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**Datasheet for the decision
of 13 December 2019**

Case Number: T 2628/16 - 3.2.04

Application Number: 10194964.2

Publication Number: 2465354

IPC: A22C11/12, A22C15/00, B65H75/44

Language of the proceedings: EN

Title of invention:
Clip supply

Patent Proprietor:
Poly-clip System GmbH & Co. KG

Opponent:
Tipper Tie technopack GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(a), 100(b)

Keyword:
Sufficiency of disclosure - (yes)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

T 1018/02

Catchword:



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Case Number: T 2628/16 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 13 December 2019

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 10 October 2016
rejecting the opposition filed against European
patent No. 2465354 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
C. Heath

Summary of Facts and Submissions

- I. The appeal was filed by the appellant opponent against the decision of the opposition division, in which it rejected the opposition against the patent in suit - referred to in the following as "the patent".

The opposition division decided that:

(1) the patent disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, and that

(2) the subject-matter of the claims as granted was novel and based on an inventive step.

- II. Oral proceedings were held before the Board of Appeal on 13 December 2019.

- III. The appellant-opponent requests that the decision under appeal be set aside and that the patent be revoked.

The respondent-proprietor requests that the appeal be dismissed, in the auxiliary that the decision under appeal be set aside and that the patent be maintained on the basis of one of auxiliary requests 1 or 2, both filed with the reply to the grounds of appeal.

- IV. The claims of the main request which are relevant for this decision read as follows:

"1. A supply (10) of suspension elements (30), like suspension loops suitable for being fed in a feeding direction (F) to a clipping machine for producing sausage-shaped products, like sausages, and suitable

for being attached to said sausage-shaped products, the supply (10) comprises:

- a carrier strip (20) having at least an upper and a lower surface (26) as well as and two longitudinally extending edges (22, 24) arranged parallel to each other, and
- a number of suspension elements (30) attached to the upper or lower surface (26) of the carrier strip (20) in at least substantially regular intervals, wherein the carrier strip (20) including the suspension elements (30) is wound up, thereby forming a roll, characterized by at least one mark (M) which is attached to the carrier strip (20) at a predefined distance from its end, and wherein the mark (M) includes information usable for controlling the clipping machine".

"6. The supply according to any of claims 1 to 5, wherein the carrier strip of the supply (10) is a double layer strip having an upper and a lower layer, with the upper and lower layer each having an upper and a lower surface and with the lower layer facing the lower surface of the upper layer with its upper surface, with the suspension elements (30) disposed between the upper and lower layer in at least substantially regular intervals, and wherein the mark (M) is also disposed between the upper and lower layer at a predefined distance from its end."

"7. Usage of a supply according to any of claims 1 to 6, in a clipping machine for producing sausage shaped products, like sausages, wherein the clipping machine comprises a sensor device (70) for detecting the mark (M) which is attached to the carrier strip (20) of the supply (10), and for preferably reading out information stored on the mark".

"8. A method for detecting the end of a supply (10) of suspension elements (30), like suspension loops, being fed in a feeding direction (F) to a clipping machine for producing sausage-shaped products, like sausages, and being attached to said sausage-shaped products, the method comprises the steps of:

- feeding suspension elements (30), which are attached to the upper or lower surface (26) of a carrier strip (20) in at least substantially regular intervals, to the clipping machine for attaching said suspension elements (30) to the sausage-shaped products, and
- scanning the carrier strip (20) and detecting at least one mark (M) which includes information used for controlling the clipping machine and which is positioned on the carrier strip (20) at a predefined distance from its end."

V. The appellant-opponent's arguments can be summarised as follows:

The invention according to claim 6 is insufficiently disclosed because its back-reference to claim 1 implies an irresolvable contradiction.

The subject matter of the independent claims lacks novelty with respect to D1 and D2.

The subject matter of the independent claims lacks an inventive step starting from D1 or D2 in combination with D5.

VI. The respondent-proprietor's arguments can be summarised as follows:

The invention according to claim 6 is sufficiently disclosed. The skilled person interprets the claim in the light of the description and this interpretation is not contradictory.

Neither D1 nor D2 takes away novelty of the independent claims.

The skilled person would not combine the teachings of D1 or D2 with D5. In any case the combined teachings would not lead to the claimed subject matter.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention relates (see published patent specification, paragraph [0001] and [0002] and claims 1, 7 and 8) to a supply of suspension elements, like suspension loops, to be attached to sausage-shaped products, such as sausages. The suspension elements are fed to a clipping machine for producing the products. The invention also relates to the usage of the supply, and a method for detecting the end of a supply of such suspension elements.

When, for example, a [partly] used supply of suspension elements is placed on a clipping machine, the number of suspension elements available is not always known. This may lead to sausages being produced without loops, or the user wasting suspension loops by replacing a supply before it is necessary (see published patent specification, paragraph [0010]). An object of the

invention is to overcome these drawbacks by detecting the end of a supply of suspension elements.

3. Opposition ground of insufficiency of disclosure, Article 100(b) EPC
- 3.1 According to established jurisprudence of the boards, the skilled person will construe the claim with a mind willing to understand, not desirous of misunderstanding. They will rule out interpretations that make no technical sense and try, by "building up rather than tearing down" to arrive at an interpretation that is technically sensible and takes into account the whole disclosure of the patent, see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA), II.A.6.1, and the decisions cited therein.
- 3.2 Claim 1 defines that suspension elements (e.g. loops) are attached to upper or lower surfaces of a carrier strip. Claim 6 has a back reference to claim 1 and defines that the carrier strip is a double layer strip with an upper and a lower layer and the suspension elements disposed there between, in other words sandwiched between the two layers of the double strip.
- 3.3 For the double layer strip of claim 6, suspension elements cannot be, at the same time, on the upper or lower surface of the [whole double layer] strip, as implied by the claim's back reference to claim 1, and sandwiched in the middle of the strip (between upper and lower layers of strip) as claim 6 itself defines. Therefore, on the face of it, claim 6 contains features that are in apparent contradiction with claim 1 and which do not make technical sense.

Following the approach outlined above, the skilled person confronted with such an apparent contradiction between claims will will try to resolve it in the light of the description and drawings.

3.4 In the general part of the description (see paragraphs [0013] to [0017]), consistent with claim 1, a supply of suspension elements is described where the suspension elements are attached to the upper or lower surface of a carrier strip. This part is followed (see paragraph [0018]) by the description of a "further advantageous configuration of the supply of suspension elements" that has a double layer carrier strip having an upper and lower layer with the suspension elements disposed between the upper and lower layers. From this the skilled person learns, without ambiguity, that there are two distinct basic configurations of the carrier strip (strip with suspension elements on top or bottom surface and a double layer strip with sandwiched suspension elements).

3.5 The detailed description of the embodiments tells the same story. Starting in paragraph [0026], the embodiment of figure 1 is described as having a carrier strip 20 with suspension elements in the form of loops 30 attached to its upper surface. This central idea of figure 1's embodiment (corresponding to the first configuration explained above) is reiterated in paragraph [0040], first sentence.

That paragraph continues by describing an alternative supply made of a double layer strip having an upper and a lower layer, the carrier loops being disposed between the layers. Thus, this corresponds to the second basic configuration already mentioned.

Therefore, the skilled person will understand that the suspension element supply of the invention has two mutually exclusive basic configurations: the first having suspension elements arranged on the top (or bottom) of a carrier strip and the second being a double layer strip with suspension elements arranged between upper and lower layers.

- 3.6 Turning again to claim 6, with its double layer strip and suspension elements disposed between upper and lower layers, the Board is in no doubt that the skilled person will recognise this as corresponding to the second basic configuration (double layer strip with sandwiched suspension elements). In other words, in spite of claim 6's back reference to claim 1, the skilled person will interpret claim 6 to define a suspension element supply in which the suspension elements are sandwiched between an upper and lower section of a double carrier strip, not arranged on one of its outer surfaces. By the same token, the skilled person will recognise that claim 1 defines a supply of suspension elements according to the first basic configuration (suspension elements on the top or bottom of a carrier strip).

It is common ground that a suspension element supply having these elements sandwiched between a double layer strip (cf. claim 6) belong to the skilled person's general knowledge. Since the subject matter of claim 6 is to be interpreted in this way, the skilled person will be able to carry out its invention.

- 3.7 The appellant-opponent has also argued that the suspension element feeding device shown in figure 2, for feeding suspension elements from a supply to a clipping machine, would only be suitable for feeding a

[single] carrier strip supply, and that the arrangement has certain technical advantages. For example (see published patent specification, paragraphs [0029], [0030] and [0032]), the suspension elements of the [single] strip supply (cf. claim 1), being arranged on an exposed surface of the strip, can easily be removed (figure 2, reference R). Thus, so the argument goes, claim 6 claims features achieving these advantages by its back reference to claim 1. However, these advantages would not be realisable because claim 6 also claims a double strip arrangement with sandwiched suspension elements which could not be easily removed by the machine of figure 2, so the invention cannot be carried out. The Board disagrees.

- 3.8 The argument merely boils down to a further confirmation that a literal reading of claim 6 could be read to define an impossible contradiction of suspension elements being on the upper or lower surface of the strip (with its advantages when used with the feeding device of figure 2) and sandwiched in the middle of the strip (which would be incompatible with figure 2's device).
- 3.9 However, as the skilled person interprets claim 6 to define only a double layer strip with suspension elements sandwiched between an upper and lower layer, the argument is moot.
- 3.10 Furthermore (noting that the device shown in figure 2 appears unsuitable for feeding the double strip supply of claim 6), the Board considers that it would be within the capability of the skilled person to provide a suitable device for feeding the supply of claim 6 to a clipping machine. Since double strip suspension element supplies are generally known to the skilled

person, so too must suitable feeding machines be generally known.

3.11 The Board concludes that the invention of claim 6 can be carried out by the skilled person. Therefore (cf. impugned decision, section 2), the opposition ground of Article 100(b) EPC does not prejudice maintenance of the patent as granted.

4. Novelty of claims 1, 7 and 8

4.1 In its preliminary opinion in preparation for oral proceedings, the Board made the following observations on these matters:

"3.1 Interpretation of certain claim features

[...In] accordance with established jurisprudence, the skilled person reads the claim with a mind willing to understand (CLBA II.A. 6.1), giving terms their usual meanings and taking into account the whole of the disclosure. Furthermore, where the reading of a claim feature imparts a clear, credible technical teaching to the skilled person, the description may not be used to give a different meaning to a claim feature (see CLBA II.A.6.3.4, in particular T 1018/02, reasons 3.8).

3.2 The characterising portion of claim 1 requires that a mark is attached to the carrier strip. Thus, the mark is physically attachable to the strip so it must be a distinct physical entity with respect to the strip.

Therefore (cf. patent specification, paragraph [0014]), what ever may be intended by the expression in the description "a shape, like a cut-out...", the mark as claimed cannot simply be a cut-out in the strip.

Therefore (cf. patent specification, paragraph [0014]), what ever may be intended by the expression in the description "a shape, like a cut-out...", the mark as claimed cannot simply be a cut-out in the strip.

3.3 Furthermore, the skilled person, with their mind willing to understand, would not consider a mark and a suspension element to be one and the same. Suspension elements are already defined in claim 1, the mark (M) is given a separate definition so the skilled person will understand it to be distinct from a suspension element.

Moreover, the mark is defined to be at a predefined distance from the end of the strip. In this context, the skilled person will understand the usual meaning of mark (see Oxford English Dictionary on line, definition VII) as "an indicator of position; esp. a physical indicator (as a line, dot, notch, etc.) intended to record or denote a position or limit".

The rest of the patent confirms this interpretation. For example, the independent method claim is a method for detecting the end of a supply of suspension elements, by scanning for the mark, likewise positioned on the carrier strip at a predefined distance from its end.

In this context, the board is not convinced by the appellant-opponent's speculation that an operator could recognise a certain characteristic of a suspension element loop, for example by its size, and in so doing they would be using the loop as a mark, so, according to this argument, a loop is a mark. This conjecture is based on recognising a loop for what it is, not

recognising a mark that indicates something. Put differently, the fact that something is recognisable does not mean it is a mark.

In summary, the skilled person will understand the mark in claim 1 to be something which indicates position (a particular distance from the end of the strip) that is distinct from the suspension elements the carrier strip likewise bears, furthermore the mark is distinct from and attached to the strip itself.

4. Novelty of claim 1 with respect to D1

D1 (see for example the abstract and column 2, lines 39 to 52 with figure 1) discloses a supply of suspension elements (loops 1) on a carrier strip (belt made of strips 2 and 3).

The appellant-opponent argues that D1 also discloses a mark as claimed in the form of the holes 4 (column 2, lines 44 to 45) or printing identifying sausage type (column 2, lines 18-19) or the loops 1 themselves.

In the Board's view, and bearing in mind the above discussion of how mark should be interpreted in the claim, none of these elements are marks as claimed.

The holes 4 are not distinct from the strip and attached to it, they are merely holes in the strip itself, used as indexing means for advancing the loops at a defined speed (see abstract, column 2, lines 44 to 45 and claims 5 and 6). Thus, for at least this reason they are not marks as claimed.

With respect to the printing, this identifies the sausage, there is no information as to where the

printing is on the strip, let alone that it has a predefined relationship to the end of the strip.

Finally, as already explained, the skilled person understands the mark claimed to be distinct from the suspension elements claimed. So the loops 1 are not marks as claimed.

Therefore, the Board is of the opinion that D1 does not take away novelty of claim 1.

5. Novelty of claim 1 with respect to D2

5.1 D2 (see abstract, paragraph [0026] and figures 2 and 4) also discloses a supply of suspension elements (loops 38) suitable for feeding to a clipping machine and attached to a carrier strip 36.

5.2 Similar to D1, and keeping in mind how the Board interprets the mark feature of claim 1, the Board does not consider the feed holes 40 to be marks as claimed, they are merely holes in the strip (used to feed it forward, see paragraph [0025]), but not marks attached to the strip.

5.3 As with D1, the loops 38 of D2 are nor [not] marks as claimed.

5.4 Nor (see D2, paragraph [0024], last five lines), in the Board's view, are the regions of the strip that pass the sensor 45 marks as claimed. This passage says that the sensor detects the end of the strip itself. The appellant-opponent's argument appears to be that when the sensor 45 isn't detecting the end of the strip it is detecting the strip, so the strip itself is a

mark as claimed which carries the information that the end of the strip has not been reached.

The Board's view is that the entire strip, apart from its end, is not a mark attached to the strip, but merely the strip itself. Nor can the entire strip be at a predefined distance from its own end, it is merely a strip having an end. Therefore the strip 36 is not a mark as claimed.

6.0 Novelty of claims 7 and 8

For the reasons explained above, neither D1 nor D2 discloses a mark attached on the carrier strip at a position a predefined distance from the end of the strip. Claims 7 and 8 each have this feature (or a corresponding one). Therefore, neither D1 nor D2 can take away their novelty".

- 4.2 The appellant-opponent has not commented on this preliminary opinion (that neither D1 nor D2 take away novelty of the independent claims) in respect of D2.
- 4.3 With respect to D1, the appellant-opponent has only challenged the Board's estimation that printing on the carrier strip identifying sausage type (see D1, column 2, lines 18-19) was not the disclosure of a mark a predefined distance from the end of the carrier strip as claimed in claim 1.
- 4.4 In particular, the appellant-opponent has argued that, wherever the printing is on the carrier strip, it must be a predefined distance from its end. In this respect, it argued that any distance from the end is a "predefined" distance, since the skilled person would be unable to distinguish a mark deliberately placed

from one randomly placed. In both cases, once in place, the mark is a certain distance from the end, so can be considered to be at a *predefined* distance from the end.

- 4.5 Whatever the merits of this argument, the Board considers that D1 does not directly and unambiguously disclose that the printing on the carrier strip is located at *any* distance from the end of the strip. Therefore, D1 does not anticipate this feature.
- 4.6 The only description of a printed mark is in column 2, lines 17 to 18: "The belt [carrier strip] may be coloured or printed for an identification of the kind of sausage".
- 4.7 The Board considers that printing neither implies the use of text nor that a discrete mark is placed some distance from the end of the strip. Whilst it might make sense for a mark identifying the kind of sausage to be detectable at the start of the strip, and the strip to have a predefined length as the appellant-opponent has speculated, D1 does not disclose this. It merely states that the strip may be printed.

Just as the colour of the carrier strip can identify a kind of sausage, so too could a printed line or band extending along the strip's entire length, for example of a distinctive colour. This would not be a mark a distance from the end of the strip, but one extending from the start to the end of the strip.

- 4.8 Therefore, the Board considers that D1 does not directly and unambiguously disclose a printed mark [located] at a distance (predefined or not) from its end. In other words, the appellant-opponent's argument

has not convinced the Board that its preliminary opinion was wrong in this respect.

4.9 Absent any further arguments challenging the Board's preliminary opinion on novelty with respect to D1 and D2, the Board sees no reason to change its preliminary opinion. Therefore, the Board concludes that the subject matter of claims 1, 7 and 8 is new with respect to both D1 and D2.

5. Inventive step, claim 1 starting from D1 with D5

Following the Board's conclusion on novelty, the subject matter of claim 1 differs from D1 in that the carrier strip has a mark a *predefined distance* from the end of the strip. In D1, there is no direct and unambiguous disclosure of a mark at any distance from the end of the strip, let alone a predefined distance.

5.1 In the Board's view, whether such a mark might be placed near the end of the strip or, as the appellant-opponent has suggested (cf. published patent specification, paragraph [0039]) further towards the start of the strip, an effect of this differing feature is that the number of suspension elements [loops] remaining on the carrier strip may be estimated (see published patent specification, column 3, lines 17 to 22).

5.2 Therefore, the Board considers that the objective technical problem can be formulated as: how to modify the supply of D1 so that the number of suspension elements [loops] remaining on the carrier strip may be estimated.

5.3 D5 does not offer a solution to this problem.

D5 (see paragraph [0002]) discloses a clip supply, where clips are fed to a clip machine with interchangeable closure tools, not a loop supply on a carrier strip.

Whether or not it would be obvious for the skilled person to apply a teaching related to a clip supply to a loop supply, D5 does not disclose how to estimate the number of items remaining in a supply (e.g. clips), much less that it uses a mark attached to the carrier strip to this end. Rather, D5 sets out to increase reliability of closure of the clips (see paragraphs [0010] and [0012]) by identifying the clips on the reel to check machine compatibility.

- 5.4 Therefore, faced with the objective technical problem (estimating number of loops remaining), the skilled person would not combine the teachings of D1 and D5.
- 5.5 Nor, in any case would such a combination (which the Board holds not to be obvious) lead to the features of claim 1.
- 5.6 D5 proposes two ways of establishing the clip's identity. The first (see paragraphs [0013] and [0014]) is to use a label such as an RFID label. The second (see paragraphs [0015] and [0016]) is to detect the geometry of the actual clips using a camera for example.
- 5.7 At most, the first proposed way of identifying clips might lead to D5's (RFID) label being added to the supply of D1. But then the skilled person would not place it on the carrier strip, let alone a predefined distance from the end of the carrier strip. This is

because D5 teaches to preferably place the label on the reel itself (see paragraphs [0013] and [0014]).

Moreover, since D5's clip supply is a continuous line of clips (see paragraph [0032] with figure 1, reference 118) it has no carrier strip, so there is no suggestion to place an [RFID] mark on a carrier strip.

- 5.8 Even if D1 and D5's (non-obviously) combined teachings might lead to the skilled person using a camera (see D5, paragraph [0016]) to detect printed information present on D1's carrier strip (cf. D1, column 2, lines 17 and 18 again), this would not lead the skilled person to the claimed subject matter.

D1's printed information (sausage type) is not disclosed to be a distance from the end of the strip, see above, points 4.6 to 4.7. Therefore, whether or not this information might be detectable with a camera (as known from D5), the combination would not lead to a mark at a distance from the end of the strip.

- 5.9 The Board concludes that the argument brought by the appellant-opponent that claim 1 lacks inventive step starting from D1 with D5 is not convincing. The question of admissibility of this argument, raised by the respondent-proprietor in its reply to the appeal, is therefore moot.

6. Inventive step starting from D2 with D5

The Board's considerations on inventive step starting from D2 are analogous to those when starting from D1 combined with D5. Following the discussion of novelty, D2 does not disclose a mark. Furthermore, D5 explains that the (RFID) mark can be placed anywhere, preferably on the reel, but certainly not on a carrier strip,

since D5's supply has no carrier strip. Therefore, the Board holds that the combination (whether obvious or not) would not lead to a mark attached to the carrier strip a predefined distance from the end.

7. For these reasons, the Board considers that the subject matter of claim 1 involves an inventive step, Article 56 EPC.
8. The subject matter of claims 7 and 8 both imply or define a supply having a mark on a carrier strip a predefined distance from the end of the strip as claim 1 defines. Therefore, these claims involve an inventive step for the same reasons as apply to the subject matter of claim 1.
9. For the reasons explained above, the arguments presented by the appellant-opponent have not convinced the Board that the opposition division (see impugned decision, reasons point 5) erred in rejecting the opposition. Therefore, the respondent-proprietor's auxiliary requests need not be considered and the Board must dismiss the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated