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D E C I S I O N
of 11 April 1994

Case Number: T 0295/92 - 3.2.5

Application Number: 86110290.3

Publication Number: 0212339

IPC: B29D 22/00, B29C 49/06, B65D 1/02

Language of the proceedings: EN

Title of invention:
Bottle-shaped container

Applicant:
Yoshino Kogyosho Co., Ltd.

Opponent:
-

Headword:
-

Relevant legal norms:
EPC Art. 56

Keyword:
"Inventive step - yes"

Decisions cited:
-

Catchword:
-



Case Number: T 0295/92 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 11 April 1994

Appellant:

Yoshino Kogyosho Co., Ltd.
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Kohto-ku
Tokyo 136 (JP)

Representative:

Heath, Derek James
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Decision under appeal:

Decision of the Examining Division 2.3.09.093 of
the European Patent Office dated 29 November 1991
refusing European patent application
No. 86 110 290.3 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C.V. Payraudeau
Members: W.D. Weiß
H.P. Ostertag

Summary of Facts and Submissions

- I. The European patent application No. 86 110 290.3, published on 4 March 1987 under No. 0 212 339, is a divisional application of European patent application No. 83 302 271.8 which was filed on 21 April 1983. In both applications the priority of Japanese patent application No. 67780/82 of 22 April 1982 is claimed. The present divisional application was refused by a decision of the Examining Division, dated 29 November 1991.
- II. The reason given for the decision was that the subject-matter of single claim, filed on 7 May 1991 with letter of 2 May 1991, lacked an inventive step having regard to a combination of the documents
- (1) DE-A-1 545 013 and
 - (2) Patent Abstracts of Japan, volume 7, No. 68 (M-201)[1213], 19 March 1983, referring to JP-A-57 210 830, published on 24 December 1982.

This single claim reads as follows:

"A hollow blow-moulded bottle-shaped container comprising a layer of a biaxially oriented mixture resin material composed of (a) a polyethylene terephthalate resin and (b) a xylene group-containing polyamide resin which is present in an amount of 5 to 30% weight with respect to the polyethylene terephthalate resin, **characterised** in that the container is of single-layer one-piece construction so that it is made entirely of the biaxially oriented mixture resin material indicated above."

III. A Notice of Appeal was filed by telecopy against this decision on 30 January 1992. The appeal fee was paid simultaneously. The Statement of Grounds was filed by telecopy on 23 March 1992.

The Appellant argued that there was no encouragement or hint in either of the documents (1) or (2) that would call for the disclosure of one of the documents to be combined with that of the respective other document and that, therefore, the decision under appeal was based on a hindsight approach.

IV. The Appellant requests that the decision under appeal be set aside and, hence, the grant of a patent be considered on the basis of the single claim filed on 7 May 1991 by letter of 2 May 1991.

Reasons for the Decision

1. The Appeal is admissible.
2. *Original Disclosure and Priority*

The subject-matter of the claim is based on page 5 to page 7, penultimate paragraph, of the originally filed description of the parent application which are identically contained in the description filed on 25 July 1986 as first description of the present divisional application.

The subject-matter of the claim is, however, not covered by the content of the priority document. Consequently, the filing date of the parent application, 21 April 1983, is the decisive date to define the state of the art for the subject-matter of the claim. The Appellant has acknowledged this fact, because he has not disputed

that document (2), which is published between the date of priority application and the filing date of the parent application, belongs to the state of the art according to Article 54(2) EPC with respect to this claim.

3. *Novelty*

Novelty is not under dispute, since none of the documents cited in the search report discloses, in combination, all the features of the claim.

4. *Inventive Step*

Document (1), which was designated by the Examining Division to be the closest state of the art with respect to the subject-matter of the claim, is concerned with the problem of improving the affinity to ionic dyes of synthetic polyesters, in particular of PET. For this purpose, document (1) teaches in its Claim 1 to produce a mixture resin material of PET resin with at least one polyamide the diamine component of which consists mainly of m-xylylenediamine. Although this material is said to be generally suitable for the production of articles which are shaped for instance by extrusion, injection moulding, slip casting etc., particular emphasis is laid on threads, fabric, and foils which are to be dyed. Besides that certain machine parts, tubes, isolating parts etc., but no blow-moulded bottle-shaped containers, are particularly mentioned. Moreover, no mixture composition falling under the definition given in the claim of the patent in suit is explicitly disclosed in document (1).

The question of whether or not a material is suitable for the manufacture of bottles is not decided by the fact alone that it is well formable by blow-moulding.

Innumerable polymers would meet this requirement. Additional prerequisites are, however, that the material is chemically neutral, does not release noxious substances into its contents, and, when pressurised, is impermeable to the enclosed gas. Document (1) is, however, completely silent about these qualities. Consequently, the polymer mixtures disclosed in document (1) **could have been** possible candidates of materials to be formed by a blow moulding process because of their known mechanical characteristics. A product resulting from such an hypothetical action would have, however, consisted of a material different from that indicated in the claim of the patent in suit.

It is, however, quite unlikely that a skilled person **would** have modified the composition of such a material and used it in a single layer to blow-mould bottle-shaped containers intended to be filled with alimentary fluids containing pressurised gas. Document (2), which was published nearly 12 years after document (1), instead of rendering the subject-matter of the claim obvious, is a reliable proof that, even at the filing date of the patent in suit, there was a strong reluctance to directly expose the bottle content to a polymer mix composed of the components (a) and (b) indicated in the claim of the patent in suit.

Consequently, neither the disclosure of document (1) alone nor its combination with that of document (2) shows an obvious way leading to the subject-matter of the claim under consideration. The other documents cited in the Search Report cannot put into question the presence of an inventive step either.

The claim is, therefore, allowable.

5. The claim, in its preamble, considers document (2) to be the closest prior art. Since this document has not yet been cited in the description, the provisions of Rule 27(1)(b) EPC are not yet met.

Order

For these reasons, it is decided that:

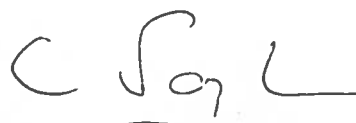
1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division with the order to grant a patent on the basis of the single claim filed on 7 May 1991, with letter dated 2 May 1991, and a suitably amended description.

The Registrar:



A. Townend

The Chairman:



C. Payraudeau