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**Datasheet for the decision
of 15 May 2020**

Case Number: T 3170/19 - 3.2.07

Application Number: 14176477.9

Publication Number: 2824038

IPC: B65D65/40, B32B27/32

Language of the proceedings: EN

Title of invention:

Thin film for waste packing cassettes

Applicant:

Flexopack S.A.

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 113(1), 116(1), 123(2)
RPBA 2020 Art. 12(8)

Keyword:

Decision in written proceedings without holding oral proceedings

Decisions cited:

Catchword:



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Case Number: T 3170/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 15 May 2020

Appellant: Flexopack S.A.
(Applicant) Thessi Tzima
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Representative: Isarpatent
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 31 May 2019
refusing European patent application No.
14176477.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

I. An appeal was filed by the applicant (appellant) in the prescribed form and within the prescribed period against the decision of the examining division to refuse European patent application No. 14 176 477.9. The then main request was found to not meet the requirements of Articles 54 and 56 EPC (lack of novelty and of inventive step). Auxiliary Requests 1 to 6 were held to not meet the requirements of Article 56 EPC (lack of inventive step), in addition auxiliary requests 5 and 6 were held to not meet the requirements of Article 123(2) EPC (extension of subject-matter beyond the application as originally filed).

II. The appellant requested

that the decision under appeal be set aside and that the case be remitted to the examining division with the order to grant a patent based on the claims of the main request or one of the auxiliary requests 1 to 5 as filed with the statement setting out the grounds of appeal on 10 October 2019.

Oral proceedings were requested if the Board did not intend to set aside the decision and order the grant of the patent on the basis of the main request.

III. In a communication pursuant to Rule 100(2) EPC, the Board gave its preliminary opinion that the subject-matter of the claims according to the main request satisfied the requirements of the EPC. The appellant was invited to adapt the description to the claimed subject-matter according to the main request.

IV. With its reply to the communication pursuant to Article 100(2) EPC the appellant filed with letter dated 16 April 2020 adapted description pages 1 to 16 and clarified their earlier requests be directed to their main request and the adapted description.

V. The present decision refers to the following documents which were considered in the decision under appeal:

D1: EP 2 332 723 A1;

D2: EP 2 535 279 A1.

VI. The appellant's arguments contesting the decision of the examining division are dealt with in detail in the reasons for the decision.

VII. Independent claim 1 of the main request, which is identical to independent claim 1 of auxiliary request 1 of the decision under appeal, reads as follows:

"A multilayer film with weight between and including 15 and 22 g/m² for use in malodorous item packaging, where the film comprises at least a layer comprising polypropylene and a further layer comprising an oxygen barrier material having a weight of less than 1.5 g/m²".

Reasons for the Decision

1. *Procedural aspects*

The present decision is taken in written proceedings without holding oral proceedings in accordance with Article 12(8) RPBA 2020. The party's rights under Articles 113 and 116 EPC are observed.

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.

The appellant's request for oral proceedings pursuant to Article 116(1) EPC is auxiliary to its main request that the decision under appeal be set aside, that the case be remitted to the examining division and that the examining division be ordered to grant a patent on the basis of the appellant's main request. Thus, since the appellant's main request is followed by the Board, the aforementioned auxiliary request does not become active.

2. *Article 123(2) EPC and Article 54 EPC*

- 2.1 In the contested decision the examining division found that the subject-matter of claim 1 of auxiliary request 1 (now main request) was based on claim 1 as originally filed and page 8, lines 10-12 of the description. The Board sees no reason to disagree with the examining division on this point. Claim 1 of the current main request corresponds to claim 1 as originally filed with the addition of the feature taken from page 8, lines 10-11 of the original description which discloses that the oxygen barrier material has a weight less than 1.5

g/m^2 . Therefore, the requirements of Article 123(2) EPC appear to be fulfilled.

2.2 The examining division further concludes that the subject-matter of claim 1 is novel (Article 54 EPC) in comparison with the disclosures of both documents D1 and D2.

Again, the Board concurs with the examining division (reasons for the decision, points 2.2 and 3.) that the subject-matter of claim 1 is novel when compared with the disclosure of D1, due to the feature that the film has a weight between and including 15 and 22 g/m^2 , and to the disclosure of D2, due to the feature that the weight of the oxygen barrier material is less than 1.5 g/m^2 .

3. *Inventive Step - Article 56 EPC*

The examining division found that the subject-matter of claim 1 of the current main request (auxiliary request 1 of the contested decision) did not fulfil the requirements of Article 56 EPC.

In the reasons for the decision (point 3), the division found that starting from the disclosure of document D1, the distinguishing feature of the invention is that the film weight is between and including 15 and 22 g/m^2 , the appellant has not contested this finding (see statement setting out the grounds of appeal, page 9, first paragraph).

The examining division formulated the objective technical problem as being to provide further films suitable for use in cassette packaging, and reasoned that it would be obvious for the skilled person to increase the weight of the film of document D1, as is

suggested by the teaching of document D2 (paragraphs [0086] to [0088]).

They reasoned that the skilled person would understand that there must be a compromise with respect to film base weight to achieve films that are thin enough for packing but strong enough in use, whilst also being aware of other factors which affect suitability of use, such as the number and nature of the layers. The examining division concluded (point 2.3) that the claimed subject-matter represents an obvious compromise of technical features known from D1 and D2 to influence film usage characteristics.

The appellant has however convincingly demonstrated (statement setting out the grounds of the appeal, section II.1), that the skilled person starting from document D1 would not increase the film weight as D1 teaches away from using a heavier film.

As the appellant has argued, document D1 clearly teaches to provide a film with a weight less than 15 g/m². Paragraph [0009] states "[w]e have surprisingly found that all these features can be achieved with a very lightweight multilayer film with grammage less than 15 grs / square meter. This is extremely beneficial for the environment as multilayer films are extremely difficult to be produced with so small weight per surface" and paragraph [0010] confirms that "[t]he invention is directed to a multilayer film with a weight of less than 15 g/m² used in malodorous item packaging". Claim 1 of D1 and both examples also show a multilayer film having a weight less than 15 g/m².

The appellant further argues that document D2 does not provide any incentive for the skilled person to modify

the film disclosed in document D1 by increasing the weight.

It is the established jurisprudence of the Boards of Appeal that in order to determine what would have been obvious to the skilled person, the question that has to be asked is not whether the skilled person could have carried out the invention but whether they would have done so (see the Case Law of the Boards of Appeal, 9th edition 2019, I.D.5).

In the present case, the skilled person, starting from document D1 and looking to produce an alternative multilayer film had no reason to modify the multilayer film of document D1 by increasing its weight based on the teaching of document D2.

Document D2 does disclose (paragraphs [0086]-[0088]) that the multilayer film described in D2 may have a weight lower than 25 g/m^2 . However, this paragraph also discloses that the film weight is preferably lower than 15 g/m^2 .

Therefore the skilled person would understand from the teaching of D2 that although a heavier weight of film can be used (for the specific film type disclosed in D2), a film weight less than 15 g/m^2 is preferable. Document D2 therefore provides no incentive to modify the film of D1 which is already in the more preferable weight range. The teaching of D2 relates to providing films with a sealing layer comprising a specific copolymer capable of forming improved heat seals preventing odour escape in the used packaging. It does not address how the weight of the film may affect its strength whilst in use or its ability to be packed in a cassette.

Therefore, without the benefit of hindsight, the skilled person starting from D1 would not be motivated by document D2 to modify the central feature of the teaching of D1, that the film should have a weight less than 15 g/m².

The subject-matter of claim 1 is therefore not obvious when compared with a combination of the disclosure of documents D1 and D2.

4. No further objections have been presented by the examining division in the reasons for the decision which would prejudice the granting of the present application.

The Board sees no reason to raise any further objections.

As a consequence, the appellant has demonstrated in a convincing manner the incorrectness of the decision under appeal in respect of the main request, so that the patent may be granted in accordance with the main request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent in the following version:

Description:

Pages 1 to 16 filed with letter of 16 April 2020.

Claims

Claims 1 to 10 of the main request, filed with the statement setting out the grounds of appeal of 10 October 2019.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated