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Datasheet for the decision of 16 September 2020

Case Number: T 1091/19 - 3.3.06

Application Number: 12166536.8

Publication Number: 2520428

IPC: B32B27/32, B32B27/08, B32B7/02

Language of the proceedings: EN

Title of invention:
Multilayer films

Patent Proprietor:
Irplast S.p.A.

Opponents:
Treofan Germany GmbH & Co. KG
Innovia Films Limited

Headword:
Irplast/Sealing-Temperature

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - extension beyond the content of the application as filed (yes)

Decisions cited:

Catchword:

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Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1091/19 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 16 September 2020

Appellant: (Patent Proprietor)	Irplast S.p.A. Strada Provinciale Val d'Elsa Zona Industriale Terrafino 50053 Empoli (FI) (IT)
Representative:	Modiano, Micaela Nadia Modiano & Partners Via Meravigli, 16 20123 Milano (IT)
Respondent: (Opponent 1)	Treofan Germany GmbH & Co. KG Bergstrasse 66539 Neunkirchen (DE)
Representative:	Mai Dörr Besier European Patent Attorneys European Trademark Attorneys Patentanwälte Kreuzberger Ring 64 65205 Wiesbaden (DE)
Respondent: (Opponent 2)	Innovia Films Limited Station Road Wigton Cumbria CA7 9BG (GB)
Representative:	TL Brand & Co 50 Eastcastle Street London W1W 8EA (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 13 February 2019 revoking European patent No. 2520428 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	J.-M. Schwaller
Members:	S. Arrojo
	C. Brandt

Summary of Facts and Submissions

I. The present appeal lies from the decision of the opposition division to revoke **European patent Nr. 2 520 428** for non-compliance with the requirements of Articles 84 and 123(2) EPC.

II. With its grounds of appeal the patentee and appellant submitted documents D31 and D32 in support of its argumentation under Article 84 EPC. Further it requested that the appealed decision be set aside and that the patent be maintained on the basis of the claims of the main request, or, as an auxiliary measure, of one of the auxiliary requests 1 to 5, all requests as enclosed with its grounds of appeal. Oral proceedings were also requested.

III. Claim 1 of the **main request** reads as follows:

"1. Use for naked collation of packs to form packages of 6 or more packs, of multilayer films comprising at least a core layer, an inner layer and an outer layer wherein:
the outer layer comprises olefin (co)polymers having a melting point in the range 65°C-85°C,
the inner layer comprises olefin (co)polymers having a melting point in the range 65°C-105°C,
the core layer comprises olefin (co)polymers of propylene and/or butene having melting point equal to or higher than 140°C,
wherein the film wrapping the single packs (film (O)) consists of one or more olefin (co)polymers having a melting point higher than 120°C,
wherein the sealing temperature between the outer layer/outer layer, outer layer/inner layer, inner

layer/outer layer of the naked collation multilayer film is in the range 60-80°C and there is no sealing between film (O) and the inner layer of the naked collation multilayer film in the sealing temperature range,
wherein the melting point is determined by DSC;
the sealing temperature is determined in the following sealing conditions:
two sealing bars, upper bar heated, lower bar not heated, contact time between the bars: 0.2s, contact pressure between the bars: 5 psi (34.5 kPa) and wherein the naked collation film complies with the seal mechanical resistance test when the seal mechanical resistance is greater than 50 g/25 mm and at the sealing temperature there is no sealing between the inner layer of the naked collation film and the film (O)."

Claim 1 of **auxiliary request 1** corresponds to that of the main request with the following amendments:

"... and wherein the naked collation film complies with the seal mechanical resistance test when the seal mechanical resistance is greater than 50 g/25 mm *measured with a dynamometer* ~~*and at the sealing temperature there is no sealing between the inner layer of the naked collation film and the film (O)*~~*."*

Claim 1 of **auxiliary request 2** corresponds to that of the main request with the following amendments:

"... the sealing temperature is ~~*determined*~~ *the temperature at which the multilayer film, sealed in the following sealing conditions:*
two sealing bars, upper bar heated, lower bar not heated, contact time between the bars: 0.2 s, contact

pressure between the bars: 5 psi (34.5 kPa), has seal mechanical resistance greater than 50 g/25 mm measured with a dynamometer. ~~and wherein the naked collation film complies with the seal mechanical resistance test when the seal mechanical resistance is greater than 50 g/25mm and at the sealing temperature there is no sealing between the inner layer of the naked collation film and the film (O).~~"

Claim 1 of **auxiliary request 3** corresponds to that of auxiliary request 2 with the following amendments:

"... has seal mechanical resistance between outer layer/inner layer, inner layer/outer layer, outer layer/outer layer greater than 50 g/25 mm measured with a dynamometer."

Claim 1 of **auxiliary requests 4 and 5** reads as follows (amendments with respect to claim 1 as granted):

"1. Use for naked collation of packs to form packages of 6 or more packs, of multilayer films comprising at least a core layer, an inner layer and an outer layer wherein:
the outer layer ~~comprises~~ is formed of one or more olefin (co)polymers having a melting point in the range 65°C-85°C and one or more additives,
the inner layer ~~comprises~~ is formed of one or more olefin (co)polymers having a melting point in the range 65°C-105°C and one or more additives,
the core layer ~~comprises~~ is formed of olefin (co)polymers of propylene and/or butene having melting point equal to or higher than 140°C and one or more additives,
wherein the film wrapping the single packs (film (O)) ~~consists~~ is formed of ~~one or more~~ olefin (co)polymers

and one or more additives and has ~~having~~ a melting point in the range >120°C-170°C ~~higher than 120°C~~, wherein the sealing temperature between the outer layer/outer layer, outer layer/inner layer, inner layer/outer layer of the naked collation multilayer film is in the range 60~~-80~~-78°C and there is no sealing between film (O) and the inner layer of the naked collation multilayer film in the sealing temperature range,
wherein
- the melting point is determined by DSC;
the sealing temperature is the temperature at which the multilayer film, sealed ~~determined~~ in the following sealing conditions:
two sealing bars, upper bar heated, lower bar not heated, contact time between the bars: 0.2s, contact pressure between the bars: 5 psi (34.5 kPa), has seal mechanical resistance between outer layer/inner layer, inner layer/outer layer, outer layer/outer layer greater than 50 g/25mm measured with a dynamometer;
- the amount of the one or more additives ranges from 0 to 10% by weight with respect to layer constituted of the additive + one or more (co)polymers; and
- the one or more additives confer to the layer one or more of the following properties: antistatic, slip, vapour-barrier, antifog, mechanical, flame retardant, optical, antiblock."

IV. Opponents 1 and 2 (here "the respondents") requested to dismiss the appeal.

V. With letter dated 31 August 2020, the appellant withdrew its request for oral proceedings and requested a decision based on the state of the file.

VI. Since none of the requests of the appellant is considered to comply with the requirements of the EPC, the board is now in a position to issue a written decision without holding oral proceedings.

VII. The requests are as follows:

The appellant requests to maintain the patent on the basis of the main request, or, as an auxiliary measure, of one of auxiliary requests 1-5, all requests as enclosed with the statement of grounds of appeal filed on 19 June 2019.

The respondents request to dismiss the appeal.

Reasons for the Decision

1. Main request - Article 123(2) EPC

1.1 The board has concluded that this request does not meet the requirements of Article 123(2) EPC.

1.2 Claim 1 as originally filed was amended by adding the feature: "*the sealing temperature is determined in the following sealing conditions:*
two sealing bars, upper bar heated, lower bar not heated, contact time between the bars: 0.2s, contact pressure between the bars: 5 psi (34.5 kPa) and wherein the naked collation film complies with the seal mechanical resistance test when the seal mechanical resistance is greater than 50 g/25 mm and at the sealing temperature there is no sealing between the inner layer of the naked collation film and the film (O)."

1.3 The determination method defined in this feature is based on the process to determine the seal mechanical strength as disclosed in the examples (pages 15-16 of the description as filed). On page 13, 6th full paragraph of the description as filed it is further indicated that "*the sealing temperature of the multilayer films of the invention is ... determined according to the test reported under in the examples*".

1.4 The appellant argued that the above passages provided a clear and unambiguous disclosure of the method to determine the sealing temperature as defined in claim 1. In particular, a skilled person would have clearly and unambiguously derived that the sealing temperature corresponded to the minimum temperature at which the test was satisfied, that is, at which the seal mechanical resistance of the film was greater than 50 g/25 mm.

1.5 The board cannot follow the above argumentation because the feature "*the naked collation film complies with the seal mechanical resistance test when the seal mechanical resistance is greater than 50 g/25 mm*" in claim 1 is disclosed *verbatim* in the first full paragraph of page 16 of the application as filed. However, while in its original context this condition is disclosed as a reference for determining when the seal mechanical resistance test is complied with, claim 1 discloses this feature as part of the method to determine the sealing temperature, therefore implying that the sealing temperature is the temperature at which this condition is fulfilled (an interpretation which is in-line with the argumentation of the appellant).

Moreover, while the above cited passage on page 13 of the application as filed establishes a link between the determination of the "sealing temperature" and the test on pages 15-16, there is no clear and unambiguous disclosure in the application as filed as to how the sealing temperature should be calculated using this test. In particular, there is no clear indication that the sealing temperature corresponds to the minimum temperature at which the seal mechanical resistance of the film is greater than 50 g/25 mm.

In the paragraph bridging pages 15 and 16 it is further indicated that the test is satisfied when the "sealing temperature" is in the range of 60-80°C and there is no sealing between the naked collation film and film (O).

While the board does not deny that the reference on page 13 of the application as filed to the use of the test in the examples for determining the sealing temperature could imply that the sealing temperature is the minimum temperature satisfying the seal mechanical resistance test, this is not the only technically reasonable interpretation of these passages. As argued by opponent 1 (see point 117 of its reply to appeal), since the concept of "no sealing" in the examples is associated with a seal mechanical resistance equal to 0 g/25 mm (see tables 2-4), it would be equally reasonable to conclude that the sealing temperature corresponds to the minimum temperature at which the seal mechanical resistance is greater than 0 g/25 mm (i.e. the temperature at which there is at least some sealing).

Since there is no clear indication as to which of these two technically reasonable conclusions is the correct one, the board considers that there is no clear and

unambiguous disclosure of the method to determine the sealing temperature as defined in claim 1.

The board therefore concludes that the application as originally filed does not clearly and unambiguously describe, either explicitly or implicitly, that the determination of the sealing temperature is linked to the condition of a seal mechanical resistance greater than 50 g/25 mm.

1.6 The subject-matter of claim 1 of the main request therefore extends beyond the content of the application as filed.

2. Auxiliary request 1 - Article 123(2) EPC

2.1 The board has concluded that this request does not meet the requirements of Article 123(2) EPC.

2.2 Claim 1 differs from that of the main request in that the wording *"and at the sealing temperature there is no sealing between the inner layer of the naked collation film and the film (O)"* has been deleted, and in that the mechanical resistance is *"measured with a dynamometer".*

2.3 Claim 1 still defines a link between the determination of the sealing temperature and the condition that the seal mechanical resistance strength is greater than 50 g/25 mm.

2.4 Therefore, the above arguments and conclusions for the main request also apply to this request.

2.5 Claim 1 is thus considered to extend beyond the content of the application as filed.

3. Auxiliary request 2 - Article 123(2) EPC

3.1 The board has concluded that this request does not meet the requirements of Article 123(2) EPC.

3.2 Claim 1 differs from that of the main request in that it further clarifies that the sealing temperature is the temperature at which the multilayer film has a seal mechanical resistance greater than 50 g/25mm.

3.3 Thus, claim 1 still defines that the sealing temperature is determined using the condition that the seal mechanical resistance strength is greater than 50 g/25 mm.

3.4 Therefore, the above arguments and conclusions for the main request also apply to this request.

3.5 Claim 1 at issue is thus considered to extend beyond the content of the application as filed.

4. Auxiliary request 3 - Article 123(2) EPC

4.1 The board has concluded that this request does not meet the requirements of Article 123(2) EPC.

4.2 Claim 1 of this request differs from that of auxiliary request 2 in that it specifies that it is the seal mechanical resistance between outer layer/inner layer, inner layer/outer layer, outer layer/outer layer which should be greater than 50 g/25mm.

4.3 Thus, claim 1 still defines that the sealing temperature is determined using the condition that the seal mechanical resistance strength is greater than 50 g/25 mm.

4.4 Therefore, the above arguments and conclusions for the main request also apply to this request.

4.5 Claim 1 is thus considered to extend beyond the content of the application as filed.

5. Auxiliary requests 4 and 5 - Article 123(2) EPC

5.1 The board has concluded that these requests do not meet the requirements of Article 123(2) EPC.

5.2 Claim 1 of these requests corresponds to a combination of claim 1 of auxiliary request 3 and claims 2, 6 and 7 of the application as filed. The method to determine the sealing temperature is identical to that defined in auxiliary request 3.

5.3 Thus, since claim 1 still defines that the sealing temperature is determined using the condition that the seal mechanical resistance strength is greater than 50 g/25 mm, the above arguments and conclusions for the main request also apply to these requests.

5.4 Claim 1 of these requests is thus considered to extend beyond the content of the application as filed.

6. The board therefore concludes that none of the requests on file meets the requirements of Article 123(2) EPC.

7. In view of this conclusion, there is no need to deal with the other objections raised by the respondents or with the content of documents D31 and D32.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

A. Pinna J.-M. Schwaller

Decision electronically authenticated