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**Datasheet for the decision
of 25 January 2022**

Case Number: T 0590/16 - 3.2.07

Application Number: 02703320.8

Publication Number: 1360110

IPC: B65B9/04

Language of the proceedings: EN

Title of invention:
PROCESS FOR MAKING POUCHES

Patent Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponents:
UNILEVER PLC / UNILEVER NV
Henkel AG & Co. KGaA
Reckitt Benckiser (UK) Limited
Harro Höfliger Verpackungsmaschinen GmbH

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Inventive step - main request (no) - auxiliary request (yes)
Amendment to appeal case - exercise of discretion
Late submitted material - evidence admitted (no)
primary object of appeal proceedings to review decision -
appeal case directed to evidence on which decision was based
(no) - appeal case directed to requests on which decision was
based (yes)

Decisions cited:

G 0009/92, G 0004/93, T 0099/16

Catchword:



Beschwerdekammern

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Case Number: T 0590/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 25 January 2022

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
14 January 2016 concerning maintenance of the
European Patent No. 1360110 in amended form.**

Composition of the Board:

Chairman R. Cramer
Members: V. Bevilacqua
S. Watson

Summary of Facts and Submissions

- I. The patent proprietor (appellant 1) and opponent 1 (appellant 2) each lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division maintaining European patent EP 1 360 110 in amended form.

- II. The patent proprietor initially requested

that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of a main request or one of the first to eighth auxiliary requests filed with their statement setting out the grounds of appeal, or one of the ninth to sixteenth auxiliary requests, filed with the reply dated 10 October 2016.

- III. Opponent 1 initially requested

that the decision under appeal be set aside and that the patent be revoked.

- IV. The respondents (opponents 2-4) initially requested

that the appeal of the patent proprietor be dismissed.

- V. In preparation for oral proceedings the Board communicated its preliminary assessment of the case by means of a communication dated 9 December 2019 pursuant to Article 15(1) RPBA according to which the appeal of the patent proprietor was likely to be dismissed and

the patent in suit was likely to be revoked, because the main, first and second auxiliary requests were preliminarily considered as being not allowable because of lack of inventive step, and the admissibility of the third to sixteenth auxiliary requests was questionable.

VI. With letter dated 24 December 2019 the patent proprietor requested, as the new ninth auxiliary request, that both appeals be dismissed and the patent be maintained on the basis of the claims as upheld by the opposition division, and that the previous ninth to sixteenth auxiliary requests be renumbered as new tenth to seventeenth auxiliary requests.

VII. With letter dated 22 January 2020 opponent 3 argued that the above new ninth auxiliary request should not be admitted.

VIII. With letter dated 5 March 2020 the patent proprietor maintained their main request, withdrew all their previous auxiliary requests and submitted new first to ninth auxiliary requests. The new first auxiliary request was that the patent be maintained on the basis of the claims as upheld by the opposition division.

The new second to ninth auxiliary requests corresponded to the previous ninth to sixteenth auxiliary requests, presented in a different order.

IX. Further arguments with respect to the admissibility of the above auxiliary requests were presented by opponent 2 (letters of 11 March 2020 and of 18 November 2021) and by the patent proprietor (letters of 18 November 2020 and 17 December 2021).

X. With letter dated 13 December 2021 opponent 1 stated that they would not participate in the oral proceedings scheduled for 25 January 2022, without commenting on the substance of the Board's preliminary opinion.

XI. Oral proceedings were held on 25 January 2022 in the absence of opponent 1. The factual and legal situation was discussed with the parties present during oral proceedings. For further details of the course of the oral proceedings, reference is made to the minutes thereof.

The final requests at the end of oral proceedings were as follows:

The patent proprietor requested that

the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of the main request or of one of the first to ninth auxiliary requests filed with letter of 5 March 2020.

Opponent 1 had requested in writing that the decision under appeal be set aside and that the patent be revoked.

Opponents 2, 3 and 4 requested that the appeal of the patent proprietor be dismissed.

At the conclusion of the oral proceedings the decision was announced.

XII. The following documents mentioned in the appealed decision will be referred to:

E15: WO 00/55044 A; and

E33: US 3 958 394 A.

The following document was filed by opponent 1 with their statement setting out the grounds of appeal:

E34: US 5 224 601 A.

XIII. The lines of arguments of the parties relevant for the present decision are dealt with in detail in the reasons for the decision.

XIV. Claim 1 of the **main request** reads as follows:

"Continuous process for making water-reactive pouches containing a product, comprising the steps of:

(a) continuously feeding a first water-soluble film onto a horizontal portion of an [sic] continuously and rotatably moving endless surface, which comprises a plurality of moulds, or onto a non-horizontal portion thereof and continuously moving the film to said horizontal portion;

(b) forming from the film on the horizontal portion of the continuously moving surface, and in the moulds on the surface, a continuously moving, horizontally positioned web of open pouches;

(c) filling the continuously moving, horizontally positioned web of open pouches with a product, to obtain a horizontally positioned web of open, filled pouches;

(d) preferably continuously, closing the web of open pouches, to obtain closed pouches, preferably by feeding a closing material onto the horizontally positioned web of open, filled [sic] pouches, to obtain closed pouches; and

(e) optionally sealing the closed pouches."

XV. Claim 1 of the **first auxiliary request** reads as follows:

"Continuous process for making water-reactive pouches containing a product, comprising the steps of:

(a) continuously feeding a first water-soluble film onto a horizontal portion of an [*sic*] continuously and rotatably moving endless surface, which comprises a plurality of moulds, or onto a non-horizontal portion thereof and continuously moving the film to said horizontal portion;

(b) forming from the film on the horizontal portion of the continuously moving surface, and in the moulds on the surface, a continuously moving, horizontally positioned web of open pouches;

(c) filling the continuously moving, horizontally positioned web of open pouches with a product, to obtain a horizontally positioned web of open, filled pouches;

(d) preferably continuously, closing the web of open pouches, to obtain closed pouches, by feeding a second web of closed, filled pouches onto the horizontally positioned web of open, filled [*sic*] pouches, to obtain closed pouches;

and

(e) optionally sealing the closed pouches."

Reasons for the Decision

1. *Transitional provisions*

The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA 2020 instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Article 25(2) and (3) RPBA 2020) as the initial summons to oral proceedings was notified prior to the entry into force of the RPBA 2020.

2. Right to be heard

Opponent 1 decided not to attend oral proceedings and may therefore be treated as relying only on their written submissions (Article 15(3) RPBA and Rule 115(2) EPC).

3. E33 - Admissibility

3.1 E33 was submitted in opposition proceedings shortly before oral proceedings. It was within the discretionary power of the opposition division to decide whether or not to admit this document into the proceedings (Article 114(2) EPC). The opposition division decided to admit this document on the basis of the *prima facie* relevance thereof and furthermore because it was considered to be a valid reaction to the filing of new requests by the patent proprietor on the final date set under Rule 116(1) EPC (see page 7, point 16.3.2 of the reasons for the decision).

3.2 The patent proprietor contests the above assessment and argues that E33 discloses a method for producing tubs

made of hard plastic, not pouches of flexible material, and requests, on this basis, to disregard the document.

- 3.3 The Board decides that the discretionary decision of the opposition division to admit E33 into the proceedings is not to be reversed for the following reasons.

According to the Case Law of the Boards of Appeal (see 9th Edition 2019, IV.C.4.5.2), a Board of Appeal should only overrule the way in which a department of first instance has exercised its discretion when deciding on a particular case if it concludes that it has done so according to the wrong principles, or without taking into account the right principles, or in an unreasonable way.

It is not the function of a Board of Appeal to review all the facts and circumstances of the case as if it was in the place of the department of first instance in order to decide whether or not it would have exercised such discretion in the same way.

As the discretionary decision to admit E33 was taken on the basis of the correct principles (*prima facie* relevance and occasioned by the filing of new requests), it could only be reviewed by the Board if this assessment was based on inappropriate or arbitrary considerations.

This was clearly not the case, as the opposition division admitted E33 into the proceedings after having *prima facie* examined the disclosure of figure 6 and column 5, lines 57-65 of this document and having compared it with the subject-matter of claim 1 of the main request (see in particular the second paragraph of

point 16.3.2 of the Reasons of the decision), and considered the filing a valid reaction to the new requests.

4. Claim 1 of the main request - inventive step starting from E33

4.1 Distinguishing features

4.1.1 According to the appealed decision the only difference between the subject matter of claim 1 of the main request and the process disclosed in E33 was that water-reactive pouches were produced by using a water-soluble film.

4.1.2 The patent proprietor argues that the "open package carriers 11" shown in figure 6 were not to be considered as "a plurality of moulds" (grounds of appeal, page 3), and that for this reason step (a) of claim 1 was also not disclosed in E33.

4.1.3 The Board disagrees, and concludes that the distinguishing features were correctly identified by the opposition division for the following reasons.

Figures 1A and 1B of E33, together with the description (column 3, lines 7 to 52) disclose a set of open package carriers 11 arranged in an endless loop for movement at constant speed, and a thermoforming module 18 (see also figure 6) in which a lower web of the packaging material 19 is formed into a series of product containers.

The internal surfaces of the cavity of the bottomless carriers of E33 were correctly considered as a mould by the opposition division, because, according to the

method of E33, these surfaces shape the side faces of the pouch.

The arguments of the patent proprietor in this respect are not convincing because claim 1 does not specify that the "mould" has to form all the external surfaces of the pouches.

The endless carriers (11), being mutually connected to each other, form (with their respective upper surfaces) a surface which comprises a plurality of moulds and is arranged in an endless loop for movement at constant speed (see E33, column 3, lines 8,9).

The first film, namely the "lower web of the packaging material 19" is fed continuously onto this surface which is endless and rotatably moving. The surface moves continuously with its plurality of moulds and the film is fed and moved continuously with the surface (column 3, lines 25-28).

The opposition division was therefore correct in concluding that step (a) of claim 1 is disclosed in E33.

4.2 E33 - suitability as the starting point

4.2.1 The patent proprietor puts forward that E33 is not a valid starting point to discuss inventive step because the process disclosed therein is not suitable for producing water-reactive pouches. This was because water-soluble films had to be processed under vacuum. In addition the clamping step of E33, according to the patent proprietor, would have ruptured any water-soluble film.

4.2.2 The Board disagrees.

The process of E33 concerns, like the process claimed in claim 1 of the main request, the production of pouches containing a product and the patent proprietor's allegation that this known process is not suitable for handling water-soluble films has remained unsubstantiated.

The presence of a clamping step does not a priori exclude the possibility of working with a water soluble film, as there is no evidence on file that clamping thereof would be impossible.

This is also in accordance with the disclosure of the patent in suit, where grips or clips are used for holding such a water soluble film (paragraph [0038]).

The Board also notes that there is no evidence on file that a water soluble foil cannot be processed by an apparatus such as the one disclosed in E33; has to be kept under vacuum; or requires any special processing condition.

As a consequence of the above the Board considers that E33 is a suitable starting point to discuss inventive step.

4.3 Effect-problem to be solved

4.3.1 The patent proprietor contests the formulation of the problem to be solved at the basis of the appealed decision.

4.3.2 The Board concludes that starting from document E33 and taking account of the above identified distinguishing

feature the problem to be solved was appropriately formulated in the appealed decision as how to find a specific flexible thermoplastic material that simplifies handling of pouches (to be used in a moist environment).

This is because the effect achieved by the distinguishing feature identified above, namely that the process uses a water soluble film, is that the products of the claimed process become water reactive pouches, which dissolve in contact with moisture (see paragraph [0090] of the patent in suit).

This means that the final user of these pouches does not need to manually open them to deliver their contents in a moist environment.

4.4 Combination with E15 - Discussion of inventive step

4.4.1 Inventive step was denied because, according to the opposition division, the skilled person would consider water soluble film in the process disclosed by E33 following the teaching of E15 (page 2, lines 18-20).

4.4.2 The patent proprietor contests the above and puts forward that the teachings of E33 and of E15 are not compatible with each other, because E15 discloses a batch process, whereby E33 deals with a continuous process.

4.4.3 The Board disagrees.

As remarked by opponents 2-4 pouches made from water-soluble flexible plastic film are well known to the skilled person, and disclosed, for example in document E15 (page 2, lines 7-31).

E15 also teaches that water soluble films can be thermoformed (see page 5, lines 25-33).

The skilled person would see the advantages of this teaching and have no practical difficulties in applying it to the method disclosed in E33. In this way he would arrive at the subject-matter of claim 1 of the main request without having to exercise any inventive skill.

For the above reasons the Board concludes that the patent proprietor failed to prove in a convincing manner that the conclusions of the appealed decision on lack of inventive step of claim 1 of the main request are not correct.

5. First auxiliary request - admissibility

5.1 The patent proprietor argues that the presence of a request for dismissal of the appeal of opponent 1 was evident when their reply to the inventive step objections raised against claim 1 of the patent as maintained in the appeal of the patent proprietor (letter dated 10 October 2016) was carefully read.

As a consequence of the above the first auxiliary request had been present in appeal proceedings from the beginning and could not be excluded therefrom.

5.2 The Board disagrees. The patent proprietor decided to defend the patent as maintained in accordance with the decision under appeal by submitting the present first auxiliary request only after having received the negative preliminary opinion of the Board on their previously filed requests (see the ninth auxiliary

request mentioned in the letter dated 24 December 2019).

As a matter of fact dismissal of the appeal of opponent 1 was not requested in the letter of 10 October 2016, but a main request and 16 auxiliary requests were explicitly put on file, none of them corresponding to the claims as upheld by the opposition division. The fact that the now first auxiliary request corresponds to a request that was on file before, and on which the decision under appeal was based, does not mean that the request has continuously been in the proceedings. A party is entitled to change their requests or withdraw them at any time, whereby such withdrawal can also be implicit by filing new requests in their place (cf. T 99/16, Reasons Nr. 2.3).

As a consequence the filing of the first auxiliary request as ninth auxiliary request with the letter of 24 December 2019 has to be considered as an amendment to the patent proprietor's case.

5.3 Opponents 2-4 argued that based on the principle enshrined in Articles 12(2) RPBA 2007 and 12(3) RPBA 2020, according to which the statement of grounds of appeal and the reply shall contain a party's complete appeal case, the first auxiliary request, being a late change to the patent proprietor's case, was not to be admitted. They also argued that consideration thereof would increase the complexity of the present case, and be detrimental to procedural economy.

5.4 The Board notes that the above question of admissibility raised by the opponents 2-4 is to be discussed in the light of Article 13(1) and (3) RPBA 2007, stipulating that such late amendments to a

party's case may be admitted and considered at the Board's discretion (see point 1 above).

In the present case the Board decides to exercise its discretion in favour of admitting the first auxiliary request for the following reasons.

The first auxiliary request does not introduce any subject-matter which was not dealt with, already at the outset of the present proceedings, in the statement setting out the grounds of appeal of the only opponent-appellant (opponent 1).

As a consequence of the above, dealing with this request does not involve any increase of the complexity of the subject-matter in comparison with what the Board and the parties initially had to deal with, which would justify, for reasons of procedural economy, not admitting it because of the late filing thereof in application of Article 13(1) RPBA 2007.

In this context the Board notes that as the non-appealing opponents cannot challenge maintenance of the patent as amended (see G 9/92 and G 4/93, both in OJ EPO 1994, 875), admission of the first auxiliary request can especially not increase the complexity of the subject-matter to be dealt with by these parties as of right.

As a consequence of the above the Board also does not see how admitting the first auxiliary request would raise issues which the Board, the only opponent-appellant or the other opponents as parties as of right cannot reasonably be expected to deal with without adjournment of the oral proceedings (Article 13(3) RPBA 2007).

In this context the Board notes that admitting the first auxiliary request also does not go against the principle enshrined in the Case Law according to which the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, as laid out in Article 12(2) RPBA 2020.

6. E34 - Admissibility

6.1 Opponent 1 submitted E34 with the statement setting out the grounds of appeal arguing (see point III) that this document was an appropriate response to the decision of the opposition division to maintain the patent in an amended form which was submitted only one month in advance of oral proceedings, and was therefore admissible.

6.2 With their reply to the statement of grounds of appeal (see page 1), the patent proprietor argued that E34 could and should have been filed during the opposition procedure, which was obviously possible considering that opponent 4 filed E33 in view of the new requests having been filed. They requested that document E34 not be admitted.

6.3 The Board notes that the above question of admissibility is to be discussed in the light of Article 12(4) RPBA 2007 (see point 1 above).

The Board finds the argument of opponent 1 that filing this document during opposition proceedings was not possible due to lack of time not convincing as a period of one month should be sufficient to find relevant prior art in this particular technical field, as was shown by the submission of E33 by opponent 4. Therefore

the document could and should have been filed before the opposition division, and the Board decides to hold it inadmissible under Article 12(4) RPBA 2007.

7. Inventive step of auxiliary request 1

7.1 The opposition division decided that, starting from E33, and taking the teaching of E15 into account, the subject-matter of claim 1 of the present first auxiliary request involved an inventive step (see point 19 thereof).

7.2 Opponent 1 contested in writing the above conclusions, arguing that claim 1 of the first auxiliary request was obvious over the following combinations (see pages 6 and 7 of the statement of grounds):

E33+E15+E34

E33+common general knowledge

E33+common general knowledge+E34

E33+E7+common general knowledge

E33+E7+E34

E33+E15+common general knowledge

E34+E33.

Opponents 2-4 supported the above objections, whereby during oral proceedings opponent 4 additionally argued that E27 has the same technical content as E34, and that therefore the subject-matter of claim 1 of the first auxiliary request was also obvious at least over the combination E33+E15+E27.

7.3 The Board is not convinced by the above arguments with respect to the incorrectness of the appealed decision to maintain the patent in amended form on the basis of

the present first auxiliary request.

As noted by the patent proprietor the sole opponent-appellant (opponent 1) only submitted arguments in the statement setting out the grounds of appeal (see in particular point V thereof) explaining why the subject-matter of claim 1 of the first auxiliary request lacks inventive step starting from E33, and taking the teachings of E15 and E34 (on the basis of a partial problems approach) into account.

As a consequence of the above the Board concurs with the patent proprietor who argues that only the inventive step objection based on the combination E33+E15+E34 can be regarded as substantiated.

Clearly the appealed decision cannot be set aside on the basis of the above objection, because it relies on a document (E34) which has not been admitted into appeal proceedings (see point 6 above).

The remaining inventive step objections of opponent 1 also cannot justify setting aside the appealed decision, because of their lack of substantiation.

Concerning the objection raised by opponent 4 during oral proceedings and based on the combination E33+E15+E27 the Board notes that this objection cannot be dealt with in the present proceedings because this objection was not substantiated in the appeal of opponent 1.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



G. Nachtigall

R. Cramer

Decision electronically authenticated