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**Datasheet for the decision
of 4 April 2022**

Case Number: T 1876/18 - 3.2.07

Application Number: 11166049.4

Publication Number: 2441697

IPC: B65D5/56, B65D77/20, B31B7/00

Language of the proceedings: EN

Title of invention:
Packaging for modified atmosphere packaging

Patent Proprietor:
Packable B.V.

Opponents:
GEA Food Solutions Germany GmbH
Colpac Limited

Headword:

Relevant legal provisions:
EPC Art. 54, 100(a), 113(1), 115
EPC R. 103(4)(a), 115(2)
RPBA 2020 Art. 13(2), 15(1), 15(3)

Keyword:

Novelty - (yes)

Observations by third party - taken into account (no)

Amendment of party case after summons - taken into account (no)

Oral proceedings - held in absence of party

Reimbursement of appel fee paid by the opponent - withdrawal
of appeal

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1876/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 4 April 2022

Appellant:

(Patent Proprietor)

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Representative:

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Respondent:

(Opponent 1)

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Representative:

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Respondent:

(Opponent 2)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 May 2018 concerning maintenance of the
European Patent No. 2441697 in amended form.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	A. Pieracci
	S. Watson

Summary of Facts and Submissions

- I. Originally all parties to the opposition proceedings, the patent proprietor, opponent 01 and opponent 02, lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division to maintain the European patent No. 2 441 697 in amended form. Both opponents later withdrew their appeals, opponent 01 with letter of 9 July 2020 and opponent 02 at the oral proceedings before the Board.
- II. The oppositions were filed against the patent as a whole based on the grounds for opposition pursuant to Article 100(a) (lack of novelty and inventive step). The opposition division found that the ground for opposition of lack of novelty prejudiced the maintenance of the patent as granted and that auxiliary requests 1 to 4 did not meet the requirements of Article 123(2) EPC. The patent was maintained in amended form according to auxiliary request 5A filed at the oral proceedings before the opposition division.
- III. In the present decision reference is made to the following documents:
- A1: US 3 779 447 A;
A4: US 4 257 530 A;
D1: EP 0 608 599 A2;
D2: DE 196 54 230 A1;
D3: JP 2000141511 A.
- IV. In preparation for oral proceedings the Board communicated its preliminary assessment of the case to

the parties by means of a communication pursuant to Article 15(1) RPBA 2020.

The Board indicated that the subject-matter of claim 1 of the patent as granted appeared to be new and that, since no further objections had been raised against the patent as granted, it appeared that the patent proprietor's appeal could be allowed.

- V. Anonymous third-party observations were received on 12 April 2021 referring to document D1. With communication dated 16 April 2021 the Board indicated its intention to disregard such observations.
- VI. Non-anonymous third-party observations including document D3 were received on 7 February 2022.
- VII. With letter dated 16 February 2022 the patent proprietor requested that the third-party observations not be admitted.
- VIII. With letter dated 17 March 2022 opponent 02 requested that document D3 be admitted into the proceedings and argued that the subject-matter of claim 1 of the patent as granted was not novel compared with the disclosures of A3 and D1.
- IX. With letter dated 29 March 2022 the patent proprietor filed a translation into English of D3 and argued against the objections of opponent 02.
- X. With letter dated 29 March 2022 opponent 02 provided further arguments against claim 1 of the patent as granted.
- XI. Oral proceedings before the Board took place on 4 April 2022. Opponent 01, although duly summoned, did

not attend the oral proceedings, as announced on 14 March 2022. The oral proceedings took place in its absence pursuant to Rule 115(2) EPC and to Article 15(3) RPBA 2020. At the end of the oral proceedings the decision was announced. For further details of the proceedings reference is made to the minutes thereof.

XII. The final requests of the patent proprietor are

that the appealed decision be set aside and that the patent be maintained as granted, or in the alternative, when setting the decision under appeal aside, that the patent be maintained on the basis of the set of claims according to auxiliary request 1 filed with the statement setting out the grounds of appeal, or according to auxiliary requests 2 or 3 filed with letter dated 12 February 2019, or according to one of auxiliary requests 4 to 6 filed with the letter dated 4 June 2019.

XIII. The final requests of opponents 01 and 02 are

that the appeal be dismissed.

XIV. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

XV. Independent claim 1 according to the patent as granted (main request) reads as follows:

"Method for providing a packaging for modified atmosphere packaging, which method comprises the steps of:

- providing an unfolded sheet (1; 30) for folding a box (1; 20; 40);
- folding the unfolded sheet (1; 30) to a box (1; 20; 40) having at least an access opening (9) and horizontal flange parts (4; 23; 33; 42) bordering the access opening, which flange parts (4; 23; 33; 42) compose an endless circumferential flange and wherein adjacent wall parts of the box abut; characterized by
 - providing a plastic foil (7);
 - heating the plastic foil (7);
 - pressing the heated plastic foil (7) against the inner wall (2, 3; 21, 22; 31, 32; 41) of the box and covering the circumferential flange (4; 23; 33; 42), such that the plastic foil (7) is laminated to the box."

XVI. The wording of the claims according to the auxiliary requests is not given here as these requests are not relevant for the decision.

Reasons for the Decision

1. Oral proceedings in the absence of opponent 01

Although opponent 01 did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and, by absenting itself from oral proceedings, a party gives up that opportunity (see the Case Law of the Boards of Appeal (CLB), 9th edition 2019, V.A.4.5.3.b)).

In accordance with Article 15(3) RPBA 2020, the written submissions of opponent 01 have been taken into account by the Board and are discussed in the following reasons.

2. Admittance of third-party observations (Article 115 EPC)
 - 2.1 Anonymous third-party observations were received on 12 April 2021 referring to document D1 and non-anonymous third-party observations were received on 7 February 2022, *i.e.* less than two months before the oral proceedings, submitting document D3.
 - 2.2 It is established case law of the Boards of Appeal that anonymous third-party observations received in *inter partes* appeal proceedings are deemed not to have been filed and are disregarded on formal grounds (CLB, *supra*, III.N.2.4, third paragraph) and that third parties' observations filed shortly before the oral proceedings are not admitted since their admission would accord the third party a more favourable treatment than would be given to an actual party (see CLB, *supra*, III.N.4.4.3, second paragraph)
 - 2.3 The Board sees no reason to depart in the present case from the established jurisprudence and therefore disregards both third-party observations.
3. Admittance of the objections raised by opponent 02
 - 3.1 Opponent 02 did not file a reply to the patent proprietor's statement setting out the grounds of appeal. It only submitted arguments in writing after oral proceedings had been summoned and orally during oral proceedings before the Board.

3.2 Opponent 02 contested the interpretation of the term "wherein adjacent wall parts of the box abut" given by the patent proprietor, arguing that a folded line of a sheet blank is to be seen as an edge in the same way a cut edge is, so that the subject-matter of claim 1 of the patent as granted was not novel in view of D2 and A4.

Opponent 02 also requested the admittance into the proceedings of an objection of lack of novelty of the subject-matter of claim 1 of the patent as granted in view of document A1; document D3 with a corresponding novelty objection; and an inventive step objection on the basis of the combination of the teachings of documents A4 and D1.

3.3 Opponent 02 justified the late submissions above with the argument that it should always be allowable to reply to the other party's appeal; that D3 and the novelty objections raised were *prima facie* relevant; and that due to the strength of the novelty objections it was not considered necessary to raise an inventive step objection until the oral proceedings.

3.4 The admittance of the above objections and evidence is subject to Article 13(2) RPBA 2020 whereby any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

3.5 The Board cannot see any of the reasons given by opponent 02 as being linked to any exceptional circumstance justifying the late submission.

3.6 With regard to the arguments of opponent 02 the following is noted.

An opportunity to reply to an opposing party's statement setting out the grounds of appeal is certainly foreseen and for this very reason an invitation to reply to the patent proprietor's appeal within a - upon request extendable - time limit of four months was sent to opponent 02 on 11 October 2018.

After the expiry of this time limit the admittance of any amendment to the party's appeal case is subject to the discretion of the Board according to Article 13 RPBA 2020.

The alleged *prima facie*-relevance of document D3 and of the novelty objections based on D3 and on A1 cannot be seen as an exceptional circumstance warranting their admittance into the proceedings as this interpretation of the requirements of Article 13(2) RPBA 2020 would allow the indiscriminate admittance of any relevant evidence and objections even if filed at the latest stage of the proceedings which would clearly be against the principle of procedural economy.

The fact that the Board does not follow the objection of lack of novelty raised by the opponents is also not an exceptional circumstance. In *inter partes*-proceedings it is always to be expected that the Board might be convinced by the arguments of the other party.

3.7 D3 and the above objections of opponent 02 are thus not admitted into the proceedings pursuant to Article 13(2) RPBA 2020.

4. Novelty of the subject-matter of claim 1 of the main request in view of documents D2 and A4 (Article 100 a) and 54 EPC)

4.1 The Board concurs with the patent proprietor (see page 1, last paragraph - page 2, fourth paragraph, of the statement setting out the grounds of appeal) that the feature of claim 1:

"wherein adjacent wall parts of the box abut"

is understood by the person skilled in the art as meaning that the wall parts touch along an edge.

4.2 This understanding which the person skilled in the art derives from the ordinary meaning of the term in the specific context, is confirmed by the description of the patent in suit, in particular in paragraphs [0023], [0038] and [0051], from which it is clear that adjacent wall parts are not meant to overlap (see page 1, third paragraph, of the letter of the patent proprietor dated 4 June 2019).

4.3 The Board cannot share the finding of the opposition division (see point 3.5 of the reasons for the decision) and of opponent 01 (see point 1.a of the letter dated 12 February 2019, pages 2 to 4) that for the specific case at issue other meanings are to be considered such as "to be next to" and "to border", as can be derived from the Merriam-Webster and Oxford dictionaries.

4.4 The Board shares the opinion of the patent proprietor (see letter dated 4 June 2019, page 1, last paragraph - page 2, first paragraph) that the person skilled in the art has no need to look for an explanation of the

contested expression since this is clear in itself and its common interpretation, that the parts touch along an edge, is further supported by the description of the patent in suit.

4.5 Furthermore, the Board is convinced that the person skilled in the art would in any case interpret the explanation of the term "abut" found in a dictionary as a further clarification but not as a different meaning contradicting the primary interpretation of touching along an edge.

The adjacent wall parts "touch along an edge" and therefore they are "next to each other" and "border each other".

4.6 The Board concurs with the patent proprietor (see page 4, paragraphs 2 to 4, of the statement setting out the grounds of appeal) that the wall parts of D2 having flaps (55) overlapping the adjacent wall parts (see column 7, lines 2-4, and figure 2) and the wall parts 74a-74d of A4, also having overlapping parts 78 (see column 4, line 66, - column 5, line 5, figure 3) cannot be seen as being "adjacent wall parts of the box" which "abut".

4.7 The Board is therefore of the opinion that at least for this reason the subject-matter of claim 1 is novel with respect to the disclosures of D2 and A4.

5. Conclusions

The Board is thus convinced by the arguments of the patent proprietor that the decision of the opposition division is not correct and that it cannot be upheld.

Since no other admissible objections have been raised by the opponents against the patent as granted, the Board does not see any reasons preventing the maintenance of the patent in unamended form.

Since opponent 02 withdrew its appeal before the announcement of the decision at the oral proceedings its appeal fee shall be reimbursed at 25% pursuant to Rule 103(4)(a) EPC. The partial reimbursement of the appeal fee paid by opponent 01 had already been administered in the written procedure.

Order

For these reasons it is decided that:

- 1. The decision under appeal is set aside.**
- 2. The patent is maintained as granted.**
- 3. The appeal fee paid by opponent 02 is to be reimbursed at 25%.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated