

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 5 October 2010**

Case Number: T 1034/10 - 3.2.07

Application Number: 05739572.5

Publication Number: 1768908

IPC: B65D 5/06

Language of the proceedings: EN

Title of invention:

Flat folded waterproof cartons with folds and a fastener with hooks and more accessories

Applicant:

Driessen, Maarten Willem

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 84, 109(1), 111(1)

Keyword:

"Interlocutory revision: should have been granted"

Decisions cited:

T 0139/87, T 0219/93

Catchword:

-



Case Number: T 1034/10 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 5 October 2010

Appellant: Driessen, Maarten Willem
Orteliusstraat 135-1
NL-1057 AW Amsterdam (NL)

Representative: -

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 23 December 2009
refusing European application No. 05739572.5
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. European patent application No. 05 739 572.5, based on the international application PCT/NL2005/000309 (published as WO-A-2005/102848) filed on 25 April 2005, was refused by decision of the Examining Division dated 23 December 2009.

- II. In its decision the Examining Division found that amended claim 1 filed with telefax on 11 August 2009 did not fulfil the requirements of Articles 84 and 123(2) EPC. It pointed out that amended claim 1 still comprised unallowable references to figures and thus remained unclear. It argued further that a basis for the new wording of present claim 1 (which completely differed from claim 1 as originally filed) could not be identified in the original description, nor did the applicant provide any sufficient information in this respect. Additionally, newly introduced figures 60 and 61 which had already been objected to under Article 123(2) EPC had been maintained in the application.

- III. The applicant (appellant) filed with telefax an appeal against this decision on 22 February 2010, paying the fee for appeal and submitting a statement of grounds of appeal in good time. Together with the statement of grounds the appellant filed a new set of claims replacing all prior versions, and for the description and drawings reverted back to those originally filed. In the statement of grounds for appeal the appellant requested that a European patent be granted on the basis of the above mentioned documents and pointed out

which parts of the originally filed application served as basis for the new claims.

Reasons for the decision

1. The application having been filed on 25 April 2005 the provisions of Articles 84, 109(1) and 111(1) EPC 1973 as well as Article 123(2) EPC 2000 apply to the present case, in view of Article 7(1) second sentence of the Act revising the European Patent Convention of 29 November 2000 (see Special Edition No. 1, OJ EPO 2007, 196), as well as Article 1.1 of the transitional provisions as established by the Administrative Council in this respect.
2. According to Article 109(1) EPC 1973 "[i]f the department whose decision is contested considers the appeal to be admissible and well founded, it shall rectify its decision".
 - 2.1 The appeal is admissible.
 - 2.2 For the question whether the appeal is well founded, the following applies:
 - 2.2.1 In the impugned decision the Examining Division objected to the claims containing references to the figures and for that reason were unclear.

The references to the figures are no longer present in any of the claims.

2.2.2 The objection against the absence of any identification in the originally filed description of a basis for the wording of claim 1 has been addressed in detailed form on page 2, lines 15 to 37 of the statement of grounds of appeal.

2.2.3 The appellant requests in its grounds of appeal that a European patent be granted a.o. on the basis of the originally filed figures, i.e. without new figures 60 and 61. The respective objection of the Examining Division is thus rendered moot.

3. The appellant has therefore preformed the acts to the absence of which the Examining Division had objected and has made amendments which clearly met the objections on which the refusal of the application was based.

In such a case - for determining whether the appeal is "well founded" for the purposes of Article 109(1) EPC 1973 - the Examining Division ought to have applied the practice indicated in the Guidelines for Examination in the European Patent Office, E-XI, 7.1(iii), in respect of amendments overcoming the objections of the decision under appeal, which make appropriate reference to T 139/87 (OJ EPO 1990, 68) as well as T 219/93 (not published in OJ EPO). It should thus have rectified its decision and continued the examination proceedings

3.1 Under these circumstances the Board considers that in accordance with Article 111(1) EPC 1973 it should remit the case to the Examining Division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders