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**Datasheet for the decision  
of 7 October 2008**

**Case Number:** T 0929/06 - 3.2.07

**Application Number:** 02764412.9

**Publication Number:** 1421003

**IPC:** B65D 1/00

**Language of the proceedings:** EN

**Title of invention:**

Improvements introduced in sandwich packing

**Applicant:**

Maia, Evaldo Cesar

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 56, 115(2), 116(1)

RPBA Art. 15(1), 15(3)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Oral proceedings - absence of appellant"

Inventive step (no) - obvious design choice"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 0929/06 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 7 October 2008

**Appellant:** Maia, Evaldo Cesar  
Rua Vila Rica, 123 Apt. 102  
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CEP-30720-380 Belo Horizon, MG (BR)

**Representative:** Magalhaes Simoes, José Raul  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 27 January 2006  
refusing European application No. 02764412.9  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** K. Poalas  
**Members:** H.-P. Felgenhauer  
E. Dufrasne

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the examining division refusing European patent application 02 764 412.9 for lack of inventive step (Article 56 EPC).
- II. Claim 1 underlying the decision under appeal and the present appeal, filed with letter dated 28 October 2005, reads as follows:

"**SANDWICH PACKING**, to reduce the sale costs and to make more practical and hygienic the consumption of this food, **comprising** two basic parts, a superior part (2) and an inferior (3), **said parts when joined, they hold a food product as a sandwich; the inferior part (3) has a straight base (8), characterized by** a superior part (2) and a inferior (3), joined by fitting like male type (4) female (5) in its borders, which are interrupted by a flexible fold (6) in one of its sides; still having, in the inferior part (3) a cut line (7) to allow its division in two parts (3A and 3B) with little effort; said parts, when joined, they form a similar contour of a sandwich with base and superior extremity are straight (8) and outline arched (9) in the level of the fittings."

- III. In the impugned decision the following documents have been considered

D1: US-A-4 189 054

D2: WO-A-9947421

IV. According to the impugned decision the subject-matter of claim 1 does not involve an inventive step in view of documents D1 and D2.

V. The appellant (applicant) requests that the decision under appeal be set aside and the patent be granted based on claim 1 cited above.

VI. The Board summoned for oral proceedings giving in the annex to the summons according to Article 15(1) RPBA dated 20 June 2008 its preliminary opinion.

The Board stated in its preliminary opinion, that after taking into consideration the reasons given in the decision under appeal and the arguments given in the grounds of appeal, the subject-matter of claim 1 appears to be correctly assessed in the impugned decision with respect to inventive step, since the feature emphasised in the grounds of appeal, which relates to a cut line defining, that "in the inferior part (3)" is "a cut line (7) to allow its division in two parts (3A and 3B) with little effort", does, within the combination of features of the claim, not appear to lead to subject-matter involving inventive step, see sections 2 to 7 of the annex to the summons.

VII. By the appellant's fax of 30 July 2008 the Board was informed that the appellant "does not wish to attend the oral proceedings, scheduled to take place October 7, 2008".

With the fax of 1 September 2008 the appellant responded to the preliminary opinion given in the annex to the summons arguing why the subject-matter of

claim 1 should be considered as involving an inventive step.

The arguments expand the ones given in the grounds of appeal, and focus on the provision of the cut line provided in the inferior part of the sandwich packing.

Concerning the packing as defined in claim 1 according to these arguments the cut line is provided such that its breakage, by means of pressure imparted by a consumer, leads to the basic structure being broken. This enables a consumer to use part of the packing - like a napkin - to hold the food.

Concerning the packing according to D1 the appellant argues that this packing is designed to facilitate access to the food item contained therein. Consequently a consumer using this known packing is not allowed to use part of the packing in a napkin like fashion to hold the food.

Concerning the packing according to D2 the appellant argues that, although this packing allows already division of the inferior part of the packing in two sections, it has the disadvantage of the two sections being joined by a coupling of the "male/female" type, which can lead to accidental separation. This disadvantage is avoided for the packing according to claim 1. In this case accidental separation of the two parts of the inferior part is avoided since these parts are connected via the cut line, which requires some effort to be broken, in order to separate the parts.

It thus needs to be considered that in the packing according to claim 1 the cut line was introduced to allow it to be broken only through some pressure imparted by the consumer.

According to the appellant the packing according to claim 1 involves an inventive step in view of D1 or D2, since it solves the problem of avoiding an accidental division of the inferior portion of the packing in two parts and enables a different use of the packing, namely one according to which part of the package is used like a napkin to hold a food item.

VIII. Oral proceedings were held on 7 October 2008 in the absence of the appellant.

### **Reasons for the decision**

1. *Procedural matters*

The Board considered it being appropriate to summon to oral proceedings (Article 116(1) EPC). The appellant has been duly summoned and has, with the fax of 30 July 2008, given notice that he will not attend.

In this fax it was further indicated that the appellant intended to file a written submission within the time limit outlined in the annex to the summons to oral proceedings according to Article 15(1) RPBA.

This written submission was filed with the fax of 1 September 2008.

As announced in its above-mentioned fax, the appellant was not represented at the oral proceedings. The appellant having been duly summoned, the oral proceedings were held in its absence, according to Rule 115(2) EPC and Article 15(3) of the Rules of Procedure of the boards of Appeal.

2. *Inventive step*

The Board considers that the arguments filed with the fax of 1 September 2008 merely expand the arguments given in the grounds of appeal.

2.1 The arguments given in the grounds of appeal have been considered as not being convincing in the provisional opinion of the Board given in the annex to the summons to the oral proceedings (cf. section VI above).

2.2 The expansion of these arguments according to the fax of 1 September 2008 does not lead the Board to deviate from its preliminary opinion.

Consequently for the reasons given in the preliminary opinion (cf. sections 6 and 7 of the annex to the summons) the subject-matter of claim 1 does not involve an inventive step in view of D1.

2.3 In the preliminary opinion it was referred to the arguments given in the grounds of appeal (cf. the paragraph bridging pages 1 and 2) according to which due to the feature (in the following referred to as feature a)) defining that "in the inferior part (3) a cut line (7) [is provided] to allow its division in two parts (3A and 3B) with little effort" the lower casing

of the packing as defined in claim 1 can be totally separated in two parts, so that the user can easily eat a quarter of a sandwich.

According to the appellant's arguments this is not the case for the packing disclosed in D1, since the three parts of the lower casing remain partially attached via a corresponding fold line.

2.4 In view of these arguments the Board expressed its provisional opinion (cf. section 4 of the annex to the summons) according to which, based on the different effect of the cut line according to claim 1 of the application in suit, the problem underlying the subject-matter of claim 1, starting from D1 as closest prior art, can be seen in facilitating eating.

2.5 According to the provisional opinion (cf. section 5 of the annex to the summons) concerning the examination of inventive step starting from D1 it appears to be an obvious design choice to aim at an inferior part of the packing having parts which can completely be separated from the remainder of the inferior part.

Starting from the packing of D1 according to the provisional opinion (cf. section 6 of the annex to the summons) it further appears to be obvious that, in order to implement the design choice of having an inferior part with completely removable parts, the person skilled in the art would, in addition to the already existing cut lines, provide cut lines instead of the fold lines provided according to D1.



According to the provisional opinion (cf. section 7 of the annex to the summons) based on the features of claim 1, the reasons given in the impugned decision and the arguments given in the grounds of appeal and a correct assessment of feature a) as indicated above do not lead to subject-matter involving inventive step.

3. In its fax of 1 September 2008 the appellant expanded its arguments with respect to feature a) (cf. section 2.3 above) stating with respect to claim 1 of the application in suit, that the cut line 7 provided for the packing is such that it allows a consumer to break the cutline in order to intentionally separate the part forming the inferior part of the packing.

According to the appellant having such a cut line has two effects. The first one residing in the fact, that due to the nature of the cut line some effort or pressure is required to break it, which leads to the fact that accidental breaking of the cut line and consequently separation of the parts forming the inferior part of the packing are excluded. The second one residing in the fact, that due to the extent of the cut line the parts forming the inferior part of the packing are completely separated by breaking the basic structure of the inferior part. The latter effect allows a consumer to use one of the separated sections of the inferior part of the packing in a napkin like fashion to hold a food item.

With respect to the packing known from D1 the appellant expanded the argument of the grounds of appeal stating that said packing aims only at a partial opening of the

inferior part to facilitate the access of a consumer to the packaged food.

- 3.1 Concerning these arguments the Board refers to the disclosure of D1, which shows a packing with an inferior part having tear lines 29 and 31 in one sidewall 23 and tear lines 36 and 37 in the other sidewall 24 (column 2, lines 20 - 29; figures 1, 2, 5 and 8). The tear lines are of a kind to facilitate the breaking of the inferior part (column 2, lines 29 - 31; figure 8). The tear lines further extend so that the inferior part can be broken into an open position (column 2, lines 29 - 31; figure 8), such that side portions of the food product are exposed, so that it can be eaten without removing the food product from the packing (column 2, lines 31 - 33; figure 8).

Consequently the argument of the appellant that the packing according to D1 aims at a partial opening of the inferior part to facilitate access of the packaged food holds true. It needs however to be considered that this partial opening of the inferior part enables a consumer to use the remaining part of the inferior section in a napkin like fashion, as stated by the appellant for the packing according to claim 1 of the application in suit.

Beyond the effect indicated above, which is alike for the packing according to claim 1 of the application in suit and for the packing according to D1 since as indicated in either case the food item can be held in a napkin like manner by a part of the inferior part of the packing the appellant did not specify a particular effect resulting from the fact that according to

claim 1 the cut line allows a complete separation of the inferior part in two parts.

The Board thus does not find the arguments of the appellant given in its fax of 1 September 2008 more convincing than the ones given in the grounds of appeal. Thus the provisional opinion of the Board given in the annex to the summons remains valid. Accordingly, based on the fact that the cut line according to claim 1 of the application in suit enables division of the inferior part of the packing in two parts, the problem underlying the subject-matter of claim 1, starting from D1 as closest prior art, can be seen in facilitating eating.

This applies likewise with respect to the conclusion drawn in the annex to the summons, according to which, starting from D1, it is a matter of an obvious design choice to aim at an inferior part of the packing having parts which can completely be separated from the remainder of the inferior part and according to which, in order to implement the design choice, to provide an inferior part with completely removable parts, the person skilled in the art would, in addition to the cut lines already existing in the inferior part of the packing of D1, provide cut lines instead of the fold lines further provided in the inferior part of the packing according to D1. The fact that in order to provide a packaging according to claim 1 of the application in suit the skilled person starting from the packaging known from D1 has to sacrifice at the same time other beneficial effects like the possibility of keeping movable parts of the packing further connected to each other for easy re-closing of the

package or of facilitating waste disposal of a used package confirms also the Board's finding for absence of an inventive step.

Since the packing of claim 1 does not involve an inventive step in view of document D1 there is no need to examine whether additional consideration of document D2 could contribute to this result being arrived at.

4. Consequently, for the preceding reasons, the subject-matter of claim 1 does not involve an inventive step and thus the requirement of Article 56 EPC is not met.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

K. Poalas