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**D E C I S I O N**  
**of 17 October 2002**

**Case Number:** T 0358/02 - 3.3.7

**Application Number:** 94302206.1

**Publication Number:** 0630745

**IPC:** B32B 27/10

**Language of the proceedings:** EN

**Title of invention:**  
Multi-layer product

**Patentee:**  
Enso Oyj

**Opponent:**  
SIG Combibloc GmbH & Co. KG

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54

**Keyword:**  
"Novelty (yes)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0358/02 - 3.3.7

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.7  
of 17 October 2002

**Appellant:** Enso Oyj  
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**Representative:** Ede, Eric  
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**Respondent:** SIG Combibloc GmbH & Co. KG  
(Opponent) Rurstrasse 58  
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**Representative:** Cohausz & Florack  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 14 February 2002  
revoking European patent No. 0 630 745 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** R. E. Teschemacher  
**Members:** B. L. ter Laan  
B. J. M. Struif

## Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 0 630 745 in respect of European patent application No. 94 302 206.1, filed on 28 March 1994 and claiming priority from earlier application FI 932 875 of 21 June 1993, was published on 29 July 1998 on the basis of a set of ten claims, Claim 1 reading:

"A multi-layer product for producing containers, comprising a layer (1) formed of a fiber-based packing material on one surface of which a gas-tight multi-layer plastic coating (3) is arranged, said gas-tight multi-layer plastic coating (3) being formed of a 1-4 g/m<sup>2</sup> barrier plastic layer (4a,4b,4c,4d,4e), a 1-4 g/m<sup>2</sup> binder layer (5), and a surface layer (6) of a heat-sealable polyolefin material having sufficient thickness for liquid-tight heat sealing, said layers being superposed such that the barrier plastics layer is the closest of said layers to the fiber-based packing material layer (1), characterised in that the barrier plastics layer (4a,4b,4c,4d,4e) is applied immediately to the fiber-based packing material layer (1) or is applied to a smoothing layer (7) disposed between said barrier plastics layer (4a,4b,4c,4d,4e) and said fiber-based packing material layer (1), said smoothing layer (7) having a thickness of less than 3 g/m<sup>2</sup>."

Claims 2 to 10 concerned preferred embodiments of the multi-layer product of Claim 1.

- II. On 29 April 1999 a notice of opposition against the granted patent was filed, in which the revocation of the patent in its entirety was requested on the grounds

set out in Article 100(a) EPC. According to the Opponent, the question of novelty needed not be answered since the claimed-subject matter was not inventive anyway. The opposition was supported *inter alia* by WO-A-92/04 187 (E1).

- III. In a decision announced at the end of oral proceedings on 22 October 2001 and issued in writing on 14 February 2002, the Opposition Division revoked the patent. That decision was based on the claims as granted. The Opposition Division held that the second alternative, according to which a smoothing layer having a thickness of less than 3 g/m<sup>2</sup> is disposed between the barrier plastics layer and the fibre-based packing material layer, was not novel in view of E1.
- IV. On 3 April 2002 the proprietor (appellant) lodged an appeal against the above decision and paid the prescribed fee on the same day. The statement setting out the grounds of appeal was filed on 11 June 2002, with which a new set of nine claims was submitted as the sole request. In claim 1 the second alternative had been deleted and the dependent claims had been adapted accordingly. The Appellant argued that, since the basis of the decision had been removed, the claimed subject-matter was now novel. Further arguments concerned differences between the objects of the products of E1 and those of the patent in suit. In support, a paper entitled "Aspects on pinhole resistant multilayer coating" was also filed.
- V. By letter of 1 August 2002, the opponent (respondent) informed the Board that they would not submit any arguments.

- IV. The appellant requests that the decision under appeal be set aside and the patent be maintained on the basis of the sole request filed with the statement setting out the grounds of appeal.

The Respondent requests a decision on the file as it stands.

### **Reasons for the Decision**

1. The appeal is admissible.

#### *Amendments*

2. Claim 1 of the sole request is now restricted to the first of two alternatives mentioned in the claim as granted. Therefore, the requirements of Article 123(2) and (3) EPC are satisfied. The amendment does not introduce any unclarities or inconsistencies with the description so that Article 84 EPC, as far as the amendment is concerned, is also complied with.

#### *Novelty*

1. E1 describes a paper cover (3) for a food product container, said paper cover (3) being heat-sealable onto said container (2) with and peelable along a heat-sealed seam (6), said cover being coated at its inside surface facing said container with polymer material coat layers (8...11) of which the top layer (11) facing the inside of the container forms said hermetically sealed and readily peelable heat-sealed seam (6), characterized in that the inside coat layers on the base material of said paper

cover (4) are formed by a polymer bonding layer (8), a polymer layer of oxygen-impermeable material (9), another polymer bonding layer (10) and a heat-sealable polymer layer (11) (claim 1). From the wording of the claims, the description and the figures of E1, it appears that there should always be a "polymer bonding layer" between the base material and the oxygen-impermeable material. No embodiment is described in which the barrier layer is directly attached to the base material layer.

As a suitable material for the barrier layer ethyl vinyl alcohol polymer (EVOH) is mentioned (page 2, lines 29 to 31). The polymer forming the bonding layer should be compatible with the barrier material and is exemplified as an appropriately modified polyethylene that can be laminated in either one or both bonding layers with the EVOH layer (page 2, lines 32 to 37). Further examples of suitable barrier materials are polyethylene terephthalate (PET) with grafted polyethylene as a compatible bonding material and polyamide (PA) with a copolymer of ethylene and unsaturated carboxylic acid as the compatible bonding material (page 3, lines 1 to 6). The thickness of the bonding layer can be in the range of 2 to 15, preferably 4 to 10 g/m<sup>2</sup> (page 3, lines 11 and 12).

2. According to present claim 1, the barrier plastics layer should be applied immediately to the fibre-based packing material layer. Therefore, the question to be answered is whether in E1 the plastics layer directly bonded to the base layer is to be seen as a barrier layer within the definition of present claim 1.
  - (a) Although specifications of the materials to be used for

the various layers are given in dependent claims 2 to 9 as well as in the patent specification (figures, column 3, line 24 to column 6, line 18), in claim 1, the broadest aspect of the claimed subject-matter, no limitation regarding the material used for the various layers, in particular for the barrier plastics layer, is given. The only indication of the properties and hence the material of the barrier layer, is implied in the requirement that the whole of the multilayer plastics coating should be gas-tight. The nature of this gas, eg oxygen, air, water vapour, is however not specified.

According to E1, the material of the layer bonded directly to the base layer is an "appropriately modified polyethene", exemplified as a grafted polyethylene or a copolymer of ethylene and an unsaturated carboxylic acid. That kind of material is mentioned or referred to in several others of the documents mentioned during the opposition and examination proceedings, but always in the context of their adhesive or bonding properties and not as barrier materials. Therefore, there is no indication that the skilled person would regard the material applied immediately to the base layer in E1 as a barrier material as indicated in present claim 1.

3. For the above reasons, the Board comes to the conclusion that the claimed subject-matter is novel.
4. The decision under appeal referred only to novelty and did not address the issue of inventive step. Therefore, the Board, in order not to deprive the parties of the possibility of being heard by two instances, does not consider it appropriate to deal with the issue of

inventive step. Accordingly, the case is remitted to the first instance for further prosecution pursuant to Article 111(1) (EPC).

## **Order**

### **For these reasons it is decided:**

1. The appeal is dismissed.
2. The case is remitted to the Opposition Division for further prosecution on the basis of claims 1 to 9 of the sole request filed with the statement setting out the grounds of appeal on 11 June 2002.

The Registrar:

The Chairman:

G. Eickhoff

R. Teschemacher