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Datasheet for the decision of 12 January 2017

Case Number: T 0270/15 - 3.3.09

Application Number: 06706230.7

Publication Number: 1989044

IPC: B32B3/10

Language of the proceedings: EN

Title of invention:
PACKAGING FILM

Patent Proprietor:
MEGAPLAST S.A.

Opponents:
Ecoventi Sistemas, S.L.
Silvalac, S.A.

Headword:

Relevant legal provisions:
EPC Art. 83, 56

Keyword:
Admission of new grounds - (no)
Sufficiency of disclosure - (yes)
Inventive step - (yes)

Decisions cited:
G 0010/91, G 0007/95, T 0063/06

Catchword:

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Case Number: T 0270/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 12 January 2017

Appellant: (Opponent 1)	Ecoventi Sistemas, S.L. Avda. Reina, Parcela 6-11a Polig. Ind. Los Prados 30530 Cieza Murcia (ES)
Representative:	ZBM Patents - Zea, Barlocci & Markvardsen Plaza Catalunya, 1 2nd floor 08002 Barcelona (ES)
Appellant: (Opponent 2)	Silvalac, S.A. C/Illes Balears, 19-23 08730 Monjos del Penedés Barcelona (ES)
Representative:	ZBM Patents - Zea, Barlocci & Markvardsen Plaza Catalunya, 1 2nd floor 08002 Barcelona (ES)
Respondent: (Patent Proprietor)	MEGAPLAST S.A. 38 Vassileos Konstantinou Avenue Koropi 194 00 Attica (GR)
Representative:	Creek, Isobel Clare The IP Asset Partnership Limited Prama House 267 Banbury Road Oxford OX2 7HT (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 8 December 2014 rejecting the opposition filed against European patent No. 1989044 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	M. O. Müller
	D. Prietzel-Funk

Summary of Facts and Submissions

I. This decision concerns the appeals filed by both opponents against the decision of the opposition division to reject their oppositions against European patent No. 1 989 044.

II. With their notices of opposition, the opponents had requested revocation of the patent in its entirety on the grounds under Article 100(a) (exclusion from patentability pursuant to Article 52(1) EPC and lack of inventive step) and 100(b) EPC.

The documents submitted during the opposition proceedings included:

D1: EP 1 539 866 B1;

D2: EP 1 465 766 B1;

D2a: US 2005/0118391 A1;

D3: Copy of the two expert opinions AT-0162/14 and AT-0166/14 submitted before the Commercial Court of Barcelona (in Spanish);

D3b: English translation of AT-0166/14;

D3c: English translation of AT-0162/14; and

D4: Product data sheet for the "ATX" product.

III. Claim 1 as granted reads as follows:

"1. Packaging film comprising

- a main film (1) made of a stretchable polymer film material; and

- a multiplicity of holes (2) on the main film (1);

characterized in that the holes (2) on the main film (1) are arranged in at least three substantially parallel columns (3) along the main direction (X); wherein the columns of holes (3) are staggered with respect to the main direction such that a center of one hole in one column is on a different line transverse to the main direction than the centers of adjacent holes in the immediately adjacent columns,
wherein the main film is made of structural polyethylene films *[sic]* material or copolymers thereof, wherein

a. a ratio of aeration percentage over final weight is greater than or equal to 14 meters per gram;

- the aeration percentage is calculated for a predetermined length of the packaging film as the total area covered by the holes (2) over the total area of the packaging film including the area of the holes (2), when the packaging film is stretched along a main direction to an elongation equal to the elongation at the Natural Draw Ratio point (NDR point);

- the final weight is the weight of the packaging film per said film meter measured in grams per meter, when the packaging film is stretched along a main direction at an elongation equal to the elongation at the Natural Draw Ratio point (NDR point);

b. the width of the packaging film is reducible by less than 15% between a condition before any stretching of the packaging film and a condition when the packaging film is stretched along a main direction at an elongation equal to the elongation at the Natural Draw Ratio point (NDR point);

c. a ratio of an absolute value of the difference of a holding force of the packaging film minus a predetermined target holding force divided by the target holding force is less than or equal to 5%, wherein the holding force of the packaging film is determined as the tensile force at the Natural Draw Ratio point (NDR point);

d. a ratio of an elongation at break of the packaging film measured along a transverse direction to the main direction over the elongation at the Natural Draw Ratio point (NDR point) is greater than or equal to 50%".

Claims 2 to 13 are dependent on claim 1, and claim 14 refers to the use of a packaging film according to any one of the preceding claims.

IV. In its decision, the opposition division considered the invention defined in the granted claims to be sufficiently disclosed.

The opposition division furthermore considered the requirements of Article 52(1) EPC to be met.

The subject-matter of the claims as granted was furthermore considered to be inventive. It differed from the closest prior art D2/D2a in terms of parameters (a) (aeration percentage) and (d) (ratio of the elongation at break). The objective problem was how

to produce a film which had good performance in the corners of pallets or around uneven objects and loads whilst maximising aeration and at the same time keeping a low final weight of the packaging film per metre. There was no hint in the cited prior art which would lead the skilled person to apply those differentiating features to the product known from D2/D2a. Hence, the subject-matter of claim 1 met the requirements of inventive step.

V. This decision was appealed by both opponents 1 and 2 (hereinafter appellants 1 and 2), their statements setting out the grounds of appeal including copies of D1, D2, D2a, D3, D3b, D3c and D4, already filed during the opposition proceedings, and of

D5: US 2005/0123721 A1;

D6: EP 0 820 856 A1; and

D7: EP 0 909 721 A1.

The appellants requested that the opposed patent be revoked since the claimed subject-matter did not meet the requirements of Article 52(2) EPC, lacked novelty and inventive step and was insufficiently disclosed. The appellants also requested that the case be remitted to the opposition division due to a substantial procedural violation and that the appeal fees be reimbursed.

VI. With its response, the proprietor (hereinafter the respondent) filed an auxiliary request and

D8a: Photograph of Air-O-Tite 200; and

D8b: Close up photograph of Air-O-Tite 200.

VII. With letter dated 24 March 2015, appellant 1 provided further arguments with regard to sufficiency of disclosure and inventive step and for the first time raised an objection of added matter under Article 100(c) EPC. Appellant 1 furthermore submitted

D9: Copy of the infringement action of the respondent against appellant 1;

D9a: Translation of part of D9; and

D10: First three pages of the decision of the Commercial Court of Barcelona.

VIII. With its communication dated 13 June 2016, the board summoned the parties to oral proceedings, to be held on 12 January 2017. With the subsequent communication dated 15 June 2016, the board communicated its preliminary opinion to the parties.

IX. With its letter dated 1 November 2016, the respondent declared that it did not give approval for the new grounds of lack of novelty and added matter to be admitted into the appeal proceedings.

X. With its letter dated 12 December 2016, the respondent requested that the case be remitted to the opposition division if the board considered matters of sufficiency to be an issue in the maintenance of the patent and filed auxiliary requests 2 and 3 together with:

D11: Judgement No. 207/16 of the Commercial Court of Barcelona;

D11a: English translation of D11;

D12: Report of Mr M. Sánchez Soto, dated 28 May 2013;

D12a: English translation of D12; and

D13: Report of Mr M. Sánchez Soto, dated 12 December 2016.

XI. On 12 January 2017, oral proceedings were held before the board, during which all parties withdrew their requests for remittal. The appellants furthermore withdrew their objections under Article 52(2) EPC.

XII. As far as relevant to the present decision, the appellants' arguments may be summarised as follows:

- The claimed subject-matter was not based on the application as filed and lacked novelty over any of D1, D2a (the appellants initially cited D2, which is a family member of D2a, but was published after the priority date of the patent) and D5 to D7.

- The invention defined in the claims was insufficiently disclosed:

  - Parameters (b) and (c) were ambiguous. The results obtained for these parameters depended in particular on the location at which the parameter was measured (parameter (b)) and what was selected as target holding force (parameter (c)).

  - The skilled person did not know how to produce a film with parameters (a) to (d) on the basis of

the information contained in the patent. There were in particular numerous features that affected these parameters without being defined in the patent. The assertion that this argument was not valid since it was based on purely theoretical considerations was at variance with T 63/06. Furthermore, the skilled person did not know how to modify the film of D2a, of which all structural features were as claimed, to obtain parameters (a) and (d) as defined in claim 1. It was not true in this respect that the patent taught to choose the width of the reinforcement strips of the film to be small compared to the distance between the columns of holes. In fact the patent was contradictory in that respect.

- The subject-matter of claim 1 lacked inventive step over the closest prior art D2a, from which it differed by parameters (a) and (d). The objective technical problem consisted of two partial problems, namely to increase aeration at low film weight and to obtain good performance at the corners of a pallet and around uneven objects and loads. If it were accepted for sufficiency of disclosure that the skilled person knew how to get parameters (a) and (d) as claimed, it would be obvious to increase the area of the holes at low film weight to solve the first partial problem and thereby obtain parameter (a). In the same way it would be obvious to allow more elongation at break in the transverse direction to solve the second partial problem and to thereby obtain parameter (d) as claimed.

  The subject-matter of claim 1 furthermore lacked inventive step in view of D7 as the closest prior

art. This attack should be admitted since it was *prima facie* relevant. Contrary to the respondent's assertion, D7 did represent the closest prior art, since in terms of technical features it was closer to the claimed subject-matter than D2a.

- The appeal fees should be reimbursed since the opposition division's decision was not reasoned and the lack of reasoning constituted a substantial procedural violation.

XIII. As far as relevant to the present decision, the respondent's arguments may be summarised as follows:

- The objections that the claimed subject-matter was not based on the application as filed and was not novel constituted new grounds for opposition. The respondent did not give its consent to deal with these new grounds.

- The invention as defined in the claims was sufficiently disclosed. The appellants' measurements of parameter (b) could not prove that this parameter was ambiguous since they had partly been performed at the wrong location, namely not at the natural draw ratio point. Furthermore, contrary to the appellants' assertion, the dependence of parameter (c) on the target holding force did not render this parameter ambiguous, since the skilled person preparing a certain film had a specific use and thus a specific target holding force in mind. In the alternative, parameter (c) did not limit claim 1 and even in this case did not lack clarity. Lastly, the patent provided sufficient information to carry out the invention and, even though the burden of proof was on the appellants, they had

failed to show that it was impossible to do so. Starting from D2a, it would have been within the skilled person's common general knowledge how to adjust parameter (a) such that it was within the claimed range. Furthermore, the skilled person would have learned from the patent how to modify the film of D2a such that parameter (d) too was as claimed.

- The claimed subject-matter was also inventive. The subject-matter of claim 1 differed from D2a in terms of parameters (a) and (d). The objective technical problem was how to produce a film for palletisation which had good performance in the corners of the pallet or around uneven objects and loads whilst maximising aeration and at the same time keeping a low final weight of the packaging film per metre. D2a did not address this problem and did not provide any guidance on how to overcome it. Contrary to the appellants' assertion, it was not obvious to reduce the thickness of the film to solve this problem, since the skilled person would have expected that a reduction of the thickness of the film would have jeopardised its strength and thus its performance at the corners of a pallet or around uneven objects or loads. So the two partial problems referred to by the appellants were linked and could not be considered in isolation.

- The inventive step attack on the basis of D7 should not be admitted into the proceedings since it was late-filed and not *prima facie* relevant. D7 could in particular not be considered to represent the closest prior art, since unlike D2a it did not address the problem of film tearing.

XIV. The appellants requested that the decision under appeal be set aside and that the European patent be revoked.

The appellants furthermore requested that the appeal fees be refunded, due to a substantial procedural violation committed by the opposition division.

XV. The respondent requested that

- the appeals be dismissed (implying maintenance of the patent as granted) or, alternatively,

- that the patent be maintained on the basis of the auxiliary request filed with letter dated 27 August 2015 or

- that the patent be maintained on the basis of either of auxiliary requests 2 or 3 filed with letter dated 12 December 2016.

The respondent furthermore requested that D5, D6 and D7 be held inadmissible.

Reasons for the Decision

1. New grounds for opposition

1.1 In their statements of grounds of appeal, the appellants for the first time invoked the ground of lack of novelty in view of D5 to D7. Furthermore, in its letter dated 24 March 2015, appellant 1 for the first time invoked the ground under Article 100(c) EPC, arguing that the subject-matter of the claims as granted was not based on the application as filed. These grounds were not relied on during the opposition proceedings and thus constitute fresh grounds.

According to G 10/91, a fresh ground for opposition can be admitted into the appeal proceedings only with the approval of the proprietor. In the present case, the respondent did not give approval. Accordingly, the board did not admit these grounds.

1.2 In their statements of grounds of appeal, the appellants additionally invoked the ground of lack of novelty in view of D1 and D2a. As set out above, the ground of lack of novelty was not relied on during the opposition proceedings. However, unlike D5 to D7, D1 and D2a had already been cited in the opposition proceedings against inventive step. Nevertheless, the ground of lack of novelty over D1 and D2a is still a fresh ground (G 7/95), the admission of which depends on the proprietor's approval. Since in the present case approval was not given, the board did not admit the appellants' novelty objections in view of D1 and D2a.

It is to be noted that, in line with G 7/95, the novelty objections in view of the closest prior art D2a could have been invoked against inventive step. Eventually, the appellants admitted however that the films disclosed in this document differed from that of claim 1 (see point 3.1.3 below) and thus that this document was not novelty-destroying.

2. Sufficiency of disclosure

2.1 The packaging film of claim 1 is defined on the one hand by structural features, namely in that it comprises a main film which is made of polyethylene and in that this main film comprises at least three substantially parallel columns of holes in a staggered arrangement, and on the other hand by functional features, namely parameters (a) to (d).

2.2 The appellants argued that parameters (b) and (c) in claim 1 were ambiguous, and for this reason alone the invention as defined in claim 1 was insufficiently disclosed.

2.2.1 Parameter (b) in claim 1 requires that the width of the packaging film is reduced by less than 15% between a condition before any stretching and a condition when the film is stretched along a main direction at an elongation equal to the elongation at the natural draw ratio point.

Referring to D3b, the appellants argued that for one and the same film two different experts had obtained rather different values for parameter (b). More specifically, during the packaging of a load on a pallet, parameter b) of a film "EPR" had been determined to be 7.73% and 28.94%, respectively, the first value having been measured adjacent to the output reel and the second higher value adjacent to the pallet. For a film "EP", 6.6% and 23.90% had been obtained, again the first value having been measured adjacent to the output reel and the second higher value adjacent to the pallet. The appellants argued that the measurement values thus depended on the location where

they were determined. Since the patent did not specify this location, parameter (b) was unclear.

However, claim 1 requires parameter (b) and more particularly the width of the stretched film to be measured at the natural draw ratio point. As set out by the respondent, a packaging film is at the natural draw ratio point when leaving the output reel. Close to the pallet, additional tensions are added to the film by the pallet and the load thereon, such that the film is further stretched beyond the natural draw ratio point. Hence, the second measurement of the appellants' experts in D3b that led to the higher values for parameter (b) had not been taken at the natural draw ratio point as required by claim 1. Thus the values obtained by this measurement are to be neglected. Any divergence of these values from those obtained in the first measurement therefore cannot prove that parameter (b) is unclear.

2.2.2 Parameter (c) refers to the ratio of (i) the holding force of the packaging film minus a predetermined target holding force and (ii) the target holding force and requires this ratio to be less than or equal to 5%. Parameter (c) is thus a function of the target holding force. The appellants argued that since the target holding force was not defined in claim 1, parameter (c) was unclear.

The board acknowledges that the target holding force is indeed not defined in claim 1. It does not however concur with the appellants that this renders parameter (c) unclear. More specifically, since the target holding force is undefined, parameter (c) can take any value rather than being unclear. In fact, lack of clarity presupposes the presence of some boundaries

which are unclear. Since in the present case there are no boundaries for parameter (c), there cannot be any lack of clarity.

