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**Datasheet for the decision
of 14 January 2009**

Case Number: T 0666/07 - 3.2.07

Application Number: 95938917.2

Publication Number: 0843636

IPC: B65B 9/06

Language of the proceedings: EN

Title of invention:
ZIPPERED FILM AND BAG

Patent Proprietor:
Yeager, James Worth

Opponents:
01) Nordenia Technologies GmbH
02) DMV Marketing + Vertriebs GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 107, 123(2)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Admissibility of the patent proprietor's appeal (yes)"
"Allowable amendments - all requests: (no)"

Decisions cited:
T 0191/93

Catchword:
Points 3.3 and 3.4.



Case Number: T 0666/07 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 14 January 2009

Appellant 01: Yeager, James Worth
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
5 April 2007 concerning maintenance of European
patent No. 0843636 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
E. Dufrasne

Summary of Facts and Submissions

I. Each of the appellants 01, 02 and 03 (patent proprietor, opponent 01 and opponent 02) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent No. 0 843 636 in amended form.

II. The oppositions had been filed against the patent as a whole based on Article 100(a) EPC on the grounds of lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC) and on Article 100(c) EPC on the ground that the subject-matter of the opposed patent extends beyond the content of the application as filed.

The Opposition Division found that the grounds for opposition mentioned in Articles 100(a) and 100(c) EPC did not prejudice the maintenance of the patent as amended.

III. Oral proceedings before the Board took place on 14 January 2009.

(a) Appellant 01 requested that the decision under appeal be set aside and that the patent be maintained as granted or, in the alternative, on the basis of:

- auxiliary request 1, i.e. claims 1 to 10 and 12 to 15 as granted and claim 11 as filed during the oral proceedings;
- auxiliary request 2 filed as auxiliary request 1 with letter dated 21 December 2007, with claim 11 of the auxiliary request 1 filed during

the oral proceedings and claims 12 to 15 as granted;

- auxiliary request 3 filed as auxiliary request 2 with letter dated 21 December 2007, with claim 11 of the auxiliary request 1 filed during the oral proceedings and claim 12 to 15 as granted;
- auxiliary request 4 filed as auxiliary request 3 with letter dated 21 December 2007, with claim 11 of the auxiliary request 1 filed during the oral proceedings and claims 12 to 15 as granted;
- auxiliary request 5 filed during the oral proceedings, with claim 11 of the auxiliary request 1 filed during the oral proceedings;
- auxiliary request 6 filed as auxiliary request 5 with letter dated 23 December 2008, with claim 11 of the auxiliary request 1 filed during the oral proceedings; or
- one of the auxiliary requests 7 to 9 filed during the oral proceedings, with claim 11 of the auxiliary request 1 filed during the oral proceedings.

(b) Appellants 02 and 03 requested that the appeal of the patent proprietor be dismissed as not admissible, that the decision under appeal be set aside and that the European patent No. 0 843 636 be revoked.

IV. Independent claim 1 as granted reads as follows (underlining added by the Board):

"A method for making reclosable bags comprising:
supplying a substantially continuous web of
thermoplastic film material (55) having two parallel

side edges (55a, 55b) by feeding said web in a direction parallel to said side edges; serially connecting a plurality of reclosable fastener assemblies (26), each having two profile strips (28, 30) that interlock with each other, to one side of said web of film material (55) by feeding said fastener assemblies (26) in a direction perpendicular to said two side edges (55a, 55b) at bag length intervals and by providing at least one of said profile strips (28, 30) with one of a continuous arm (38) and a continuous leg (44) and connecting said one of the continuous arm (38) and the continuous leg (44) to one side of said film, wherein said one of said profile strips (28, 30) includes an extruded body (36, 42), with said one of said continuous arm (38) and said continuous leg (44) extending from said extruded body (36, 42) and having a width greater than a width of said extruded body, connecting said one of said profile strips (28, 30) to said one side of said film material (55) by seal means (40, 46) joining at least a portion of said one of said continuous arm (38) and said continuous leg (44) to said one side of said film adjacent a portion of said film that can be opened to gain access to that one of said reclosable fastener assemblies (26), connecting the other of said profile strips (28, 30) to said one side of said film material (55), wherein said one side of said film (55) provides an inside surface of a front wall (16) and a back wall (18) of each of said reclosable bags (10); folding said web material (55) so that said profile strips (28, 30) of each reclosable fastener assembly (26) are maintained in an interlocked position, to form said front wall (16) and said back wall (18) by overlapping said two side edges (55a, 55b); and joining said front wall (16) to said back wall (18)

at bag length intervals to form first and second end seams (20, 22) that are perpendicular to the longitudinal axis of said film material (55) to form a bag (10) therebetween enclosing a single one of said reclosable fastener assemblies (26), and forming a third seam (24) connecting said side edges (55a, 55b) of said film to form said reclosable bag (10) that is sealed shut".

Claim 1 according to each of the auxiliary requests 1 to 7 is based on claim 1 as granted and contains the above underlined expression "said one of said continuous arm (38) and said continuous leg (44) ... having a width greater than a width of said extruded body". Claim 1 according to each of the auxiliary requests 8 and 9 is based on claim 1 as granted and contains the above underlined expression in the form of "~~said one of said~~ continuous arm (38) ~~and said~~ ~~continuous leg (44)~~ ... having a width greater than a width of said extruded body".

V. Appellants 02 and 03 argued as follows:

(a) Admissibility of appellant 01's appeal

In the appeal letter dated 16 May 2007 it is stated that "We herewith file Appeal against the Decision...". Also in the first line of the letter with the grounds of appeal dated 25 July 2007 it is stated that "...we herewith submit the Grounds of Appeal". The use of the personal pronoun "we" results in an unclear situation as to who is actually appealing: the patent proprietor or some other (legal) person(s). Accordingly, it could

have been filed on behalf of a third party, i.e. not even affected by the decision. In such a situation the appeal is inadmissible.

Appellant 03 requested that the auxiliary requests 7 to 9 filed by appellant 01 during the oral proceedings should not be admitted into the proceedings as being late filed and prima facie not allowable.

- (b) *Amendments, Article 123(2) EPC - Claim 1 according to all requests of appellant 01*

The original figures 2 and 3 are schematical drawings not allowing the isolation from the other features shown in these figures of a specific relationship, as claimed, existing only between the width of an arm or leg on the one hand and of an extruded body of the profile strip on the other. This fact is underlined by figure 7C showing a profile strip with no arm or leg at all. Furthermore, no advantageous or special technical effect achieved with the claimed width relationship was disclosed in or derivable from the originally filed application.

On the contrary, while original figure 3 shows the left profile strip having a leg with a width greater than the width of the corresponding extruded body, original figure 2 shows the same profile strip having a leg with a width approximately equal to the width of the corresponding extruded body.

Therefore, no clear width relationship is derivable from the figures of the application as originally filed.

VI. Appellant 01 argued as follows:

(a) *Admissibility of its appeal*

Just underneath the heading of the first page of the appeal letter dated 16 May 2007 and of the letter with the grounds of appeal dated 25 July 2007, the patent proprietor's name "Yeager, James Worth" and the publication number of the patent in suit "0843636" are given. It is therefore clear that the personal pronoun "we" refers to the patent attorneys of "FORRESTER & BOEMERT" filing the appeal and the corresponding appeal grounds on behalf of the proprietor of the patent in suit. Therefore, said appeal filed in the name of a party negatively affected by the impugned decision is admissible.

(b) *Amendments, Article 123(2) EPC - Claim 1 according to all requests of appellant 01*

Figures 3, 5, 6B and 7C show an arm and/or a leg having a width greater than the width of the extruded body of the profile strip, whereby the width is measured "along the longitudinal direction of the film". In claim 44 of the application as originally filed, which corresponds to the embodiment according to figure 7C, it is clearly expressed the fact that the arm is intended to enable the profile strip to be

attached to the flexible film, without interfering with the entry of the protuberance of the profile strip into the groove of the other profile strip, i.e. without interfering with the actual closure process. This, however, is only possible if the arm, which is very thin in comparison with the thickness of the profile strip, is fairly wide relative to the profile strip itself, as can be gathered from Fig. 7C. The skilled person derives therefore from the originally filed application that the arm has a width greater than the width of the corresponding extruded body.

Reasons for the decision

1. *Admissibility of appellant 01's appeal*

Just underneath the heading of the first page of the appeal letter dated 16 May 2007 and of the letter disclosing the grounds of appeal dated 25 July 2007, the patent proprietor's name "Yeager, James Worth" and the publication number of the patent in suit "0843636" are given. It is therefore clear that the personal pronoun "we" refers to the patent attorneys of "FORRESTER & BOEMERT" filing an appeal and the corresponding appeal grounds on behalf of the proprietor of the patent in suit. Therefore, said appeal being lodged on behalf of the party adversely affected by the rejection of its main request is admissible.

The requirements of Article 107 EPC, first sentence are therefore met.

2. *Procedural matters*

Appellant 03 requested that the auxiliary requests 7 to 9 filed by appellant 01 during the oral proceedings should not be admitted into the proceedings as being late filed and prima facie not allowable. Due to the fact that the Board considered claim 1 of all requests of appellant 01 as violating the requirements of Article 123(2) EPC, see point 3 below, the Board sees no need for deciding on said issue separately.

3. *Amendments, Article 123(2) EPC - Claim 1 according to all requests of appellant 01*

3.1 The Board considers that it is clear to the skilled reader from the originally filed application that only a linguistic but no technical distinction exists between the terms "arm" and "leg" used in the patent in suit.

The Board, following for the sake of argument appellant 01's definition, considers further that the term "width" in claim 1 of all the requests defines the extension of a part "measured along the longitudinal direction of the film", even though said definition is not given in the originally filed application.

Claim 1 according to all requests of appellant 01 involves accordingly the feature that the arm has a width which is greater than the width of the corresponding extruded body of the profile strip, both measured in the longitudinal direction of the film.

3.2 This feature has not been mentioned *expressis verbis* in the description, nor in the claims of the originally filed application.

This was not disputed by appellant 01. Appellant 01 relies entirely on what it contends that the figures show, and on the wording of original claim 44.

3.3 The Board follows, again for the sake of argument, appellant 01's contention that figures 3, 5, 6B and also figure 7C of the application as originally filed, when considered in the light of original claim 44 convey the teaching that the arm is intended to enable the corresponding profile strip to be attached to the flexible film, without interfering with the protuberance and the groove connecting the profile strips with each other.

However, a closer scrutiny of said figures in the light of that teaching will just as well reveal to the skilled person the following technically meaningful information concerning the width of the arm connecting the extruded body to the flexible film:

Figures 3 and 5: the upwardly directed arm needs to have a width which is considerably greater than the sum of the thicknesses of both extruded bodies shown therein, whereas the width of the downwardly directed arm may be arbitrarily selected, as it cannot interfere with the closing of the two profile strips.

Figure 6B: the width of the upwardly directed arm depends on the curvature/inclination of the bag's wall above the profile, whereas the downwardly directed arm needs to have a width which is again considerably

greater than the sum of the thicknesses of both extruded bodies shown therein;

Figure 7C: the upwardly directed arm needs to have a width which is considerably greater than the thickness of the extruded body of the profile strip 1422 shown therein.

In all figures the thickness of the arm should be sufficiently small with respect to the width to allow the profile strips to bend easily when being closed.

- 3.4 This means in summary that even considering that these figures disclose a width of the arm as presently claimed, the skilled person would also derive from the original figures 3, 5, 6B and 7C when considered in the light of the information in claim 44 that the width of the arm connecting the corresponding extruded body to the flexible film has to be chosen in a specific relationship to the **thickness** of one or even both extruded body(ies) used and to the **thickness** of the arm itself.

This means that the width relationship introduced into claim 1 of all requests has been singled out from amongst equally feasible other features, which selection is an arbitrary one as there is no basis for it in the originally filed application, see in this respect T 191/93 (not published in OJ EPO), point 2.1 of the reasons.

- 3.5 In this respect, it is in any case to be noted that, as was pointed out by appellants 02 and 03, the reclosable bag shown in figure 2, which according to the brief description of the drawings (page 7, lines 5-9) is for

the same bag as the one shown in figure 3, has a fastener assembly with a downwardly extending arm with a width almost equal to the width of the corresponding extruded body. This means for the Board that the drawings are in fact schematic, involving expressions of the draughtsman's artistic freedom, and not necessarily leading to specific technical teachings as presently claimed with the width relationship.

- 3.6 As a result of the above the application, with claim 1 according to all requests of appellant 01, has been amended in violation of the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

1. The appeal of the patent proprietor is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders