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D E C I S I O N
of 16 June 2005

Case Number: T 0869/04 - 3.2.7

Application Number: 01119757.1

Publication Number: 1288139

IPC: B65D 75/58

Language of the proceedings: EN

Title of invention:

Package for packing food products and method of packing food products

Applicant:

Kraft Foods R&D, Inc., Zweigniederlassung München

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 56, 84, 111(2), 123(2)(3)

Keyword:

"Inventive step - main and first auxiliary request (no)"
"Support in the description - second auxiliary request (no)"
"Third auxiliary request - feature not contained in claims as filed; remittal for consideration of further search"

Decisions cited:

T 0074/90

Catchword:

-



Case Number: T 0869/04 - 3.2.7

D E C I S I O N
of the Technical Board of Appeal 3.2.7
of 16 June 2005

Appellant:

Kraft Foods R&D, Inc.
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Bayerwaldstrasse 8
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Representative:

HOFFMAN - EITLE
Patent- und Rechtsanwälte
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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 1 March 2004
refusing European application No. 01119757.1
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. A. O'Reilly
E. Lachacinski

Summary of Facts and Submissions

- I. European application No. 01 119 757.1 was refused by the Examining Division for lack of inventive step.
- II. The appellant (applicant) filed an appeal against the above decision.
- III. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of claim 1 of the main request or of the first to third auxiliary requests filed at the oral proceedings before the Board on 16 June 2005.
- IV. Claim 1 of the main request reads as follows:

"1. Package for packing generally block-shaped food products (12), the package comprising a generally rectangular sheet of a flat, foldable packing material (10) having an inner and an outer surface, the sheet comprising a central body portion (14) for enclosing the top, bottom, side, front and rear surfaces of the block-shaped food product (12), a frame-shaped sealing portion (16) enclosing the body portion (14) for sealing the package and comprising a front (17), a rear (18) and two side portions (19), and two flap portions (20, 21), one of the flap portions (20) being adjacent one side portion (19) of the sealing portion and the other flap portion (20) being adjacent the other one the side portions (19) of the sealing portion (16), wherein the package is folded around the food product (12), such that the body portion (14) encloses the food product (12) with the inner surface of the sheet (10) directed to the food product (12), the inner surface of

one of the side portions (19) of sealing portion (16) abuts to the inner surface of the other one of the side portions (19) of the sealing portion (16), and a seal being formed along the front (17), rear (18) and the side portions (19) of the sealing portion (16), respectively, wherein the inner surface of the flap portion (20, 21) and the outer surface of the flap (20, 21) portion are accessible, one of the flap portions (20) is wider than the other one of the flap portions (21), the flap portions (20, 21) are folded such that the wider flap portion (20) is located on top of the narrower flap portion (21) and the seal is formed by means of adhesive applied on the inner surfaces of the sheet (10) in the sealing portion (16), characterised in that both flap portions (20, 21) are free of adhesive."

Claim 1 of the first auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. Package for packing generally block-shaped food products (12), the package comprising a generally rectangular sheet of a flat, foldable packing material (10) having an inner and an outer surface, the sheet comprising a central body portion (14) for enclosing the top, bottom, side, front and rear surfaces of the block-shaped food product (12), a frame-shaped sealing portion (16) enclosing the body portion (14) for sealing the package and comprising a front (17), a rear (18) and two side portions (19), and two flap portions (20, 21), one of the flap portions (20) being adjacent one side portion (19) of the sealing portion and the other flap portion (20) being adjacent the other one

the side portions (19) of the sealing portion (16), wherein the package is folded around the food product (12), such that the body portion (14) encloses the food product (12) with the inner surface of the sheet (10) directed to the food product (12), the inner surface of one of the side portions (19) of sealing portion (16) abuts to the inner surface of the other one of the side portions (19) of the sealing portion (16), and a seal being formed along the front (17), rear (18) and the side portions (19) of the sealing portion (16), respectively, wherein the inner surface of the flap portion (20, 21) and the outer surface of the flap (20, 21) portion are accessible, one of the flap portions (20) is wider than the other one of the flap portions (21), the flap portions (20, 21) are folded such that the wider flap portion (20) is located on top of the narrower flap portion (21) and the seal is formed by means of adhesive applied on the inner surfaces of the sheet (10) in the sealing portion (16), characterised in that both flap portions (20, 21) are free of adhesive **and in that the adhesive applied to the sealing portion (16) is peelable.**"

Claim 1 of the second auxiliary request reads as follows (amendments when compared to claim 1 of the first auxiliary request are depicted in bold):

"1. Package for packing generally block-shaped food products (12), the package comprising a generally rectangular sheet of a flat, foldable packing material (10) having an inner and an outer surface, the sheet comprising a central body portion (14) for enclosing the top, bottom, side, front and rear surfaces of the

block-shaped food product (12), a frame-shaped sealing portion (16) enclosing the body portion (14) for sealing the package and comprising a front (17), a rear (18) and two side portions (19), and two flap portions (20, 21), one of the flap portions (20) being adjacent one side portion (19) of the sealing portion and the other flap portion (21) being adjacent the other one of the side portions (19) of the sealing portion (16), wherein the package is folded around the food product (12), such that the body portion (14) encloses the food product (12) with the inner surface of the sheet (10) directed to the food product (12), the inner surface of one of the side portions (19) of sealing portion (16) abuts to the inner surface of the other one of the side portions (19) of the sealing portion (16), and a seal being formed along the front (17), rear (18) and the side portions (19) of the sealing portion (16), respectively, wherein the inner surface of the flap portion (20, 21) and the outer surface of the flap (20, 21) portion are accessible, one of the flap portions (20) is wider than the other one of the flap portions (21), the flap portions (20, 21) are folded such that the wider flap portion (20) is located on top of the narrower flap portion (21) and the seal is formed by means of adhesive applied on the inner surfaces of the sheet (10) in the sealing portion (16), characterised in that

the seal is formed by a patterned peel sealant, for example by embossing a pattern in the sealing portion and in that both flap portions (20, 21) are free of adhesive and in that the adhesive applied to the sealing portion (16) is peelable."

Claim 1 of the third auxiliary request reads as follows (amendments when compared to claim 1 of the second auxiliary request are depicted by being struck through):

"1. Package for packing generally block-shaped food products (12), the package comprising a generally rectangular sheet of a flat, foldable packing material (10) having an inner and an outer surface, the sheet comprising a central body portion (14) for enclosing the top, bottom, side, front and rear surfaces of the block-shaped food product (12), a frame-shaped sealing portion (16) enclosing the body portion (14) for sealing the package and comprising a front (17), a rear (18) and two side portions (19), and two flap portions (20, 21), one of the flap portions (20) being adjacent one side portion (19) of the sealing portion and the other flap portion (20) being adjacent the other one the side portions (19) of the sealing portion (16), wherein the package is folded around the food product (12), such that the body portion (14) encloses the food product (12) with the inner surface of the sheet (10) directed to the food product (12), the inner surface of one of the side portions (19) of sealing portion (16) abuts to the inner surface of the other one of the side portions (19) of the sealing portion (16), and a seal being formed along the front (17), rear (18) and the side portions (19) of the sealing portion (16), respectively, wherein the inner surface of the flap portion (20, 21) and the outer surface of the flap (20, 21) portion are accessible, one of the flap portions (20) is wider then the other one of the flap portions (21), the flap portions (20, 21) are folded such that the wider flap portion (20) is located on top of the

narrower flap portion (21) and the seal is formed by means of adhesive applied on the inner surfaces of the sheet (10) in the sealing portion (16), characterised in that the seal is formed by ~~a patterned peel sealant, for example by~~ embossing a pattern in the sealing portion and in that both flap portions (20, 21) are free of adhesive and in that the adhesive applied to the sealing portion (16) is peelable."

V. The documents relevant for the present decision are the following:

D1: US-A-5 945 145

D2: US-A-2 968 396

D3: US-A-2 998 880

D4: DE-U-1 997 266

D5: US-A-3 291 377

D6: GB-A-2 337 243

VI. The appellant argued essentially as follows:

- (i) The subject-matter of claim 1 of the main request involves an inventive step. Starting from the second embodiment of D1 this subject-matter is distinguished by the features that one of the flap portions is wider than the other one of the flap portions and that the flap portions are folded such that the wider flap portion is located on top

of the narrower flap portion. These features have the advantage that the opening of the package is easier and the appearance of the package is improved. These advantages must be taken into account when assessing inventive step. It must also be taken into account that packages of the type claimed are produced by the million and that small improvements may have a large effect. This point of view is supported by decision T 74/90 (reasons point 7.2.6). This effect also applies to the consumer who opens the package.

In D2 and D3 there are disclosed flap portions of which one is wider than the other. However, the flap portions disclosed in these documents are not located one on top of the other and in particular the wider flap portion is not located on top of the narrower flap portion. Moreover, the teaching of these documents is directed to sterile surgical packages whereas claim 1 is directed to a package for food products so that the skilled person would not consider their teaching.

D5 does not disclose these features. D5 discloses two flap portions which are formed by folding. The outer edges of these folds are stated to be spaced apart. This means that the flap portions have the same width but that their outer edges have a space between them in the direction perpendicular to their plane. Also D5 does not mention the appearance of the package. The skilled person would therefore not consider D5 and would not find the distinguishing features of claim 1 disclosed in the document. Moreover, if he did take features

from D5 he would also take the feature of the folded edges.

- (ii) The subject-matter of claim 1 of the first auxiliary request involves an inventive step. In D1 the sealing portion is not completely sealed by a **peelable** adhesive. There are portions 84 of the seal which are described as "permanently sealed". The skilled person would not change these permanent seals into a peelable seal since the product contained in the package is a sliced product and this product is normally accessed without opening the whole package. A synergistic effect must be seen in the features of the claim since they reduce the total time required by the consumer to open the package.

- (iii) Claim 1 of the second auxiliary request is supported by the description. The feature that the seal is formed by a patterned peel sealant, for example by embossing a pattern in the sealing portion, is supported by the description. One type of pattern - an embossed pattern - is specifically mentioned in the description. Also there is a passage in the description on page 4, last full paragraph, which states that the embodiments are characterized in the claims. Since this feature was in claim 5 as filed this passage, together with claim 5, forms a support for the feature.

- (iv) The subject-matter of claim 1 of the third auxiliary request involves an inventive step. There is no indication in any document of embossing the adhesive in the sealing portion. The

marking in the figures of D1, e.g. figure 14, is merely a hatching to distinguish areas which are attached permanently from areas which are attached peelably.

- (v) It is not necessary to remit the case to the Examining Division for further prosecution. The extra feature of the third auxiliary request is an example in the description of the feature of claim 5 as originally filed. The Guidelines for Examination indicate that the Search Division should also search features mentioned in the description. The Search Division when searching claim 5 as filed would have seen that the description contained an example of this feature and would also have searched this feature. The applicant is interested in a rapid grant procedure and a remittal will delay the procedure.

Reasons for the Decision

Main request

1. *Allowability of the amendments*

The subject-matter of claim 1 may be derived from claims 1, 2, and 4 as originally filed, together with the description on page 9, first full paragraph as well as the drawings as originally filed. The Board is therefore satisfied that the claim as amended satisfies the requirements of Article 123(2) EPC.

2. *Inventive step*

2.1 The Board considers that the second embodiment of D1 relating to figures 8 to 15 constitutes the nearest prior art. The Examining Division in its decision considered that the third embodiment of D1 was the nearest prior art. The Board cannot agree with the Examining Division in this respect. The third embodiment of D1 does disclose flap portions with one flap portion wider than the other. However, the wider flap portion is provided wider specifically so that it may carry adhesive for attachment to the packing. Thus, the provision of the wider portion is inextricably linked to the provision of adhesive on this portion so that this document is a less promising springboard for discussing inventive step of the feature of the absence of adhesive on the flap portion.

2.2 Compared to the disclosure of the second embodiment of this document the appellant considered that claim 1 is distinguished by the features that firstly one of the flap portions is wider than the other one of the flap portions, and that secondly the flap portions are folded such that the wider flap portion is located on top of the narrower flap portion. The Board agrees with the appellant in this respect.

2.3 The objective problem solved by the first feature is to improve the prior art package such that the opening of the package is facilitated and the objective problem solved by the second feature is to improve its appearance.

2.4 In the opinion of the Board these features are known from D5. In D5 two flaps 26, 27 are disclosed which are attached to the extremities of wings 22, 23 (cf. column 3, lines 63 to 65). The flaps are stated to be folded interiorly to form tabs 30, 31 (cf. column 3, lines 67 to 70). It is further stated that the outer edges of these tabs are spaced apart and that the inner edges of the tabs are coterminous (cf. column 3, line 75 to column 4, line 2). The fact that the inner edges of the tabs are stated to be coterminous indicates that the folded portion of each tab extends inwardly to end at the same distance from the sealed wings 22, 23. In this context the statement that the outer edges of the tabs are spaced apart can only be understood as a contrast to coterminous inner edges and hence that they are spaced apart in their distance from the wings 22, 23. This can only mean that one is wider than the other.

The argument of the appellant that this wording in D5 means that the outer edges are spaced apart in a direction perpendicular to their plane cannot be followed by the Board. In the first place this would always be the case so that such a statement would merely be stating a necessary fact. In the second place the wording cannot be given a meaning divorced from its context and as already explained the context is that the inner edges are stated to be coterminous. Moreover the interpretation given by the Board reflects what is clearly visible in figures 3 and 4. The interpretation of the appellant is inconsistent with these figures. Figure 4 of the drawings further shows that the wider tab 30 is located on top of the narrower tab 31. The Board is thus satisfied that the distinguishing

features of claim 1 over the second embodiment of D1 are disclosed in D5.

- 2.5 Turning to the question of whether the skilled person would take these features from the teaching of D5 and provide them on the device according to the second embodiment of D1 in order to solve the problems referred to, the disclosed purpose of these features in D5 needs to be considered.

According to column 4, lines 7 to 11 of D5 it is stated that "... the spacing between the outer edges of the tabs allows for the ready insertion of a finger between the tabs for separating of the tabs prior to opening of the package as discussed hereinafter." Column 5, lines 32 to 35 contains a similar wording. Thus the purpose of the feature of the wider and narrower flap portions disclosed in D5 is to facilitate the opening of the package. The document does not give any indication as to why the wider tab is located on top of the narrower tab. The Board concludes that the skilled person would find the solution to the problem of easy opening in D5 and apply that solution to the package of D1. The Board considers that the skilled person, when applying the solution, would provide the tabs to the package of D1 in the same manner as is disclosed in D5, i.e. with the wider tab located on top of the narrower tab. In this respect the Board would note that the problem of improving appearance is at least partially a matter of aesthetic values in that it is a matter of opinion as to whether the location of the wider tab on top of the narrower tab leads to an improved appearance. In any case when providing the feature of wider and narrower tabs the skilled person may be expected in the first

instance to follow the teaching of D5 even in the absence of an explanation for this teaching.

The appellant argued that the skilled person would also take over from D5 the teaching that the tabs have to be folded. However, the explanation in D5 of which feature solves the problem of easy opening makes it clear that it is the spacing of the outer edges of the tabs which solves this problem and the folding is not mentioned in this respect so that the skilled person has no reason to include this feature as well.

2.6 The appellant has argued that the packages are produced by the million and hence even small improvements may make a difference. In the opinion of the Board the relevant question is not the size of the improvement and the number of products involved but whether the improvement was obvious in the sense of Article 56 EPC. The Board does not disagree with T 74/90 to which the appellant refers but finds that the facts on which that decision is based are quite different to those of the present case.

2.7 Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC.

First auxiliary request

3. Allowability of the amendments

3.1 Claim 1 of this request contains the additional limiting feature that the adhesive applied to the sealing portion is peelable. A basis for this amendment

may be found on page 5, fourth full paragraph. The Board is therefore satisfied that the claim as amended satisfies the requirements of Article 123(2) and (3) EPC.

4. *Inventive step*

4.1 According to the second embodiment of D1 the sealing portion is partly provided with a peelable seal. The description further establishes that the remaining portions 84 of the seal "may be permanent seals". The appellant has argued that this is not a disclosure that the remaining seals may not be a permanent seal. The Board agrees with the appellant in this respect.

4.2 The problem solved by providing the whole sealing portion as a peelable seal may be seen to be to provide a package which gives a greater access to the packaged product than the access provided by the partially peelable seal. The Board considers that the skilled person would immediately see that when a complete access to the packaged product is desirable then this would be achieved by replacing the remaining permanently sealed portion with peelable portions. Although it may be the case, as argued by the appellant, that sliced food products are normally accessed without opening the whole package it cannot be said that there is a prejudice against this since the essential point is that the package may be resealed to cover the remaining slices of the food product. The amount of access that is desired may depend upon the food product contained in the package. The fact that D1 states that the remaining portions "may" be permanently sealed indicates that this is not an irreplaceable measure,

i.e. the permanent seals are not so essential that there would be a prejudice against their replacement by a peelable seal. In any case, D1 also mentions (column 1, line 17) the packaging of blocks of cheese, as does the patent in suit in terms of block-shaped food products (see paragraph [0004]).

4.3 With regard to the combination of the feature of the peelable seal together with the features concerning the flap portions of differing widths the appellant argued that a synergistic effect in this combination could be seen in the easy complete opening of the package. The Board cannot agree, however, that there is a synergetic effect in this combination. The effect of the feature of the differing widths of the flap portion finishes when these portions have been grasped by the user and the seal has been initially opened. It is at this stage that the sealing portion being peelable has its effect as it allows a subsequent complete opening. The features thus take effect in succession and not in combination. The Board thus cannot identify any synergistic effect.

4.4 Therefore, the subject-matter of claim 1 of the first auxiliary request does not involve an inventive step in the sense of Article 56 EPC.

Second auxiliary request

5. *Support in the description - Article 84 EPC*

5.1 Claim 1 of the second auxiliary request contains the additional limiting feature that the seal is formed by a patterned peel sealant, for example by embossing a

pattern in the sealing portion. The feature that the seal is formed by a patterned peel sealant was contained in the application as filed as claim 5.

The Board notes that the feature may be interpreted in more than one manner. The pattern could be considered to be a geometric pattern in the plane of the sealing portion, i.e. a pattern involving areas provided with adhesive and areas without adhesive. Alternatively, the pattern could be considered to be three-dimensional in the form of a pattern out of the plane of the sealing portion, e.g. embossing of the areas covered by the adhesive. The feature of embossing the pattern is mentioned in claim 1 only as an example and hence does not limit the scope of the claim. The only disclosure of a pattern in the description as filed relates to an embossed pattern which is disclosed as enhancing the closing strength of the package (cf. page 5, fifth full paragraph).

The description contains no disclosure of a geometric pattern in the plane of the sealing portion and hence no indication of the intended effect of such a geometric pattern. It may be noted that geometric patterns can be used to reduce the strength of a seal (cf. D6, page 11, lines 10 to 18). Therefore in the absence of an indication in the description of a suitable example of such a geometric pattern as well as a statement of the purpose of the pattern the Board concludes that the feature whereby the seal is formed by a patterned peel sealant is not supported in its full breadth by the description. In particular claim 1 is not supported when it includes geometric patterns within its scope.

The appellant referred to the third full paragraph on page 4 of the description as originally filed. This paragraph however merely states that "Preferred embodiments are characterized by the remaining claims." Such a statement cannot provide support for this claim since at best it must be interpreted as a mere repetition of the claims as filed.

5.2 Therefore, claim 1 of the second auxiliary request is not supported by the description in the sense of Article 84 EPC.

5.3 The Board would further note than in the absence of any indication of the type or purpose of the pattern it would not be possible to base the presence of an inventive step on this feature.

Third auxiliary request

6. *Allowability of the amendments*

Claim 1 of this request is further limited by the additional feature that the seal is formed by embossing a pattern in the sealing portion. A basis for this amendment may be found on page 5, fifth full paragraph of the description as filed. The Board is therefore satisfied that the claim as amended satisfies the requirements of Article 123(2) and (3) EPC.

7. *Inventive step*

7.1 In their decision the Examining Division stated that this feature "is one of several straightforward possibilities from which the skilled person would

select, in accordance with the circumstances, without the exercise of inventive skill, in order to enhance the closing strength of a seal." (see point 10.6 of the reasons). The appellant has interpreted this as a statement of general knowledge without any document to back up that this actually was general knowledge. The appellant has also argued that the other possibilities to which reference is made have not been indicated. The Board agrees with the appellant in this respect. The unsupported general statement of the Examining Division is one which leaves the appellant without a possibility to rebut it. If the Examining Division considered that the feature belonged to general knowledge then this should have been supported by documentary evidence. If the Examining Division considered that there are several possibilities then these should be stated and it should have been demonstrated why the skilled person would choose in particular the one which is claimed.

7.2 The Board is thus not convinced by this argument of the Examining Division. It does not appear to be self-evident to the Board that the skilled person would combine the application of an adhesive with embossing a pattern in it.

7.3 However, the Board does not consider that it can order the grant of a patent based on this claim at this stage. The claim contains a feature which was not contained in the claims of the application as filed. In accordance with the Guidelines for Examination, B-III, 3.6, the European search should cover not only the subject-matter to which the claims are directed but "to which they might reasonably be expected to be directed after they have been amended". However, there is no

indication to the Board as to whether such further searching took place during the initial search on the present application and if so to which subject-matter the further searching may have been directed. The appellant has argued that since the extra feature of this claim is an embodiment of a claimed feature then the search would automatically have been extended to this feature. The Board cannot agree with the appellant in this respect. As indicated in the Guidelines the extent of the search beyond the claimed subject-matter depends upon the amendments which the Search Division considers could be expected. In the absence of knowledge of what the Search Division considered could be possible amendments no conclusion can be drawn in this respect.

8. *Remittal to the Department of First Instance*

8.1 In accordance with Article 111(1) EPC, the Board therefore considers it appropriate to remit the case to the department of first instance so that the Examining Division may consider whether a further search is necessary and whether the remaining claims and the description conform to the Convention.

8.2 The appellant has indicated a desire for a rapid grant procedure. However, in the view of the Board the interest of the public that the patent that may be granted has been correctly searched and examined outweighs that of the appellant in the present case. This is particularly the case where part of the delay is caused by the decision of the appellant to include features from the description in the independent claim thus necessitating the consideration of an extra search.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders