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Datasheet for the decision of the Enlarged Board of Appeal of 24 March 2011

Case Number: R 0013/10

Appeal Number: T 0678/08 - 3.2.05

Application Number: 96935122.0

Publication Number: 0858390

IPC: B29C 65/02

Language of the proceedings: EN

Title of invention:
Method for applying articles to a carton surface

Patentee:
ELOPAK SYSTEMS AG

Opponent:
SIG Technology AG

Headword:
-

Relevant legal provisions:
EPC Art. 112a(2)c), 113
EPC R. 106, 107, 109(2)(a), 109(3)

Keyword:
-

Decisions cited:
R 0001/08, R 0022/10

Catchword:
Petition for review clearly unallowable.

Europäisches Patentamt | European Patent Office | Office européen des brevets

Große Beschwerdekammer | Enlarged Board of Appeal | Grande Chambre de recours

Case Number: R 0013/10

D E C I S I O N
of the Enlarged Board of Appeal
of 24 March 2011

Petitioner: (Patent Proprietor)
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Decision under review: **Decision of the Technical Board of Appeal 3.2.05 of the European Patent Office of 29 June 2010.**

Composition of the Board:

Chairman: R. Menapace
Members: J.-P. Seitz
D. H. Rees

Summary of Facts and Submissions

I. European patent No. 0858390 was granted to Elopak Systems AG.

In its decision posted on 25 January 2008 the Opposition Decision of the European Patent Office rejected the opposition filed by SIG Technology AG.

The opponent lodged an appeal against this decision and requested that it be set aside and that the patent in suit be revoked in its entirety.

The patent proprietor respondent requested that the appeal be dismissed.

II. A communication setting out the provisional opinion of the Technical Board of Appeal 3.2.05 was sent to the parties with a letter dated 23 September 2009. Oral proceedings were held on 29 June 2010 at the end of which the decision to revoke the patent was pronounced. The corresponding decision in writing posted on 22 July 2010 was deemed notified on 2 August 2010.

III. With a letter dated 1 September 2010 and received at the EPO on 7 September 2010 the patent proprietor (hereafter petitioner) filed a petition for review of the said decision on the ground under Article 112a(2)c) EPC that a fundamental violation of Article 113 EPC had occurred.

In support of this ground the petitioner put forward that:

"*an immediately obviously erroneous statement going to the root of the invention is made in the Decision by the Appeal Board and, because the serious error by the Board could not have been known by the Petitioners' Representative at the Oral Proceedings, the Petitioner had no opportunity of pointing out the error to the Board at the Oral Proceedings.*"

It was further explained that:

a vital feature of the invention of Claim 1 is that the heat-storing thermoplastic portion (26) of the article (22) is heated to a temperature no higher than the melting point of the thermoplastic of that portion (26). In the paragraph spanning pages 10 and 11 of its Decision, the Appeal Board used document D4 (US-3,498,868) to provide that feature for asserting obviousness given D1. The Board refers to the passages at column 2, line 70 to column 3, line 6 and column 4, lines 2 to 6. Those lines include the statement "The surface temperature of the element is above the fusion temperature of the plastic material so as to quickly heat this circular area 35 above its melting point...", yet the Decision states at lines 5 to 7 of page 11 "thus, there is no suggestion that the material of the article should be heated to a temperature above its melting point".

In its eyes, that that obvious error goes to the root of the invention is clear from the example, line 4 of column 5 onwards of the European Patent (which

immediately follows the Statement of Invention corresponding to Claim 1), stating that "Owing to this aspect of the invention, it is possible... also to avoid the serious risk of distortion of the thermoplastic portion of the article which arises if that portion is heated to higher than the melting point of its thermoplastic."

The petitioner requested that the decision be reviewed in respect of Claim 1 (and, in effect, its appended Claims 2 to 6) and that the petition fee be refunded. In the event that the Enlarged Board of Appeal be minded to dismiss the petition, oral proceedings were requested.

IV. With a letter posted 3 February 2011 the petitioner was summoned to oral proceedings to be held on 24 March 2011. Enclosed with the summons was a communication of the Enlarged Board of Appeal pursuant to Articles 13 and 14(2) of the Rules of Procedure of the Enlarged Board of Appeal.

V. Oral proceedings were held in the absence of the petitioner although duly summoned.

Reasons for the Decision

1. The Enlarged Board of Appeal in its current composition pursuant to Rule 109(2)(a) EPC is empowered to examine the petition for review and to reject it only if clearly inadmissible or unallowable; such decision requires unanimity and under Rule 109(3) EPC is taken on the basis of the petition.

Admissibility

2. It appears to the Enlarged Board of Appeal that the petition was filed within two months of notification of the decision for which review is sought, that the petitioner was adversely affected thereby, that the prescribed fee has been paid in time, and that the petition complies with Rule 107 EPC. It also appears, at least on the petitioner's contention that it first became aware of the alleged violation of its right to be heard upon notification of the decision in writing, that the exception in Rule 106 EPC could apply. Accordingly the petition is not clearly inadmissible.

Allowability

3. The following documents, the relevance of which had already been stressed in the Board of Appeal's communication dated 23 September 2009, are referred to in the decision under review:

D1: US-A-4,507,168

D4: US-A-3,498,868.

The Board of Appeal as to the teaching of Document 4, concluded as follows: "Whilst document D4 refers at column 2, line 70 to column 3, line 6 and at column 4, lines 2 to 6, to temperatures above the melting point of polyethylene, these passages relate to the temperature of the heating element itself and teach that the contact of the element with the plastic should only be of a short duration. Thus, there is no

suggestion that the material of the article should be heated to a temperature above its melting point. Rather, as set out in claim 1, the heat of the article is such that heat of less than the fusion temperature of the film is applied to the film."

This finding indeed corresponds to the line of argumentation followed by the appellant (see decision under review, page 4, lines 5 to 15) and it cannot for this very reason be disputed that the petitioner was given the opportunity to reply to this argument. Therefore in the absence of any reaction from the petitioner, who neglected to attend the oral proceedings held before it, the Enlarged Board of Appeal sees no reason to depart from its provisional opinion set out in its communication that the content of Document D4 has been thoroughly discussed in writing as well as during the oral proceedings held on 29 June 2010 before the Board of Appeal and that the right to be heard of the petitioner in this respect has not been in any way violated.

4. On the other hand the petition relies on the contention that the decision under review contains a contradiction in its reasoning in the form of an "obviously erroneous statement".

It is established case law of the Enlarged Board of Appeal that under the provisions of Article 112a EPC it has no jurisdiction and competence whatsoever to enter into the merits of the case. (See R 1/08 to R 22/10).

Therefore, even if assuming for the sake of argument that the petitioner were right, this could not alter

the fact, that an erroneous statement in the reasons for the decision of a Board of Appeal does not, as a matter of principle, qualify as a ground in the exhaustive list of grounds for review pursuant to Article 112a EPC.

5. Hence the present petition for review is clearly unallowable and must be rejected as such.

Order

For these reasons it is decided that:

The petition is unanimously rejected as clearly unallowable.

The Registrar: The Chairman:

P. Martorana R. Menapace