has not provided convincing and admissible arguments that would demonstrate the incorrectness of the decision under appeal that the patent as maintained by the opposition division meets the requirements of the EPC. Therefore, **the appeal of the opponent is dismissed.**

10.2 In addition, the patent proprietor has not convincingly demonstrated the incorrectness of the decision under appeal with respect to the higher-ranking requests. In the absence of any admissible and allowable higher-ranked request, **the appeal of the patent proprietor is also dismissed.**

Order

For these reasons it is decided that:

Both appeals are dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated