

OPINION UNDER SECTION 74A

Patent	EP2643238
Proprietor(s)	R. Faerch Plast A/S
Exclusive Licensee	n/a
Requester	Ollila Law Limited
Observer(s)	n/a
Date Opinion issued	12 July 2017

The request

1. The Comptroller has been requested to issue an opinion as to whether EP 2643238 (“the patent”) is valid in light of various documents and also whether the specification discloses the invention clearly and completely enough for it to be performed by a person skilled in the art. Observations and observations in reply have been filed.

Matters to be considered by this Opinion

2. Section 74A(3) of the Patents Act 1977 states:

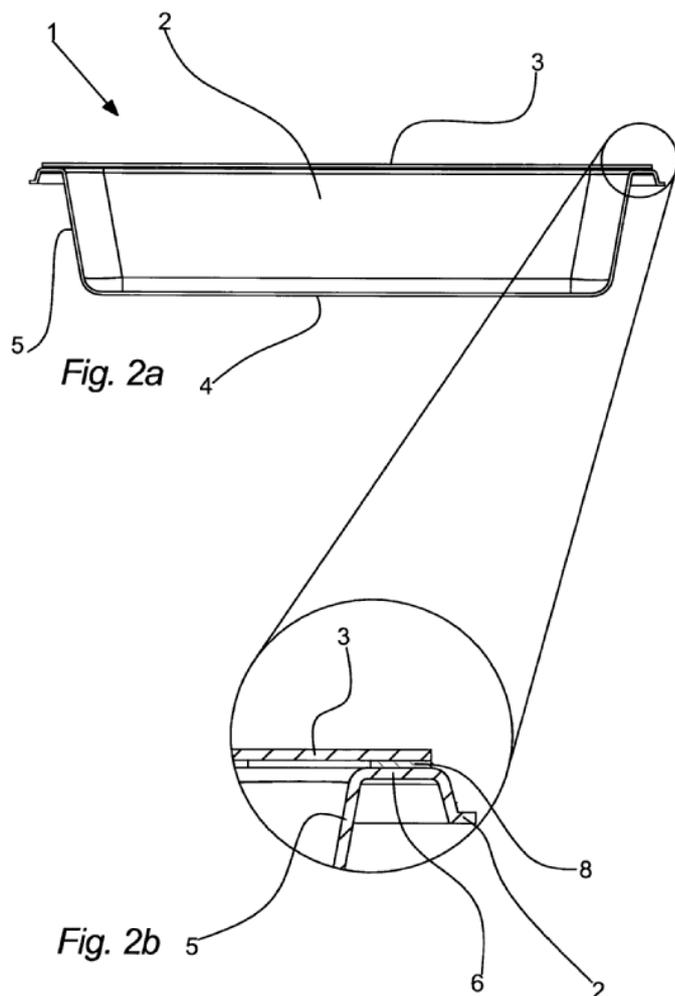
The comptroller shall issue an opinion if requested to do so under subsection (1) above, but shall not do so –
(a) in such circumstances as may be prescribed, or
(b) if for any reason he considers it inappropriate in all the circumstances to do so.

3. Following the request for this opinion the proprietor filed an application to amend the specification of the patent under section 27 of the Patents Act 1977. In view of the application to amend the specification and the fact that at least some of the documents referred to in the request were considered in earlier opinion 24/16 it would be inappropriate to issue an opinion on a question of inventiveness.
4. In their observations the proprietors suggest that the part of the request concerning sufficiency of disclosure is in fact “*a disguised clarity attack*”. The observations go on to suggest that “*this objection should be disregarded*”, since “*clarity is not a ground for revocation under the exhaustive list provided in Section 72*”. I assume by this they mean that the list in section 72(1) includes no item equivalent to the section 14(5)(b) requirement that “*The claims or claims shall ... be clear and concise*”.

5. The matters on which an opinion may be requested are set out in rule 93(6) of the Patents Rules 2007, which includes item (c): “*whether the specification of the patent discloses the invention clearly enough and completely enough for it to be performed by a person skilled in the art*”, wording equivalent to sections 14(3) and 72(1)(c) of the Patents Act 1977. There is no item in this list equivalent to the “*clear and concise*” requirement in section 14(5)(b).
6. It seems to me however that in considering sufficiency one must construe the claims and this will inevitably require consideration of the clarity of wording used. Hence in this case I do not think that the request for an opinion on sufficiency is simply a device to secure an opinion on the clarity of the claims.
7. I will therefore not consider questions of inventive step and I will only consider whether the specification discloses the invention clearly and completely enough for it to be performed by a person skilled in the art.

The patent

8. Entitled Sealed Container for Foodstuffs, the patent was filed on 25 November 2010 and made no claim to an earlier priority date. It was granted with effect from 25 May 2016 and remains in force.
9. According to the specification the invention provides containers for foodstuff that use amorphous polyethylene terephthalate (APET) as the “basis” (sic) material of trays as well as lids or lidding film whilst overcoming problems such as poor sealing of lids or lidding films to the rims of containers, warping of sealing rims or contamination of waste APET. This is achieved by ensuring that each layer of a tray is formed from at least 85% APET and providing a layer of adhesive on an upwardly facing sealing surface of the rim of the tray, the adhesive being provided along the full circumference of the tray.
10. Figures 2a and 2b, below, show an embodiment of the invention in which a container consists of a tray 2, a lid 3 and a layer of adhesive 8 placed around the full circumference of the tray 2 on a flat upwardly facing surface of a sealing rim 6. The tray is thermoformed from a sheet having typically three layers of APET, the outer layers comprising some additional material making the sheet easier to roll off and the stacked trays easier to separate from each other. Crystallisation of the material of the tray is minimised such that it remains essentially amorphous.



11. Claims 1 and 18 are the only independent claims and are directed to apparatus and method aspects of the same invention. They currently read as follows, i.e. I am not taking account of the amendments recently applied for under section 27:

1. A container (1) for foodstuff, said container comprising a tray (2) formed from a sheet of material comprising one or more layers, where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate, said tray comprising a bottom part (4), one or more side walls (5) and a peripheral sealing rim (6) at its top, said sealing rim having a substantially flat upward facing sealing surface (7), wherein, in addition to the material from which the tray is made, the sealing surface is provided with a layer of an adhesive (8) along the full circumference of the tray.

*18. A method of producing a container for foodstuff, said method comprising the steps of:
forming a tray made from a sheet of material comprising one or more layers, where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate, said tray comprising a bottom part, one or more side walls and a peripheral sealing*

rim at its top, said sealing rim having a substantially flat upward facing sealing surface; and providing the sealing surface with a layer of an adhesive along the full circumference of the tray.

Sufficiency

12. The observations from the proprietors take me to the following passage from *Eli Lilly v Human Genome Sciences* [2008] RPC 29 setting out principles to be applied when assessing sufficiency:

"The specification must disclose the invention clearly and completely enough for it to be performed by a person skilled in the art. The key elements of this requirement which bear on the present case are these:

- (i) the first step is to identify the invention and that is to be done by reading and construing the claims;*
- (ii) in the case of a product claim that means making or otherwise obtaining the product;*
- (iii) in the case of a process claim, it means working the process;*
- (iv) sufficiency of the disclosure must be assessed on the basis of the specification as a whole including the description and the claims;*
- (v) the disclosure is aimed at the skilled person who may use his common general knowledge to supplement the information contained in the specification;*
- (vi) the specification must be sufficient to allow the invention to be performed over the whole scope of the claim;*
- (vii) the specification must be sufficient to allow the invention to be so performed without undue burden."*

13. The manual of Patent Practice explains at paragraph 14.60 that:

The purpose of the requirements imposed by s.14(3) and s.72(1)(c) is to prevent a patentee laying claim to products or processes which the teaching of the patent does not enable the skilled addressee to perform (*Zipher Ltd v Markem Systems Ltd* [2009] FSR 1). Thus, all consideration of sufficiency in essence deals with the extent to which the applicant has provided an enabling disclosure for their invention (see also 2.10 and 72.03).

14. I will start by construing the claims of the patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claims, interpret it in the light of the description and drawings as instructed by Section 125(1) and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.

15. Section 125(1) of the Act states that:

For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.

16. The Protocol on the Interpretation of Article 69 of the EPC, which corresponds to section 125(1), states that:

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.

17. In Opinion 24/16 I said that that the claims were clear and required little or no interpretation and this remains the case. In theory the adhesive might be applied elsewhere than the sealing surface, but I could find no support for this in the application and I construed the claims as relating to a tray with a layer of adhesive applied only to its rim. For me the wording “*in addition to the material from which the tray is made*” in claim 1 also precluded the adhesive of the claims forming part of a multi-layer film from which a tray is formed.
18. The latest request highlights the following passage from claim 1 “*where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate*” as implying that “*at least 85 % of amorphous polyethylene terephthalate*” is considered significant.
19. As the observations from the proprietors note, the percentage of APET was not a part of the claims I felt the need to construe in coming to my earlier opinion. I did however consider it in the context of inventive step and the differences between the matter cited and the inventive concept of the claims. In doing so I referred to APET of relatively high purity and in paragraph 26 I stated a belief that “*85% is intended to represent the maximum level of contamination within the APET that is acceptable to the invention*”. I could have perhaps expressed my point better, but I meant that a maximum of 15% of the material referred to in the claims could be other than APET, for example the contamination described at paragraphs 0010 and 0011 or the additional material described at paragraph 0060. This is essentially the same construction of the at least 85% requirement to which the proprietors refer in their observations.
20. The observations from the proprietors state that they agree with my construction from Opinion 24/16 and add some comments on the at least 85% requirement, as noted above.
21. The requester points out the percentage of APET required by the claims is not enlarged upon in the specification as a whole, beyond repeating in paragraphs 0013 and 0046 the at least 85% requirement from the claims. They go on to advance two possible meanings, in effect construing the at least 85% requirement:
1. The layers forming the tray comprise only APET and that the 85% refers to a

percentage purity of APET - whatever that may mean.

2. The layers forming the tray comprise a plurality of constituents, one of which is APET and that the APET in this scenario constitutes 85% of the layer- whatever that may mean.
22. The proprietors observe that purity is not mentioned in their specification. However, there is a reference to a sheet made from pure APET in paragraph 0010 where the problem of reusing skeletal waste is discussed. The specification also makes multiple references to contamination, either to food material contained within a tray contaminating a sealing layer as described for example in paragraphs 0006, 0008 and 0009 or to APET skeletal waste being contaminated by other material used to form the tray as described in paragraphs 0010 and 0011.
23. In my view to take the first option identified by the requester is to mis-read the claim. The relevant part of the claim is "*where the material of each of the layers of the formed tray comprises at least 85 % of amorphous polyethylene terephthalate*". It seems to me that the 85% must refer to the material of each of the layers and not specifically to the APET. This seems to be consistent with the specification as a whole and the discussion of contamination. The claim does not require something along the lines of "*where the material of each of the layers of the formed tray comprises amorphous polyethylene terephthalate having a purity of at least 85 %*".
24. The second option comes closer to my construction of the requirement, but is more prescriptive. I take it that the claims allow the layers to include other than APET, but do not require other constituents to be present. In other words my understanding of the claim is that each layer comprises anywhere between 85% and 100% APET.
25. The request also highlights a passage at paragraph 0061 in the specification where the APET itself is discussed. This states "*Furthermore, it is advantageous to use a modified PET rather than the homopolymer type. Preferably, the modified PET contains between 1.5 % and 2 % (or at least less than 15 %) of one or more suitable comonomers, such as isophthalic acid (IPA), cyclohexanedimethanol (CHDM) or diethylene glycol. Such compositions result in materials generally known as APET.*". It seem to me that the percentages in this discussion are quite distinct from the at least 85% required by claim 1. The passage in 0061 is seeking to further explain the nature of APET that might be used in the invention.
26. As I noted in my earlier opinion, the patent does not discuss the particular benefit in 85% as the threshold in claim 1. However, in terms of sufficiency I do not see that this places any undue burden on the skilled man in performing the invention. I can see no difficulty for the skilled man in ensuring that the material of each layer includes at least 85% APET. Whilst it is true there is little discussion in the specification of how he could achieve this, I feel it is equally true that, armed with his common general knowledge, he could perform the invention without undue burden.

Opinion

27. In my opinion the specification of the patent discloses the invention clearly enough and completely enough for it to be performed by a person skilled in the art.

Karl Whitfield
Examiner

NOTE

This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Office.