

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen

D E C I S I O N
of 20 March 2001

Case Number: T 0536/99 - 3.2.1

Application Number: 93901507.9

Publication Number: 0614434

IPC: B65D 39/08

Language of the proceedings: EN

Title of invention:
Drum with drum closure

Patentee:
KONINKLIJKE EMBALLAGE INDUSTRIE VAN LEER B.V.

Opponent:
I) Technocraft Ind., (India) Ltd
II) Rheem Closures (FE) PTE. Ltd
III) FEMBASA S.A.

Headword:
-

Relevant legal provisions:
EPC Art. 100(c) EPC

Keyword:
"Added subject-matter (yes)"

Decisions cited:
T 0169/83

Catchword:
-



Case Number: T 0536/99 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 20 March 2001

Appellant: KONINKLIJKE EMBALLAGE INDUSTRIE
(Proprietor of the patent) VAN LEER B.V.
Amsterdamseweg 206
NL-1182 HL Amstelveen (NL)

Representative: de Bruijn, Leendert C.
Nederlandsch Octrooibureau
P.O. Box 29720
NL-2502 LS Den Haag (NL)

Respondents: Technocraft Ind., (India) Ltd
(Opponent I) 136-A Mittal Court, Nariman Point
Bombay - 400 021 (IN)

Representative: Weber, Dieter, Dr.
Weber, Dieter, Dr.
Seiffert, Klaus, Dipl.-Phys.,
Lieke, Winfried, Dr.,
Gustav-Freytag-Straße 25
D-65189 Wiesbaden (DE)

(Opponent II) Rheem Closures (FE) PTE. Ltd
9 Sixth Lok Yang Road, Jurong Industrial Estate
SINGAPORE 628107 (SG)

Representative: Jackson, Richard Eric
Carpmaels & Ransford
43 Bloomsbury Square
London WC1A 2RA (GB)

(Opponent III)

FEMBASA S.A.
Poligono Industrial La Torre, Marie Curie 2
y 4 (Ewq. Avenida Monserrat)
08760 Martorell (ES)

Representative:

Duyck, Frans
Rue du Meunier, 20
B-7830 Graty (BE)

Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 11 March 1999
revoking European patent No. 0 614 434 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: F. Gumbel
Members: S. Crane
J. Van Moer

Summary of Facts and Submissions

- I. European patent No. 0 614 434 was granted on 2 November 1995 on the basis of European patent application No. 93 901 507.9 (published as WO-A-93/10986).

The single claim of the granted patent reads as follows:

"Drum with a drum closure provided in a drum wall, comprising an insert (4) and a closure cap which can be placed in the insert (4), which insert (4) is situated in a collar (2, 11) on the drum wall (3) pointing towards the outside of the drum (1), and has a first flange (6) which rests against the inside of the drum wall (3), and a second flange (5) which is flanged radially outwards over the collar (2, 11), a sealing ring (7, 12) which is wedged between the first flange (6) and the inside of the drum wall (3) to form a first seal, and an additional seal (9, 14) formed either by a sealing ring (14) integral with the first sealing ring (13) or by a separate sealing ring (9), which additional seal (9, 14) is provided between the collar (2, 11) and the insert (4) lying opposite the collar, characterized in that in the area delimited by the outer peripheral edge of the first flange (6) on the one hand, and of the top edge of the collar (2, 11) on the other hand, the insert (4) and the container (1) are in contact only with the sealing rings (7, 9, 12), in such a way that the sealing action is maintained even if the insert (4) is pressed inward relative to the collar (2, 11)."

- II. The granted patent was opposed by the present respondents (opponents I, II and III) on the ground

inter alia that it contained subject-matter extending beyond the content of the original application (Article 100 (c) EPC).

- III. With its decision posted on 11 March 1999 the Opposition Division revoked the patent. The reasons given for the decision were that the granted claim contained added subject-matter since the requirement stated in its characterising clause could not be derived from the original disclosure; as for the amended claims submitted in the opposition proceedings these likewise contained added subject-matter or had been extended in scope with respect to the granted claim, contrary to Article 123(3) EPC.
- IV. A notice of appeal against this decision was filed on 7 May 1999 and the fee for appeal paid on 10 May 1999. The statement of grounds of appeal was filed on 14 July 1999.
- V. In reply to a communication pursuant to Article 11(2) RPBA dated 11 October 2000 the appellants (proprietor of the patent) filed further submissions on 20 February 2001 and clarified and revised their requests. The main request was that the decision under appeal be set aside and the patent maintained as granted. Respective new claims according to first and second auxiliary requests were filed for the case that the Board accepted the arguments of the appellants concerning the meaning of the term "in contact only" as used in the granted claim but held that the subject-matter of the granted claim or respectively the claim according to the first auxiliary request lacked novelty or inventive step.
- VI. Oral proceedings before the Board were held on

20 March 2001.

Opponents II, who had already stated in their letter of 6 February 2001 that they would not be attending, were not present.

The appellants maintained their requests made in writing. The respondents requested that the appeal be dismissed.

VII. The main arguments put forward by the appellants can be summarized as follows:

The Opposition Division had failed to take proper account of how the person skilled in the art would understand the "contact only" requirement of the granted claim, when read in the light of the patent specification, and had instead based their finding of addition of subject-matter on a purely literal interpretation of the claim. The person skilled in the art would immediately recognise from his common general knowledge and what was said in the patent specification itself that the latter was specifically concerned with an improvement in the well-known "Tri-Sure" type of closure marketed by the appellants and that this improvement resided exclusively in means which enabled the maintenance of the sealing action even if there was deformation of the collar and drum wall. These means were directed to ensuring the maintenance of compression in the additional seal. Whether or not there was direct metal-to-metal contact between the insert and the container in the area defined in the claim was however completely irrelevant in this context. Furthermore, having no metal-to-metal contact would be incompatible with the technical realities of

how the insert was assembled to the container wall. As a consequence of this the person skilled in the art would understand the reference in the claim to "contact only" as meaning that in the area defined the container and the insert are in **sealing** contact only with the sealing rings. In other words what the claim requires is an interrelationship of the container collar, insert and sealing rings which enables sealing action to be maintained by the sealing rings alone. Since such an arrangement was clearly originally described the objection of added subject-matter was therefore misdirected.

That this interpretation was the one which the skilled person would in practice adopt was backed up by the statutory declaration of Harri Probert Mostyn submitted with their letter of 20 February 2001.

VIII. In reply the respondents argued substantially as follows:

There was nothing in the patent specification taken as a whole which would induce the person skilled in the art to give an interpretation to the characterising clause of the claim different to that of its plain natural meaning, namely that in the area defined the insert and the container were in contact only with the sealing rings, not with each other. Furthermore, that arrangement is one which would make technical sense as it ensured that the sealing rings could be placed under high initial compression. It must also not be overlooked that the feature involved was intended to distinguish the claimed subject-matter from the state of the art referred to in the patent specification and would be considered in this light by the person skilled

in the art; the interpretation the appellants wished to impose on the feature would not however be capable of offering any such distinction.

As the appellants implicitly now conceded, the original application did not support there being an absence of direct contact between the container and the insert in the area defined in the claim, so that the objection under Article 100(c) EPC held good.

Reasons for the Decision

1. The appeal complies with the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.

2. In their reply to the notice of opposition and, at least subsidiarily, in their statement of grounds of appeal the appellants argued that the application as originally filed provided proper support for there being in the area delimited by the outer peripheral edge of the first flange and the top edge of the collar no direct contact between the container and the insert, in other words that in this area the container and the insert were indeed "in contact only with the sealing rings" as required by the literal sense of the granted claim. In their submissions of 20 February 2001 and at the oral proceedings before the Board they withdrew however completely from this position and instead argued exclusively on the basis that the person skilled in the art would not in fact understand the claim in this way when read in the context of the patent specification as a whole.

It is therefore necessary to develop the investigation of the ground of opposition under Article 100(c) EPC in two stages. In the first it is necessary to determine how the requirement of the claim that there is "contact only with the sealing rings" would be understood by the person skilled in the art in the light of the teachings of the patent specification as a whole and his common general knowledge of the type of container closure involved. (Both the terms "drum" and "container" are used in the claim with the same intended meaning. For the avoidance of any confusion only the term "container" shall be used thereafter.) In the second stage it will then be necessary to determine whether the requirement as understood by the person skilled in the art can be derived from the original disclosure.

In the introductory description of the patent specification reference is made to two prior art documents, US-A-3 946 894 (D4) and GB-A-943 148 (D1), as disclosing containers closures having an additional seal between the collar of the container wall and the second flange of the insert, as set out in the preamble of the claim. With respect to this prior art it is stated that if the insert and collar are pressed inwards with respect to the container wall, as can happen if the container falls topside down on a hard surface, there results an increased spacing between the first flange and the container wall and thereby the sealing action of the sealing rings is impaired (column 1, lines 18 to 33). The objective of the invention is then stated to be to provide a container with a closure which offers better sealing even in case the insert and the collar are pressed inwardly; this objective is to be achieved by the measures specified in the characterising clause of the claim (column 1,

lines 34 to 44).

From these introductory passages the person skilled in the art can clearly draw the conclusion that the claimed invention is concerned with means which will allow the sealing action of the sealing rings to be maintained if the insert and the collar are pressed inwardly. This basic idea is further elucidated with respect to the two specific embodiments. That of Figures 1 to 3 employs a separate additional sealing ring between the collar and the second flange of the insert, whereas in the embodiment of Figures 4 to 6 the additional seal between the collar and the second flange is provided by a sealing ring part integral first main sealing ring. In both cases the insert, sealing rings and container wall are shown prior to final assembly (Figures 1 and 4), in normal operating position after assembly (Figures 2 and 5) and after the insert and collar have been pressed inwardly by deformation of the container wall (Figures 3 and 6). With respect to Figures 2 and 3 it is explained in column 2 at lines 26 to 39 how after deformation the first flange lies at a greater distance from the container wall which leads to a loss of a great part of the pre-tension in the first sealing ring and potential leakage; the pre-tension of the second sealing ring has however not been lost, so that a correct seal is maintained at this point.

Since there is no explicit correlation to be found in the particular description between what is disclosed there and the invention as portrayed in general terms in the introductory description and as defined in the claim, the person skilled in the art is called upon to interpret the two to bring them together. In the

Board's view there can be no doubt that a first literal understanding of the terms of the claim is that there should be no direct contact between the container and the insert in the area delimited by the outer peripheral edge of the first flange and the top edge of the collar, so that the container and insert are here in contact only with the sealing rings. Furthermore, despite the extensive arguments presented by the appellants, the Board can see nothing in the patent specification which could persuade the person skilled in the art that this requirement was in any way incompatible with the general aims of the invention or the description of the particular embodiments. Indeed, the opposite would seem to be true. Having regard to what is said above it can be seen from the particular description that the maintenance of sealing action is dependent upon reducing the amount by which the pre-tension of the sealing rings obtained upon assembly is lost when the collar and insert are pressed inwardly. Now, there being no direct contact between the container and the insert can advantageously contribute to this in two ways. Firstly, the first seal must absorb all the axial force generated when the second flange is flanged over the collar, rather than some of this being transmitted directly from the first flange to the container wall, as is normally the case with closures of the type involved. Secondly, the possibility of bringing the additional sealing ring into a position between the collar and the second flange where the gap between the two does not widen excessively on deformation of the container wall is enhanced. In this context the person skilled in the art will also note that narrow gaps between the first flange and the container wall are visible in Figures 2 and 5 of the drawings, so that there is no apparent

inconsistency here with the terms of the claim.

Thus the Board can find no support for the contention of the appellants that the person skilled in the art would automatically discard the plain meaning of the claim and replace it with the one they advocate, namely that the container and insert are "in sealing contact only with the sealing rings". That statement, which ever way it is read, namely that the only sealing contact the container and insert have is with the sealing rings or that the only contact the container and insert have with the sealing rings is of a sealing nature, is essentially a truism and cannot be causally linked to the functional statement at the end of the claim that sealing action is maintained on pressing inwards of the insert. Furthermore, it has to be borne in mind that what is set out in the characterising clause of the claim is intended to distinguish its subject-matter from the prior art according to documents D1 and D4. Since however the interpretation of it put forward by the appellants can be read onto this prior art it is for also this reason unlikely to be one that the person skilled in the art would adopt.

For completeness it should also be noted that the declaration of Mr Mostyn can in no way be understood as saying that the plain meaning of the claim, when seen in the context of the patent specification as a whole and common general knowledge, would be rejected for another one by the person skilled in the art. Indeed, in his answers 15 and 18 Mr Mostyn clearly recognises the benefits, as indicated above, of having no metal-to-metal contact between the insert and the container wall in the area identified in the claim.

As a consequence of the above it is therefore necessary to address the question whether the original application teaches that there be no direct contact between the container and the insert in the area delimited by the outer peripheral edge of the first flange and the top edge of the collar. Here, the considerations can be kept to a minimum since the appellants are no longer arguing that there is support for this feature. It suffices to say that a basis for there being no direct contact between the collar and the second flange (apart from where this is flanged over the top edge of the collar) is to be found in original claim 5 and the original Figures 5 and 8 (equivalent to granted Figures 2 and 5). On the other hand the narrow gap between the first flange and the container wall visible in those Figures cannot by itself be seen as a teaching of a purposive avoidance of direct contact between these parts, cf decision T 169/83 (OJ EPO 1985, 193). This has now been explicitly recognised by the appellants who state in paragraph 1, page 8 of their submissions of 20 February 2001: "the gaps shown in .. the as-filed drawings ... between the first flange (6) and the adjacent recessed part (3) of the drum wall (1) are artificial, probably being put there by the draftsman in order to more clearly delineate the insert (4), collar (11) and recessed part (3)".

The Board has therefore come to the conclusion that the claim as granted contains subject-matter extending beyond the content of the original application so that the main request of the appellants must be rejected.

3. The auxiliary requests of the appellants were made conditional on the Board accepting their arguments with

respect to the main claim, so do not need to be considered further.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel