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**Datasheet for the decision
of 1 February 2024**

Case Number: T 1636/22 - 3.2.07

Application Number: 15736036.3

Publication Number: 3169611

IPC: B26F1/44, B65D77/20, B65D85/804

Language of the proceedings: EN

Title of invention:
A DIE-CUT LID AND ASSOCIATED CONTAINER

Patent Proprietor:
Koninklijke Douwe Egberts B.V.

Opponent:
Nestec S.A.

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA 2020 Art. 12(6)

Keyword:

Inventive step - (yes)

Late-filed objections - should have been submitted in first-
instance proceedings (yes) - no longer maintained in first-
instance proceedings (yes) - circumstances of appeal case
justify admittance (no) - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1636/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 1 February 2024

Appellant: Nestec S.A.
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Respondent: Koninklijke Douwe Egberts B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 May 2022 concerning maintenance of the
European Patent No. 3169611 in amended form.**

Composition of the Board:

Chairman G. Patton
Members: A. Cano Palmero
M. Millet

Summary of Facts and Submissions

- I. The opponent (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. 3 169 611 in amended form on the basis of the then auxiliary request 4.
- II. An opposition was filed against the patent in its entirety and based on the grounds for opposition pursuant to Article 100(a) and (b) EPC (lack of novelty, lack of inventive step and lack of sufficiency of disclosure).
- III. In preparation for oral proceedings, scheduled upon the parties' requests, the board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA. Neither of the parties replied to this communication in substance.
- IV. Oral proceedings before the board took place on 1 February 2024. 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 are as follows,

for the appellant

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

for the patent proprietor (respondent)

that the 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 in accordance with the then auxiliary request 4 (main request),

or, in the alternative, that, if the decision under appeal is set aside, the patent be maintained in amended form according to one of the sets of claims according to auxiliary requests 1 to 6 filed with the reply to the statement setting out the grounds of appeal.

VI. The lines of argument of the parties, which are focused on inventive step of the subject-matter of claim 1 of the main request and on the admittance of further objections of lack of inventive step, are dealt with in detail in the reasons for the decision.

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

"A die-cut lid for closing a container, the lid (20) being formed from a flexible composite sheet material; the lid (20) comprising a functional area (70) bearing human-readable and/or machine-readable data; the lid (20) comprising one or more rigidifying indentations (50) to promote flatness of the functional area (70) in a resting state of the lid (20); characterized in that the one or more rigidifying indentations (50) are selected from the group of:

- i) one or more encircling indentations (72, 73) that border the functional area (70); and/or
- ii) a planar indentation (75) that encompasses the functional area,;

wherein the one or more rigidifying indentations (50) have a height measured perpendicular to the plane of the lid (20) of from 600 to 1000 microns."

VIII. As the auxiliary requests are irrelevant to this decision, it is not necessary to reproduce them here.

Reasons for the Decision

1. *Main request - Inventive step starting from document D6 (FR 2731986 A1) as closest prior art, Article 56 EPC*

1.1 Distinguishing feature

It is common ground that the subject-matter of claim 1 according to the main request differs from the known die-cut lid of D6 **at least** in that "the one or more rigidifying indentations have a height measured perpendicular to the plane of the lid of from 600 to 1000 microns".

1.2 Technical effect

1.2.1 According to the appellant (see points 3.23 and 3.30 of the statement setting out the grounds of appeal), the claimed range might be preferable simply for aesthetic reasons, and there are no technical reasons given in the patent in suit (hereinafter "the patent") for this preferred range, other than having a rigidifying function.

In particular, paragraph [0006] of the patent in suit merely related to rigidifying indentations without making reference to the height of such indentations. The patent in suit did not set a minimum lower limit for the indentations, but just an upper limit which was

merely dependent on the diameter or nominal dimension of the lid (see paragraph [0014] of the patent in suit).

The embossing of D6 also had a rigidifying function in the same way as the indentations of the patent, as known by the skilled person (see for example document D17 (**K.J. Rajput, "A Textbook of Manufacturing Technology: Manufacturing Processes", Laxmi publications (P) Ltd, New Dehli, first edition 2007, pages 184 and 185**), page 184) and as acknowledged by the opposition division in point 20.2.2 of the reasons for the decision under appeal.

Therefore, the particular range of 600 to 1000 microns did not provide any particular technical effect at all compared to general stiffening indentations such as the ones in the range of 80 to 140 microns disclosed in D6.

- 1.2.2 The board disagrees. As correctly argued by the respondent, the indentations of the patent have a different technical character than the embossing of D6. While the indentations of the patent are directed to promote flatness of a functional area (see paragraph [0006] of the patent), D6 does not disclose or teach that the worm embossing of the peripheral zone has any effect on the flatness of the central area of the lid, but is rather directed to maintain an ability to prevent suction between lids to enable an improved de-stacking. Even if it could be agreed that the indentations or embossing of both lids involved a rigidifying effect, the argument of the appellant cannot be followed, that the peripheral embossing of D6 is directed to improve flatness of the central area. This relationship between peripheral embossing and flatness is neither explicitly disclosed in D6 nor can

it be seen as implicit, *i.e.* inherent, in the lid of D6 in the absence of any evidence in this respect.

1.2.3 In this light, the board is satisfied with the conclusion of the opposition division that starting from D6 as closest prior art, the distinguishing claimed range has the technical effect of providing an improved flatness of the functional area by reducing any curl of the lid (see patent, paragraph [0006]).

1.3 Objective technical problem

In contrast with the problem posed by the appellant, to provide an alternative height for the indentations, the board concurs with the opposition division that the objective technical problem solved by the distinguishing feature and starting from D6 as closest prior art can be seen as to improve the readability of the functional area, as detailed in the patent, paragraph [0004].

1.4 Obviousness

1.4.1 In view of the above, the board is in alignment with the finding of the opposition division that, starting from D6, which discloses an embossment in the range from 80 to 140 microns, the skilled person would not be prompted by D6 or by the common general knowledge to increase by at least four times the height of the rigidifying portion in view of the technical problem posed.

It follows that the subject-matter of claim 1 of the main request is inventive in view of the teaching of **D6 in combination with the common general knowledge.**

1.4.2 The appellant further argued (see points 3.38 to 3.48 of the statement setting out the grounds of appeal) that the indentation heights as claimed were rendered obvious by the teaching of D9 (**JP 2000 255619 A**), which was in the same technical field as D6 of lids for food or beverage containers and explicitly taught a height of 700 microns. The skilled person, when attempting to solve the objective technical problem of choosing an alternative height for the indentations would turn to D9 and incorporate the height of 700 microns disclosed in D9 in the lid of D6, thereby arriving at the subject-matter of claim 1 of the main request without inventive skill.

Furthermore, the appellant argued in points 3.50 to 3.53 of the statement setting out the grounds of appeal that D9 was directed to the problem of promoting flatness (*i.e.* reducing curling), so that if the objective technical problem was regarded as being to promote flatness of the lid, the skilled person would also consider the teaching of D9 and would arrive at the claimed subject-matter according to the main request in an obvious manner.

1.4.3 The board disagrees. As already concluded in point 1.3 above, the technical problem starting from D6 is how to improve the readability of human-readable and/or machine-readable data on a die-cut lid. As correctly argued by the respondent and as acknowledged by the appellant in point 3.40 of the statement setting out the grounds of appeal, D9 is not concerned with improving the readability of a functional area of a lid. Therefore, the skilled person starting from D6 would have no motivation to consult the teaching of D9 in view of the objective technical problem posed.

- 1.5 In consequence of the above, the board concludes that the subject-matter of claim 1 of the main request is inventive starting from **D6 as closest prior art in combination with the common general knowledge or with the teaching of D9**, and does not see an error in this respect in the decision under appeal.
2. *Main request - Inventive step starting from document D7 (CH 673827 A5) as closest prior art, Article 56 EPC*
- 2.1 The appellant argued in points 3.54 to 3.82 of the statement setting out the grounds of appeal and in points 3.21 to 3.29 of its letter dated 18 July 2023 that the subject-matter of claim 1 of the main request lacked inventive step in view of document **D7 as closest prior art in combination with the teaching of D9 and the common general knowledge**.
- 2.1.1 In particular, the appellant indicated that the subject-matter of claim 1 of the main request differed from the known lid of D7 in the following features:
- (a) the height of the indentations, and
 - (b) the location for the readable data.
- 2.1.2 According to the appellant, since the particular claimed height of the indentation in the range of 600 to 1000 microns was not linked to any particular technical effect over and above that which is achieved by generic "rigidifying indentations" such as those in D7, this feature could not be taken into account when assessing the objective technical problem.
- 2.1.3 In view of this lack of a particular technical effect, the location of the readable data and the height of the indentations provided no synergistic technical effect.

Furthermore, the height of the indentations could be freely adjusted without affecting the location of the readable data.

- 2.1.4 The selection of an indentation height range of 600 to 1000 microns was thus a matter of routine experimentation. Furthermore, document D9, which was directed to promote flatness of the lids, taught the height of 700 microns. Accordingly, the skilled person would arrive at the claimed height range on the basis of D7 and their common general knowledge and/or D9.
- 2.1.5 With respect to the location of the readable data, the appellant argued that the skilled person, when selecting a location for the expiry date on the lid of D7, would place the expiry date, *i.e.* the readable data, with the help of common general knowledge, either in the innermost region of the bottom half of figure 2 of D7 or between neighbouring concentric rigidifying indentations, thereby arriving at "one or more encircling indentations that border the functional area", as required by claim 1. In this sense, the appellant referred to document D18 ("**Guidelines for Bar Code Symbol Placement**", **GS1 US, Inc., May 2007**), point 2.3.3 on page 7 which depicted the common general knowledge of the skilled person that, in order to avoid scanning obstacles, symbols should be placed on flat surfaces and never be placed under a package flap.
- 2.1.6 Therefore, as the skilled person would implement both of the features of claim 1 identified in point 2.1.1 above without inventive skill, the subject matter of claim 1 lacked an inventive step when starting from D7.
- 2.1.7 The board disagrees for the following reasons.

2.1.8 The board is not convinced that the two features identified by the appellant have no synergistic effect. Indeed, the indentations according to claim 1 of the main request are not only mere rigidifying indentations, they also need to encompass or encircle the functional area and have the function of improving flatness of this area. The combination of both features enables the skilled person, as correctly identified by the respondent in point 7.3 of the reply to the statement setting out the grounds of appeal, to improve the readability of human-readable and/or machine-readable data on a die-cut lid.

2.1.9 The board is therefore of the view that both distinguishing features need to be considered in combination. In this sense, the board concurs with the finding of the opposition division of point 35.3.2 of the reasons for the decision under appeal, that neither D7 nor D9 discloses an encircling indentation that borders a functional area bearing human-readable and/or machine-readable data or a planar indentation that encompasses said functional area. It follows that starting from D7 as closest prior art in combination with either common general knowledge or the teaching of D9, the skilled person would not arrive at the subject-matter of claim 1 of the main request without exercising inventive skill.

2.1.10 Notwithstanding the above, the board emphasises that it does not follow the appellant in that the skilled person looking for a location for the expiry date would inevitably select the lid, as it could also be located on the container closed by the lid. Should they anyway select the lid, they is also no reason that they would inevitably choose a location in an innermost region of the lid of D7 as alleged by the appellant, since there

is space available on the tab 7 away from the indentations 13. In this respect the board is not convinced that D18 actually teaches away positioning bar codes, *i.e.* readable data, on the tab of a lid. The board follows the respondent in that the "flap" referred to in D18, point 2.3.3, does not amount to such tab. As a consequence, the appellant's line of argumentation consists in an *ex post facto* analysis based on the knowledge of the claimed subject-matter.

3. *Main request - Admittance of the inventive step objections starting from document D1 (EP 2 345 352 A1) as closest prior art in combination with the teaching of D7 and starting from D7 as closest prior art in combination with the teaching of D1, Article 12(6) RPBA 2020*

3.1 The appellant argued that claim 1 of the main request lacked inventive step over D7 as closest prior art in combination with the teaching of D1 (see points 3.30 to 3.33 of its letter dated 18 July 2023) and in view of document D1 as closest prior art in combination with the teaching of D7 (see points 3.83 to 3.106 of the statement setting out the grounds of appeal).

3.2 The board notes that these objections did not form part of the decision under appeal. Indeed these objections were not raised, or at least were not maintained by the appellant during opposition proceedings. Due to this course of action, the respondent did not take position on these objections and the opposition division could not decide on the matter.

3.3 According to Article 12(6), second sentence, RPBA, 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.

- 3.3.1 The appellant did not provide orally or in writing any reasons or justifying circumstances in this respect. In the absence of these, the board does not admit the objections of lack of inventive step based on the combinations D7 with D1, as well as D1 with D7 into the appeal proceedings pursuant to Article 12(6), second sentence, RPBA.

4. *Conclusion*

It follows from the above that the appellant has not demonstrated, by admissible and convincing arguments, the incorrectness of the decision under appeal. The appeal is thus to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated