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Datasheet for the decision of 23 January 2014

Case Number: T 0127/11 - 3.2.07

Application Number: 06005249.5

Publication Number: 1707498

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Language of the proceedings: EN

Title of invention:
Process and system for manufacturing a vessel made of foamed material for packaging foodstuff

Patent Proprietor:
MAGIC PACK S.R.L.

Opponents:
NESPAK S.p.A
Silver-Plastics GmbH & Co. KG

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - allowable (no)

Decisions cited:
T 1067/97

Catchword:

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Case Number: T 0127/11 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 23 January 2014

Appellant: (Patent Proprietor)	MAGIC PACK S.R.L. Via del Lavoro 1 26030 Gadesco Pieve Delmona (CR) (IT)
Representative:	Long, Giorgio Jacobacci & Partners S.p.A. Via Senato 8 20121 Milano (IT)
Respondent: (Opponent 1)	NESPAK S.p.A Via Damano 1 Massa Lombarda (RA) (IT)
Representative:	Raimondi, Margherita Dott. Ing. Prof. Alfredo Raimondi S.r.l., Piazzale Cadorna, 15 20123 Milano (IT)
Respondent: (Opponent 2)	Silver-Plastics GmbH & Co. KG Godesberger Strasse 9 53842 Troisdorf (DE)
Representative:	Wagner, Matthias Müller-Gerbes Wagner Albiger Patentanwälte Friedrich-Breuer-Strasse 72-78 53225 Bonn (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 10 December 2010 revoking European patent No. 1707498 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 707 498.

II. Two oppositions had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty, Article 54 EPC and lack of inventive step, Article 56 EPC), and on Article 100(b) EPC (insufficient disclosure; Article 83 EPC).

III. The Opposition Division found that the ground for opposition under Article 100(b) EPC holds against the claims 1 of the main request and the first auxiliary request, and that the subject-matters of the claims 1 of the second and third auxiliary requests do not involve an inventive step, all requests having been filed on 14 October 2010.

IV. The appellant requested in its statement of grounds of appeal that the impugned decision be set aside and the patent maintained according to the main request or one of the first, second or third auxiliary requests, all filed with that statement and being identical with those refused by the Opposition Division.

V. The respondents I and II (opponents I and II) requested the dismissal of the appeal.

VI. With its communication dated 19 November 2013 the Board summoned the parties to oral proceedings scheduled for 7 February 2014. In the annex to the summons the Board noted *inter alia* that it had to be discussed whether the introduction of features of specific parts of the cooling system into the claims 2 of all requests, said

specific parts being extracted in isolated form from the set of features disclosed in combination for the cooling system as originally defined (see page 11, line 8 to page 13, line 8 of the original application and figure 5), violates the requirements of Article 123(2) EPC, see point 1.2 of the annex.

VII. With the faxes of 9 December 2013 and 10 January 2014 the Board was informed that the appellant and respondent I did not intend to attend the scheduled oral proceedings; respondent II communicated its intention to attend with fax of 9 December 2013.

VIII. Under these circumstances the Board considered that the present decision could be arrived at without holding the scheduled oral proceedings and cancelled them.

IX. The independent claims 2 of the main request and the first auxiliary request read as follows (amendments over claim 2 as granted are in bold or struck through):

"System for manufacturing a vessel (1) for packaging foodstuff formed of a foil made of composite single-layer foamed material (1), said foil (10) being made of:
- a lower supporting part (5) made of closed cell foam polystyrene:
- an upper part (2) made of closed cell foam polystyrene, aimed to get in contact with a foodstuff contained in said vessel (1); and
- an absorbing layer (4) having an open cell structure, said absorbing layer being placed between said lower part (5) and said upper part (2);
- said upper part (2) being equipped with a plurality of holes (3) adapted to allow a liquid emitted from said foodstuff to penetrate into said surface layer (2)

and to be absorbed by said absorbing layer (4); said system comprising:
a) extruding means (20) of a band of material for the foil (10);
b) forming means (30) of the band of material for the foil (10);
c) cutting means (40) of the band of material for the foil (10);
d) possible dragging means (45) for the foil (10);
e) drilling means (50) of the surface layer (2) of the band of material for the foil (10);
f) winding means (60) of the foil (10); and
g) drawing means adapted to thermo-form the vessel (1) from the foil (10)
~~characterized in that~~ **wherein** said cutting means (40) for making a band of material for said upper foil (2) comprise a calibrator (74) with internal forced air cooling equipped with a cooling air ring and at least two counter-facing blades placed on sides of said calibrator (74), **characterized in that said cooling air ring (66) for internal forced air cooling is supplied by a compressor (90), and in that the system comprises a first external cooling ring (64') supplied by the compressor (90) with a flow control valve (68) and related manometer, and a second external air cooling ring (64") supplied by a flow generating fan (70**)".

The claims 2 according to the second and third auxiliary requests differ from the claims 2 of the main and the first auxiliary request in that the expression "upper foil (2)" has been replaced by the expression "foil (10)".

X. The appellant argued in its grounds of appeal that support for the additional features introduced into claims 2 of all requests can be found on page 12, lines

6 to 20 of the application as originally filed and in figure 5.

Reasons for the Decision

1. Claims 2 of all requests - Amendments, Article 123(2) EPC

1.1 The claims 2 of all requests have the following additional features over claim 2 as granted in common, namely that
"said cooling air ring (66) for internal forced air cooling is supplied by a compressor (90), and in that the system comprises a first external cooling ring (64') supplied by the compressor (90) with a flow control valve (68) and related manometer, and a second external air cooling ring (64") supplied by a flow generating fan (70)".

1.2 The appellant referred to figure 5 showing "*the part of the internal cooling system to the calibrator responsible for forming in the layer of the foil of the inventive vessel*", see last complete paragraph of page 7 of the originally filed application, and to a corresponding description part of the application as filed, page 12, lines 6 to 20, as together forming the basis for the introduction of the above-mentioned additional features into each of the claims 2.

1.3 The Board notes that the **complete** (internal and external) cooling system according to the single specific embodiment of the manufacturing system is disclosed in the application as originally filed by what is shown in figure 5 and what is described on page 11, line 8 to page 13, line 8. Said cooling system comprises *inter alia* the two external air cooling air

rings 64’ and 64’’, the internal cooling air ring 66, a cooling air pressure control ring (*sic*) 68, and a fan 70 for the forced cooling air flow for the cooling air ring 64’’.

Furthermore, the claimed calibrator 74 operating with the internal forced air cooling has a cylindrical wall, so that the foamed material coming out of the extruder head 62 expands in a tubular form; the calibrator is further internally equipped with a pipe 76, which allows aligning the calibrator with the extruder head 62 and the transport of cooling air to the internal cooling ring 66. This pipe is provided with a suitable control 91. Pipes 78, 80 are further provided in the internal space of the calibrator 74, for letting said air flow out of the calibrator. Said pipes are provided with fine-regulating valves 82, 83 for the outlet air.

This specific combination of features allows the conveying of “*great amounts of cold air which are able to form the closed cell surface layer, such air having to go out of suitable openings in the calibrator 74*”, see page 13, lines 1 to 8.

From this passage it is clear that the pipe 76 with control 91, and the pipes 78, 80 with the outlet air fine-regulating valves 82, 83 provide a **counter-pressure** in the area between the calibrator 74 and the extruder head 62 which allows the extruded foamed material to build its tubular form around the outer cylindrical surface of the calibrator 74. By “suitably adjusting the amount of air” via control 91, “the amount of closed surface cells can be partly determined and therefore the surface layer 2 thickness”.

1.4 According to the established case law of the Boards of Appeal, if a claim is restricted by amendment to features exclusively disclosed in a preferred embodiment, it is not necessarily admissible under Article 123(2) EPC to extract such features in isolated form from the set of features disclosed in combination for that embodiment. Such a type of amendment would only be justified in the absence of any clearly recognisable functional or structural relationship among said features, see e.g. T 1067/97 (not published in OJ EPO), point 2.1.3.

1.5 In the present case, however, although the aforementioned features introduced into the claims 2 according to all requests define some additional specific structural features of the cooling system, at the same time they leave out other functionally related structural features, for example the pipes 76, 78, 80, the control 91 for pipe 76, and the outlet air fine-regulating valves 82, 83 for the pipes 76, 78. These features are indispensable for regulating, together with the additional features introduced into claims 2, the influx, the outflow and the pressure of the internal cooling air within the calibrator 74. They are thus indispensable for enabling the building up of a sufficient internal cooling air pressure within the area between the calibrator 74 and the extruder head 62, allowing thereby the extruded foamed material to maintain its tubular form around the outer cylindrical surface of the calibrator 74. Via the control 91 the amount of air is determined, which has a direct influence on the forming of the closed cell surface layer. Both are essential features of the invention.

1.6 The person skilled in the art, reading the information in page 11, line 8 to page 13, line 8 of the

application as originally filed in combination with figure 5, would consider

a) the pipes 76, 78 and 80;

b) the control 91; and

c) the outlet air fine-regulating valves 82, 83,

as being indispensably connected to the mentioned features introduced into the claims 2 for achieving a functioning cooling system according to the present invention.

1.7 Therefore, since the aforementioned additional features introduced into the claims 2 of all requests result from the extraction of only some features from the specific combination of features of the single embodiment in the application as originally filed, omitting their structurally and functionally related features mentioned under point 1.6 above, they bring about an inadmissible intermediate generalisation. Since the appellant did not refer to any other parts of the application as originally filed that could support these amendments, nor have such parts been identified by the Board, the claims 2 of all requests do not meet the requirements of Article 123(2) EPC.
None of the requests under consideration can therefore be allowed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall H. Meinders

Decision electronically authenticated