2.2.3 Since parameters (b) and (c) are thus not unclear, there cannot be any insufficiency arising out of unclarity.

2.3 The appellants furthermore argued that, even if parameters (b) and (c) were to be clear, the patent was still insufficiently disclosed since it did not provide any information on how to obtain a film with the required parameters (a) to (d). In line with the expert opinion D3c, there were numerous features of the film that affected these parameters, such as the number, shape and distance between the holes, their way of preparation and the kind and number of reinforcements needed to obtain the required parameters. Since there was no information in the patent about how to vary or adapt these features, the skilled person could not carry out the invention.

2.3.1 The board does not agree. The patent contains information as regards the material of the film (claim 1), the arrangement of the holes (claim 1 and paragraph [0066]), the location, arrangement, type and thickness of reinforcement strips (paragraphs [0042] to [0062], [0064], [0065] and [0067] to [0073] and figures 1 to 15), and the way the holes are prepared (paragraph [0063]). The patent furthermore provides two detailed working examples (inventive films 1 and 3 on page 10). Contrary to the appellants' assertion, the patent thus provides information as to how to carry out the invention defined in claim 1.

Furthermore, the appellants' argument that information about further features would be required to carry out the invention relies entirely on theoretical considerations. In the absence of any experimental evidence, this argument must fail. This is not changed by the appellants' reliance on T 63/06, according to which theoretical considerations without any experimental evidence were enough to convincingly argue insufficiency of disclosure. More specifically, this decision pertains to cases where the patent specification does not contain any information at all or at least does not contain detailed information on how to put the invention into practice (headnote and point 3.2.1(b)). This is different from the present case, where, as set out above, the patent contains quite detailed information as regards how to carry out the invention.

2.3.2 During the oral proceedings the appellants also relied on D2a and argued that even though the films disclosed in this document had all the structural features required by claim 1, they did not have parameters (a) and (d) as claimed. According to the appellants, the skilled person would not know on the basis of the patent and his common general knowledge how to modify the films of D2a such that they had parameters (a) and (d) as claimed.

D2a discloses a film made of stretchable linear low-density polyethylene (paragraph [0029]) with a multiplicity of holes located in a staggered arrangement in at least 6 parallel columns along the main direction and with reinforcement strips being placed therebetween (paragraphs [0007] and [0015] and figure 1). The films disclosed in D2a thus have all the structural features required by claim 1. Furthermore,

as acknowledged by all parties, a film Air-O-Tite 200, which is in accordance with the teaching of D2a, has parameters (a) and (d) of 13.2 m/g and 19%, respectively, which are below the lower limits of 14 m/g (parameter (a)) and 50% (parameter (d)) in claim 1.

Thus, even though the films of D2a have structural features as defined by claim 1, they do not exhibit parameters (a) and (d) as required by this claim. The board does not however agree with the appellants' argument that the skilled person would not know on the basis of the patent and his common general knowledge how to modify the films of D2a such that they have parameters (a) and (d) as claimed:

As set out above, parameter (a) was measured to be 13.2 m/g for the film of D2, whereas claim 1 requires a value of equal to or greater than 14 m/g. In order to be in the claimed range, parameter (a) of the film of D2a must thus be increased. Parameter (a) refers to the ratio of the aeration percentage over the film weight. Hence, the aeration percentage has to be increased and/or the film weight has to be decreased. The question thus is whether the skilled person would have known how to do this. The aeration percentage corresponds to the area of the holes of the film relative to the total area of the film. It would be trivial (and thus common general knowledge) that in order to increase this area of holes, more and/or bigger holes would have to be provided in the film. In the same way it would be trivial (and thus common general knowledge) that the film weight can be decreased by reducing the film thickness. Consequently, adjusting parameter (a) of the film of D2 such that it is within the claimed range

would be within the skilled person's common general knowledge.

As set out above, parameter (d) in the film of D2 was 19%, whereas claim 1 requires parameter (d) to be equal to or greater than 50%. Hence, parameter (d) too must be increased to be in the claimed range. This parameter refers to the ratio of the elongation at break along the transverse direction over the elongation at the natural draw ratio point. As explained by the respondent, in order to increase parameter (d) and thus the elongation at break in the transverse direction, the width of any reinforcement elements should be small, compared to the distance between two adjacent columns of holes. Consequently there would be less reinforcement and hence a higher elongation at break in the transverse direction than in D2a, where the width of the reinforcement elements (reference number (4)) is as large as the distance between two adjacent columns of holes (figures 1 to 4). This is in fact what the opposed patent teaches the skilled reader. More specifically, according to paragraph [0017] of the patent the packaging film should have good mechanical properties in the transverse direction. As explained in this paragraph, to achieve this, tension created when using the film in packaging should not only be concentrated in the area of the reinforcement elements, if any, but should be more evenly distributed along the whole structure of the film. This results in a packaging film not having excessive holding force and stiffness. According to paragraph [0062] the width of the reinforcement elements should be suitably small, e.g. less than 10 mm or even less than 6 mm, while the distance between two adjacent columns of holes desirably should be as large as, e.g., 100 mm or more. This teaching is implemented in all figures of the

patent where packaging films are shown (figures 1 to 15) and where the width of the reinforcement strips is always lower than the distance between two adjacent columns of holes. So the skilled person starting from the films of D2a and following the teaching of the patent would obtain a film with parameter (d) as claimed.

The appellants argued in this respect that the patent provided contradictory teachings with regard to the width of the reinforcement strips. While the passages cited by the respondent did indeed teach a width of the reinforcement strips smaller than the distance between holes, according to paragraph [0045], the reinforcement strips had to be placed close to the holes of the film, which implied that their width was as great as the distance between two adjacent columns of holes. This is however not correct. The paragraph cited by the appellants does not say anything about the width of the reinforcement strips. In fact, in the same paragraph it is stated that the reinforcement strips can be placed selectively only where they are needed. This implies that they are narrower than the distance between two adjacent columns, since otherwise there would be no choice for the position in between two adjacent columns of holes. As set out above, this is confirmed by figures 1 to 15, where the width of the reinforcement strips is always smaller than the distance between two adjacent columns of holes.

Hence, contrary to the appellants' assertion, the skilled person starting from a film having all structural features required by claim 1, such as the film of D2a, is able - on the basis of his common general knowledge and the information contained in the

patent - to modify it such that it has parameters (a) and (d) as claimed.

2.4 The invention as defined in claim 1, and by the same token in all remaining claims, is thus sufficiently disclosed.

3. Inventive step

3.1 The appellants argued that the subject-matter of claim 1 lacked inventive step over D2a.

3.1.1 The opposed patent relates to packaging films (paragraph [0001]). The films should provide sufficient holding force and stretchability (paragraph [0002]) and should not break around uneven surfaces such as pallet and load corners (paragraph [0017]).

3.1.2 In a similar way, D2a relates to packaging films which have sufficient stretchability without tearing at the edges of the holes (paragraph [0007]). In line with the arguments of all parties, D2a can thus be considered to represent the closest prior art.

3.1.3 As set out above, and as acknowledged by all parties, the films disclosed in D2a differ from that of claim 1 in terms of parameters (a) and (d).

3.1.4 As further acknowledged by all parties, the objective technical problem is how to produce a film for palletisation which has good performance in the corners of a pallet or around uneven objects and loads whilst maximising aeration and at the same time keeping a low weight of the packaging film.

3.1.5 It was a matter of dispute whether the claimed solution was obvious.

D2a does not disclose the objective technical problem, nor does it indicate that this problem can be solved by adjusting parameters (a) and (d) such as required by claim 1.

The appellants argued that the claimed solution was nevertheless obvious. They split the objective technical problem into two partial problems, namely firstly the maximisation of aeration at low film weight and secondly the provision of good performance in the corners of a pallet or around uneven objects and loads.

As regards the first thus-defined partial problem of maximising aeration at low film weight, the appellants argued that, in the same way as for sufficiency of disclosure, it would have been known to the skilled person that, in order to solve it, the aeration percentage would have to be increased while the thickness of the film and thus its weight would have to be reduced. The skilled person would thus inevitably have arrived at a film with a parameter (a) as claimed. As regards the second thus-defined partial problem of providing good performance of the film at the corners of a pallet and around uneven objects and loads, the skilled person would have known that, to solve it, the film had to be made more resistant in the transverse direction. The skilled person would thus also have inevitably arrived at a film with parameter (d) as claimed.

The board does not concur with the appellants' argument. The two problems of maximising aeration at low film weight and of obtaining good performance at

the corners of the pallet and around uneven objects and loads are interlinked and thus cannot be split into two partial problems. More specifically, while it is true that the skilled person would have known that in order to maximise aeration percentage at low film weight the film thickness had to be reduced, he would at the same time have expected that this would jeopardise the performance in the corners of the pallet or around uneven objects and loads. He would in particular have expected a thinner film to have less strength and thus poorer performance. Consequently, the skilled person confronted with the objective technical problem in its entirety would not necessarily have reduced the film thickness.

Furthermore, the appellants' argument that, in order to achieve a good performance in the corners of a pallet or around uneven objects and loads, it would have been obvious to increase elongation at break in the transverse direction and thus parameter (d) is a mere assertion that lacks any substantiation.

Lastly, the board acknowledges that for sufficiency of disclosure it was assumed that the skilled person knew on the basis of the patent how to prepare a film with parameter (d) as required by claim 1. However, contrary to the appellants' assertion, this is irrelevant for inventive step. What matters for inventive step is firstly whether the skilled person would have known how to prepare a film with parameter (d) as claimed in view of the prior art or his common general knowledge (rather than the patent) and secondly whether there would have been an incentive to do so in order to solve the objective technical problem, and that condition is not met in the present case.

3.1.6 The subject-matter of claim 1, and by the same token of all remaining claims, is therefore inventive in view of D2a as the closest prior art.

3.2 The appellants additionally argued that the subject-matter of claim 1 lacked inventive step over D7 as the closest prior art and that this attack should be admitted since it was *prima facie* relevant. The respondent requested that this attack not be admitted.

3.3 The inventive step attack on the basis of D7 is a new attack made for the first time in appeal. While D7 had been mentioned as possible closest prior art in the statement of grounds of appeal, the attack was actually substantiated only in appellant 1's letter of 24 March 2015, i.e. after the response to the statement of grounds of appeal had been received. This attack was thus clearly filed late.

D7 concerns packaging films that have sufficient stretchability. As not disputed by the appellants during the oral proceedings, unlike D2a, D7 does not address the problem of film tearing. Hence, in terms of the purpose to be achieved, D7 is less close to the patent than D2a. Consequently D7 does not constitute the closest prior art and thus, contrary to the appellants' assertion, is not *prima facie* relevant. In this respect, the appellants' argument that, in terms of technical features, D7 was closer to the patent than D2 is not convincing. What matters for selection as the closest prior art is rather the proximity of the alleged closest prior-art document to the patent in terms of the purpose to be achieved and the problem to be solved.

Since the inventive step attack on the basis of D7 was thus late-filed and lacks *prima facie* relevance, the board decided not to admit this attack into the proceedings.

3.4 Appellant 1 in its letter dated 15 April 2015 and appellant 2 in its only letter of the same date mentioned in passing that D5 and D6 also constituted closest prior art, but neither of them supplied any arguments as regards the two documents. The respondent requested that the inventive step attacks on the basis of D5 and D6 not be admitted.

The board had already indicated in its communication dated 15 June 2016 (point 8.3) that these attacks had not been substantiated and therefore appeared not to be admissible. In fact, the appellants no longer relied on these attacks during the oral proceedings.

4. Since the subject-matter of claim 1 and by the same token of all remaining claims is thus sufficiently disclosed and inventive, the appeals are not allowable.

5. The appellants had requested reimbursement of the appeal fees, since in their view the opposition division had committed a substantial procedural violation. Reimbursement of the appeal fees presupposes that an appeal is allowable (Rule 103(1)(a) EPC). Since this precondition was not met in the present case, the board decided to reject the appellants' request for reimbursement. In these circumstances, there was no need for further investigation of the appellants' objection of a substantial procedural violation.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated