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**Datasheet for the decision
of 1 December 2015**

Case Number: T 0999/12 - 3.3.09

Application Number: 05779224.4

Publication Number: 1817165

IPC: B32B27/32, B32B3/30

Language of the proceedings: EN

Title of invention:

MULTILAYER LAMINATED FILM FOR PACKAGES

Patent Proprietor:

Alcan Packaging Italia S.r.l.

Opponents:

Amcors Flexibles Transpac N.V. (opposition withdrawn by letter dated 11 February 2010)
Huhtamaki Flexible Packaging Germany GmbH & Co. KG
Mondi Halle GmbH

Headword:

Relevant legal provisions:

EPC Art. 54

Keyword:

Decisions cited:

G 0003/14

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0999/12 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 1 December 2015

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 22 February
2012 revoking European patent No. 1817165
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	N. Perakis
	F. Blumer

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division to revoke European patent No. 1 817 165. The patent was granted with 15 claims. Claim 1 reads as follows:

"1. A multilayer laminated film for packages, constituted by a first layer (11, 111, 211, 311, 411, 511, 611, 711) made of plastic material and by at least one second layer (12, 112, 212, 312, 412, 512, 612, 712, 213, 313, 413, 513, 613, 713, 614, 714) made of material chosen among plastic material, metallic material, paper-like material or equivalent materials, each layer being coupled to the adjacent layer by means of an intercalated layer (15) of adhesive material, said multilayer laminated film (10, 110, 210, 310, 410, 510, 610, 710) being characterized in that it has, on at least one face (16, 216, 416, 616, 117, 317, 517, 717) of the more rigid layer of plastic material (11, 111, 211, 311, 412, 512, 613, 713), a plurality of continuous, parallel, side-by-side incisions (18, 18a, 18b, 18c, 18d, 18e, 118, 218, 318, 418, 518, 618, 718), which are suitable to facilitate a reduction of the breaking load at right angles to the direction of the incisions (18, 18a, 18b, 18c, 18d, 18e, 118, 218, 318, 418, 518, 618, 718), said incisions (18, 18a, 18b, 18c, 18d, 18e, 118, 218, 318, 418, 518, 618, 718) affecting partially the thickness of said more rigid layer and being obtained by removing material".

II. Notices of opposition were filed by

- opponent 1 (Amcor Flexibles Transpac NV)
- opponent 2 (now Huhtamaki Flexible Packaging Germany GmbH & Co KG)

- opponent 3 (now Mondi Halle GmbH)

requesting revocation of the patent in its entirety on the grounds of Article 100(a) EPC (lack of novelty and inventive step) and Article 100(b) EPC.

The following documents were filed among others during the proceedings before the opposition division:

D1: EP 0 345 930 B1; and

D4: US 4 903 841.

III. On 11 February 2010, opponent 1 withdrew its opposition and ceased being a party to the proceedings.

IV. In its decision, the opposition division acknowledged novelty over *inter alia* D1 and D4, but revoked the patent because the subject-matter of claim 1 of the main request and auxiliary request 1 lacked inventive step.

Claim 1 of the main request corresponds to claim 1 as granted, with the further limitation that the incisions are obtained by "mechanically" removing material (combination of claims 1 and 14 as granted).

The auxiliary request was not pursued in the appeal proceedings and is thus not relevant for this decision.

Regarding the novelty of claim 1 of the main request over D4, the opposition division held in point 8.2.3 of the appealed decision that knurling the polypropylene layer with a roller having a plurality of circumferential extending projections as used in D4 would not necessarily remove material from its surface,

because knurling simply cut the layer material without any removal.

- V. On 12 April 2012, the patent proprietor (in the following the appellant) filed an appeal against the decision of the opposition division. The statement setting out the grounds of appeal included additional experimental data (Annexes 1-4) in order to support the appellant's argument that the subject-matter of claim 1 of the main request involved an inventive step.

The appellant requested that the decision of the opposition division be set aside and that the patent be maintained on the basis of the claims of the main request before the opposition division (sole request).

Furthermore, the appellant asserted that the decision of the opposition division was also based on grounds on which it had not had an opportunity to present its comments, contrary to Article 113(1) EPC (in relation to the redefinition of the technical problem for assessing inventive step).

- VI. By letter of 8 November 2012, opponent 2 (in the following respondent 2) filed observations on the appeal and requested that the appeal be dismissed.
- VII. By letter of 22 January 2013, opponent 3 (in the following respondent 3) filed observations on the appeal and requested that the appeal be dismissed.
- VIII. By letter of 25 September 2013, the appellant replied to the observations of the respondents.
- IX. In a communication dated 2 October 2014, the board expressed its preliminary non-binding opinion regarding

- the outstanding issues of sufficiency, novelty and inventive step.
- X. By letter of 20 November 2014, the appellant commented on the preliminary opinion of the board and submitted additional technical evidence (Annex 5, irrelevant for this decision).
- XI. On 27 January 2015, first oral proceedings were held before the board. During the discussion of sufficiency of disclosure in relation to the features:
(a) "the more rigid layer of plastic material" and
(b) "being obtained by mechanically removing material"
the question arose whether the objection was essentially one of clarity and thus whether the proceedings should be interrupted pending the decision of the Enlarged Board of Appeal in G 3/14. It was agreed to interrupt the proceedings.
- XII. The decision of the Enlarged Board of Appeal G 3/14 was issued on 24 March 2015 and on 21 April 2015 the parties were summoned to second oral proceedings to be held on 1 December 2015.
- XIII. By letter of 30 October 2015, respondent 3 submitted additional arguments regarding sufficiency of disclosure.
- XIV. Second oral proceedings before the board were held on 1 December 2015. The issues discussed were sufficiency of disclosure and novelty of claim 1 of the main (sole) request of the appellant. The board decided that the invention underlying claim 1 was sufficiently disclosed, but that the subject-matter of claim 1 lacked novelty in view of D4.

XV. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

- The subject-matter of claim 1 of the main request was also novel in view of D4, since it did not disclose (i) the formation of continuous incisions, (ii) that the incisions affected partially the thickness of the more rigid layer, and (iii) that the incisions were obtained by mechanically removing material.
- D4 did not disclose that the incisions were drawn from one side of the layer to the other. In fact, D4 did not disclose anything at all about what the incision looked like. Continuous incisions were, however, not possible, since the incisions penetrated through the entire thickness of the more rigid layer and cut it in separate sections which could not afterwards be laminated on the adjacent layer (column 3, lines 34-37).
- D4 did not disclose that the incisions only partially affected the thickness of the more rigid layer 15. On the contrary, it disclosed that it affected the entire thickness of this layer (figure 3). Layer 14 although made of the same material as layer 15 it was made separately and had an external surface in contact with the external surface of layer 15.
- D4 disclosed that the incisions were made by knurling the more rigid layer with a roller having a plurality of circumferentially extending projections. This was not understood to mean that

the incisions were obtained by removing material from the more rigid layer.

XVI. The relevant arguments put forward by the respondents in their written submissions and during the oral proceedings may be summarised as follows:

- The subject-matter of claim 1 lacked novelty in view of D4. Regarding the alleged differences referred to by the appellant, they were all disclosed in D4.
- The incisions of D4 were continuous, as could be seen from the industrial drawing in figure 3. Furthermore, the term "continuous incisions" was not defined in the patent, and should be understood simply as the opposite to the "perforated incisions" disclosed in D4 (column 3, lines 32-33). D4 used the equivalent term "perforated score lines".
- The incisions of D4 only partially affected the thickness of the more rigid polypropylene layer, which was explicitly disclosed to consist of layers 14 and 15 (column 3, lines 37-40). Furthermore, it clearly and unambiguously derived from D4 that, when the incisions were continuous, they only partially affected the layer thickness, contrary to perforated incisions, which affected the whole thickness of layer 15 and necessitated the additional layer 14 in order to protect the aluminum foil from corrosion (column 4, lines 22-30).
- The mechanically obtained incisions (column 3, lines 28-29) did in fact remove the layer

material. The argument of the appellant was based on an incorrect interpretation of the feature used in the claimed subject-matter, which did not require removal of the material from the layer. The skilled reader of D4 would have understood that the formation of incisions in the polypropylene layer (15) by knurling with the specified roller (column 3, lines 30-32) did in fact remove the material by displacing it towards the sides of the incisions.

XVII. The appellant requested that the decision of the opposition division be set aside and that the patent be maintained on the basis of claims 1-14 of the main request.

XVIII. The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. Sufficiency of disclosure

At the second oral proceedings, the board decided that the invention underlying claim 1 of the main (sole) request was sufficiently disclosed. Since, however, the main request was not allowable for lack of novelty (see below), there is no need to elaborate this issue any further.

2. Novelty of claim 1

2.1 The respondents contested the novelty of the subject-matter of claim 1 *inter alia* on the basis of D4.

D4 relates to a pouch formed of a laminate sheet (film) for containing therein a product such as retort food. In particular, D4 discloses:

A multilayer laminated film (figure 3; column 3, line 9) for making the pouch. The film is thus suitable for packaging and comprises:

- a polypropylene layer having a total thickness of 65 μm , consisting of a first cast polypropylene film (14) having a thickness of 15 μm and a second cast polypropylene film (15) having a thickness of 50 μm (figure 3; column 3, lines 13-16 and 37-40); and
- a polyester film layer (10) having a thickness of 12 μm (figure 3; column 3, line 10);
- including an adhesive layer (11), an aluminium foil (12) and an adhesive layer (13) between the polyester film (10) and the first cast polypropylene film (14) of the propylene layer (figure 3; column 3, lines 11-13);
- a plurality of scored lines (9a), ie incisions, forming a surface roughened portion (figure 3; column 3, lines 25-28), which:
 - are formed on the surface of the second cast polypropylene film layer (15) (figure 3; column 3, lines 18-20);
 - are spaced and parallel (ie side by side) (figure 3; column 3, lines 25-32; claim 2);

- are suitable for facilitating a reduction of the breaking load at right angles to the direction of the incisions since the pouch can be torn along the surface roughened zone from one side to the other of the laminate structure (column 2, lines 24-28; column 4, lines 7-12);
- affect partially the thickness of the polypropylene layer, since they only penetrate the polyolefin sub-layer (15) (figure 3; column 3, lines 34-35 and 39-40);
- are formed mechanically (column 3, lines 28-29), for example by subjecting the cast propylene film layer (15) to knurling by a roller formed with a plurality of circumferentially extending projections (column 3, lines 29-31).

As pointed out by the respondents, the polypropylene layer having a total thickness of 65 μm corresponds to the more rigid layer of plastic material of claim 1, since the polyester film layer (10) of D4 with a thickness of only 12 μm would be less rigid. This was not contested by the appellant.

2.2 Nevertheless, the appellant saw three differences between the multilayer laminated film of claim 1 and the one disclosed in D4, namely

- the incisions (9a) in D4 were not continuous,
- the incisions (9a) did not partially affect the propylene layer, since they penetrated the polypropylene layer (15) completely,

- no material was removed when the incisions in D4 were formed.

2.3 However, the board disagrees with the appellant for the following reasons:

2.3.1 Although D4 does not explicitly disclose that the incisions are continuous, it makes the following disclosure in column 3, lines 32-33:

"Alternatively, perforated score line(s) is also available to provide the surface roughened portion".

This alternative is mentioned immediately after the passage describing the formation of scored lines (9a) by subjecting the cast polypropylene film layer (15) to knurling by a roller formed with a plurality of circumferentially extending projections. The only technically meaningful alternative to perforated (ie discontinuous) score lines is in fact to use continuous score lines. Thus, the skilled reader would understand from the description of the two alternatives in D4 that the treatment with the knurling roller relates to the formation of continuous score lines in polypropylene layer (15).

In this context, the board accepts that the meaning of continuous in the context of D4 is rather broad. However, the patent in suit, let alone claim 1, does not provide any definition of this term which could be different from that derived from D4, in particular that the term "continuous" relates to incisions drawn from one side of the polyolefin layer to the other. Thus this term cannot distinguish the subject-matter of claim 1 from the disclosure of D4.

2.3.2 D4 also discloses that the incisions only partially affect the thickness of the polypropylene layer. As mentioned above, D4 explicitly discloses that **the** polypropylene layer is formed from a first cast polypropylene film (14) having a thickness of 15 μm and a second cast polypropylene film (15) having a thickness of 50 μm , and that "the polypropylene layer thus a total thickness of 65 microns" (column 3, lines 37-38). The incisions are, however only made in the polypropylene (sub)layer (15). Thus, even in the worst-case scenario, in which the incisions penetrated the whole thickness of the layer (15), the second cast polypropylene film (14) would not be affected. Consequently, the (total) polypropylene layer in figure 3 of D4 is only partially affected as required by claim 1.

In this context, the appellant argued that claim 1 referred to "a more rigid layer", whereas D4 described two layers of polypropylene which should be viewed separately. According to the appellant, only the second cast polypropylene film (15) corresponded to the more rigid layer of claim 1. The score lines penetrated the film (15) completely.

However, this argument is not convincing, for the following reasons:

First of all, as mentioned above, D4 explicitly states that polypropylene films (14) and (15) form **the** polypropylene layer. Such an assembly of two polypropylene films forming a layer is not excluded from claim 1. Thus, the appellant's argument is flawed from the beginning.

But even if it were to be accepted, in favour of the

appellant, that only the polypropylene film (15) corresponds to the more rigid layer of plastic layer of claim 1, D4 does not disclose that knurling leads to scored lines which penetrate the film (15). The perforation of the film (15) is only explicitly disclosed in the context of the "perforation" alternative, but not for knurling, which represents the "continuous" alternative (column 4, lines 22-30). The respondents also pointed out that a skilled person would not consider penetrating the film (15) for the "continuous" alternative (ie knurling) in view of the preparation of the polypropylene layer from films (14) and (15) as disclosed in D4.

In view of the above, the subject-matter of claim 1 does not differ from the disclosure of D4 with respect to the degree of penetration of the incisions into the more rigid layer.

2.3.3 D4 discloses that the incisions are obtained by subjecting the polypropylene film (15) to knurling by a roller (column 3, lines 29-32). The question is whether this disclosure equates to "mechanically removing material" as required by claim 1. It was common ground that knurling is a mechanical process. However, the appellant argued that knurling did not remove material in the sense that material was cut out from the film (15). The board agrees with the respondents that the term "removing material" is rather broad and encompasses the formation of incisions by displacing layer material to the sides (ie removing layer material from its original place), a process which actually occurs during knurling. The board sees no reason to interpret the term "removing material" in the rather narrow sense advocated by the appellant. Hence, D4 also discloses the feature "removing material" in the

context of the embodiment of figure 3 and the corresponding passages in the description.

3. In view of the above, the subject-matter of claim 1 lacks novelty in view of D4, with the consequence that the main request (sole request) of the appellant is not allowable.

4. In view of the finding on novelty, the issue of the alleged procedural violation during the assessment of inventive step before the opposition division (and any potential request associated therewith) is no longer pertinent. This was accepted by the appellant during the second oral proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated