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D E C I S I O N
of 11 May 2001

Case Number: T 0730/99 - 3.2.2

Application Number: 96911055.0

Publication Number: 0823876

IPC: B31B 23/00

Language of the proceedings: EN

Title of invention:
MANUFACTURE OF BAGS

Applicant:
CEDO Limited

Opponent:

-

Headword:

-

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Novelty and inventive step: yes, after amendments"

Decisions cited:

-

Catchword:

-



Case Number: T 0730/99 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 11 May 2001

Appellant: CEDO Limited
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Representative: Lerwill, John
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 3 March 1999
refusing European patent application
No. 96 911 055.0 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. D. Weiß
Members: D. Valle
R. T. Menapace

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal against the decision of the Examining Division to refuse the application No. 96 911 055.0 for lack of novelty of the subject-matter of the independent claims 1 and 10 against the document:

D1: GB - A - 2 274 446.

II. The present application originated from an international application filed on 25 April 1996 and published under WO 96/34737 which entered the regional phase before the EPO on 14 November 1997.

III. The Examining Division issued a first communication on 25 February 1998 merely referring back to the objections raised in section V.2 of the international preliminary examination report of 8 July 1997 which stated that: "It is true that GB - A - 2 274 446 is silent ...whether the folding steps are performed simultaneously, or sequentially... . The submission of the applicant that in continuous handled bag producing processes, the side portions must be inevitably folded simultaneously cannot be accepted. A fair approach to the teaching of GB - A - 2 274 446 would lead the objective reader of said document to the conclusion that folding can be performed either simultaneously or sequentially. The information of a sequentially performed gusset folding step is therefore already implicitly disclosed in the teaching of GB - A - 2 274 446".

IV. Following this first communication of the Examining Division, the applicant filed with letter of 19 June

1998 an answer accompanied by a declaration of Mr David M. Angless, the inventor designated in the application, in which he put forward detailed reasons why in his opinion document D1 could not have implicitly disclosed a successive folding, and which can be summarized as follows: The only known possibility at the time of the invention for folding a tubing having handle cut-outs was with the sky-type folder as sketched in Figure 3 of the above cited declaration. With this system - in order to maintain the necessary even transversal tension on the tubing - only a simultaneous, C-folding was possible. A successive folding, as was theoretically possible with a so-called "A" machine (Figures 1 and 2 of the above declaration) was not practically feasible because the handle cut-out would catch on the apex of the A-frame and tear off will ensue.

V. The Examining Division in the subsequent consultation by telephone of 21 October 1998 merely stated that the answer of the applicant did not provide reasonable and convincing grounds to change its position. There were "two and only two options with respect to the gusset folding operation: folding is performed either concurrently or subsequently. There is thus no multiple choice selection with respect to the possible folding characteristics. The subsequent folding step as claimed is therefore already implicitly contained in the teaching of GB - A - 2 274 446". Claim 1 thus lacked novelty against document D1. In the same communication the examining division suggested that the applicant requested a decision according to the state of the file.

VI. With letter of 16 December 1998 the applicant requested

a decision on the basis of the previous written submissions.

VII. On 3 March 1999 the Examining Division issued a concise decision in which no further grounds were given but it was referred back to the previous communications for the reasons of the decision.

VIII. On 27 April 1999 the applicant filed a notice of appeal against the above decision of the examining division. In the statement setting out the grounds for appeal which was filed on 28 June 1999, at page 3, point 2.9, he pointed out that "The applicant has repeatedly and consistently maintained the line of reasoning set out above in its responses dated 7 April 1997 (in the international phase) and 19 June 1998. Further, to reinforce their position the Applicant's provided a Declaration sworn by the inventor, David Angless, with their second response. In view of those submissions and the Declaration, it is apparent that the applicants have put forward a plausible case which shifts the burden of disproving the Applicant's assertions to the Examining Division. However, the Examining Division has consistently failed to provide reasoned arguments in support of its position, and instead has simply relied on its original and unsupported assumption that D1 implicitly discloses successive folding of the side portion of the tubing with a handle cut-out onto a medial portion. It has, therefore, conspicuously failed to discharge the burden that has been placed upon it."

IX. Oral proceedings took place 11 May 2001 on request of the appellant; at its end the requests of the appellant were that the decision under appeal be set aside and that a patent be granted on the basis of the set of

claims 1 to 16 submitted during the oral proceedings.

X. Independent claims 1 and 9 as submitted on 11 May 2001 during the oral proceedings read as follows:

"1. A method of manufacturing a bag from layflat tubing comprising steps of first folding the longitudinal edges (4) of the tubing (1) to form inwardly extending gussets (2), further folding the flattened gusseted tubing to reduce the tubing's width, transversely sealing the folded and gusseted tubing to form a base seal, and forming handles (10) between the folding operations by removing a central section of the gusseted tubing and by transversely sealing the tubing at a position corresponding to the ends of the handles, characterised in that the gusseted portions are folded successively about respective longitudinal fold lines (5) to lie against opposite sides of a medial portion (3) of the tubing between the gusseted portion and the gusseted portions are each folded by passing the flattened tubing under controlled tension over a discrete arcuate folding ramp (33, 34) having a lateral edge around which the gusseted portion is folded."

"9. Apparatus for manufacturing a series of bags from layflat tubing comprising: first folding means (21) for folding the longitudinal edges (4) of the tubing to form inwardly extending gussets (2), second folding means (24) for further folding the gusseted tubing to reduce the tubing's width; means (25) for transversely sealing the folded and gusseted tubing thereby to form a base seal; and means for producing a transverse line of weakness extending across the tubing to facilitate separation of individual bags; cutting means (23) for removing a central section of the tubing for forming

handles, and sealing means (22) to seal the tubing transversely at a position corresponding to the ends of the handles are provided between the first and second folding means, characterised in that the second folding means (24) is arranged to fold the gusseted portions (4) about respective longitudinal fold lines (5) in succession to lie against opposite sides of a medial portion (3) of the tubing between the gusseted portions, and wherein the second folding means (24) comprises two arcuate folding ramps (33, 34) for folding the respective portions onto the medial portions and means for guiding the flattened tubing under controlled tension over the folding ramps."

- XI. During the oral proceedings the appellant argued essentially that the last submitted version of the claims contained features that clearly overcome the objection of novelty raised by the Examining Division and also complied with the further requirements of the EPC. In particular the essential features of the invention, namely that the gusseted portions were folded successively to lie against opposite sides of a medial portion of the tubing by passing the tubing over a discrete arcuate folding ramp, were clearly above a mere workshop activity of a person skilled in the art.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments*

New independent claims 1 and 9 contain the features of the original claims 1, 3 and 10, 12 respectively.

Claims 3 and 12 were directly dependent from claims 1 and 10 respectively. The additional feature of "(passing the flattened tubing) under controlled tension (over a discrete arcuate folding ramp)" originally derives from page 2, penultimate paragraph of WO 96/34737. The remaining dependent claims have been renumbered accordingly. Therefore, the amendments comply with Article 123 EPC.

3. *Novelty*

3.1 The closest state of the art is represented by document D1 which contains all the features of the preamble of the independent claims 1 and 9.

3.2 The Examining Division was of the opinion that also all the features of the characterizing part of the original independent claims were disclosed by the document D1, that is: "the gusseted portions are folded successively about respective longitudinal fold lines to lie against opposite sides of a medial portion of the tubing between the gusseted portions".

Document D1 however is silent about the method of folding. Furthermore, to state that the method of successively folding was implicitly disclosed just because there were apparently only two possibilities of folding, namely concurrently or successively, is not correct. A prior art disclosure is novelty destroying only if the subject-matter claimed can be inferred directly and unequivocally from that disclosure, including features which for the skilled person are implicitly disclosed therein (see e.g. T 677/91, T 465/92 and T 511/92). There is however no basis in document D1 which can lead unambiguously and

necessarily to the conclusion that there are only two possible methods for producing the two folds. In fact there are an undefined number of methods which differ from each other not only by the time variable but also by other method steps. To limit the possible variations of the method only to the time variable is, in the given circumstances, a typical ex-post-consideration which is objectionable even in an argument against inventive step.

- 3.3 In addition to the above considerations, the subject-matter of the independent claims differs from the cited prior art also by the feature referring to the passing under controlled tension over the arcuate folding ramp.

4. *Inventive step*

The problem underlying the invention is to make it possible to fold a layflat tubing for manufacturing bags - whereby the tubing has a central portion removed in order to form the handles of the bags - avoiding that the cut-out portions be caught and torn off by the folding apparatus.

This problem is solved by the combination of features of the characterizing part of claims 1 (method) or 9 (apparatus), in particular by the features that the portions are folded successively by means of two arcuate folding ramps.

By passing the tubing over an arcuate folding ramp having a lateral (slanted) edge around which the gusseted portion is folded, tearing of the handle cut-out portions can be avoided because the same tension which keeps the tubing flat and pressed against

the ramp helps folding the gusseted portion around the arcuate ramp by effect of the curvature.

No document of the available prior art hints at the above combination of features. Accordingly the subject-matter of the independent claims 1 and 9 involves an inventive step.

5. The Board has the impression that the Examining Division in the present case failed to make a real effort to seriously and constructively consider the applicant's arguments. In particular in the decision under appeal it referred merely to its communication of 21 October 1998 were the latest arguments of the applicant together with the declaration of Mr D. M. Angless were only mentioned but no reasons were given to refute them.

Nevertheless, in view of the decision on the merits of the present appeal and in order to avoid further inconveniences to the applicant who has not asked for reimbursement of the appeal fee, the Board considers it inappropriate in the present case, to take further measures and it deems it sufficient to point out that the applicant is entitled to a thorough and complete consideration of his arguments (cf. Article 114(1) EPC). The ensuing responsibility of the Examining Division, which includes the provision of reasons for refuting the applicant's arguments, is - as the present case demonstrates - also imperative under the aspect of the overall procedural economy and may not be passed on to the second instance.

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 with claims 1 to 16 as submitted at the oral proceedings and a description and figures to be adapted accordingly.

The Registrar:

The Chairman:

R. Schumacher

W. D. Weiß