BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

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File No.: T 0960/91 - 3.2.1

Application No.: 86 102 273.9

Publication No.: 0 193 130

Classification: B65D 75/58, B65D 81/32, B65B 9/06

Title of invention: A dispenser-container containing wet and dry contents and process for manufacturing the same

D E C I S I O N
of 5 August 1993

Applicant:

Proprietor of the patent: Nakamura, Kenji

Opponent: Klöckner Pentapack

Headword:

EPC: Art. 56

Keyword: "Inventive step (yes)"

Headnote
Catchwords

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0960/91 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 5 August 1993

Appellant: (Opponent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office dated 7 November 1991 rejecting the opposition filed against European patent No. 0 193 130 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: F. Gumbel
Members: P. Alting van Geusau
M. Aúz Castro

Summary of Facts and Submissions

I. The mention of the grant of European patent No. 0 193 130 based on patent application No. 86 102 273.9, which was filed on 21 February 1986 was published on 2 May 1990.

The four independent claims of the patent read as follows:

"1. A dispenser-container containing wet fibrous materials (3) and dry materials (4) separated from each other, comprising:

a first container (1) made of a gas impervious material and containing said wet fibrous materials (3);

said first container (1) including one of a first opening (11a) and a first weakened line (13, 71) for forming said first opening (11a), to permit dispensing of said wet fibrous materials (3) therethrough;

a flexible flap (5, 16) for releasably covering said first opening (11a);

said first container (1) including a pressure sensitive adhesive (51) which permits said flap (5, 16) to be repeatedly attached to and removed from said first container (1); and

a second container (2) containing dry materials (4);

said second container (2) including a first surface (22) having one of a second opening (32 and 33) and a second weakened line (26, 36) for forming said second opening, to permit dispensing of said dry materials (4) therethrough, characterized in that

said second container (2) contains said first container (1) and includes a third surface (21) having one of a third opening (21a) and a third weakened line

(27, 28) for forming said third opening, at a position corresponding with said first opening (11a).

12. A method of producing a dispenser-container containing wet fibrous materials (3) and dry materials (4) separated from each other, comprising the steps of:

preparing a first container (1) made of a gas impervious material and containing said wet fibrous materials (3), said first container (1) including one of a first opening (11a) and a first weakened line (13, 71) for forming said first opening (11a), to permit dispensing of said wet fibrous materials (3) therethrough, a flexible flap (5,16) for releasably covering said first opening (11a), and a pressure sensitive adhesive (51) which permits said flap (5, 16) to be repeatedly attached to and removed from said first container (1);

forming one of a third opening (21a) and a third weakened line (27, 28) for forming said third opening (21a), in a continuous sheet (20);

forming one of a second opening and a second weakened line (26) for forming said second opening in said continuous sheet (20) at a position parallel to and offset from said third opening (21a), to permit dispensing of said dry materials (4) therethrough;

positioning said first container (1) on said continuous sheet (20) with the flap (5) thereof coinciding with said third opening (21a) formed in said continuous sheet (20), and positioning said dry materials (4) in stacked relation on the surface of said first container (1) opposite to said flap (5);

wrapping said stacked first container (1) and dry materials (4) with said continuous sheet (20) such that said second opening is formed with respect to said dry materials (4);

sealing at least two longitudinal edges (24) of said continuous sheet (20) with each other; and

sealing said continuous sheet (20) in a transverse direction.

14. A method of producing a dispenser-container containing wet fibrous materials (3) and dry materials (4) separated from each other, comprising the steps of:

preparing a first container (1) made of a gas impervious material and containing said wet fibrous materials (3), said first container (1) including one of a first opening (11a) and a first weakened line (13, 71) for forming said first opening (11a), to permit dispensing of said wet fibrous materials (3) therethrough, a flexible flap (5, 16) for releasably covering said first opening (11a), and a pressure sensitive adhesive (51) which permits said flap (5, 16) to be repeatedly attached to and removed from said first container (1);

forming one of a third opening (21a) and a third weakened line (27, 28) for forming said third opening (21a), in a continuous sheet (20);

positioning said first container (1) on said continuous sheet (20) with the flap (5, 16) thereof coinciding with said third opening (21a) formed in said continuous sheet (20), and positioning said dry materials (4) in stacked relation on the surface of said first container (1) opposite said flap (5, 16);

wrapping said stacked first container (1) and dry material (4) with said continuous sheet (20);

overlapping longitudinal edges (32, 33) of said continuous sheet (20) with each other to form a second opening to permit dispensing of said dry materials (4) therethrough; and

sealing said continuous sheet (20) in a transverse direction.

16. A method of producing a dispenser-container wet fibrous materials (3) and dry materials (4) separated from each other, comprising the steps of:

preparing a first container (1) made of a gas impervious material and containing said wet fibrous materials (3), said first container (1) including one of a first opening (11a) and a first weakened line (13) for forming said first opening (11a), to permit dispensing of said wet fibrous materials (3) therethrough, and a flexible flap (5, 16) for releasably covering said first opening (11a), by a pressure sensitive adhesive (51);

forming one of a third opening (21a) and a third weakened line (27, 28) for forming said third opening (21a), in a first continuous sheet (20);

forming one of a second opening (36) and a second weakened line (27, 28) for forming said second opening (36) in a second continuous sheet (30), to permit dispensing of said dry materials (4);

positioning said first container (1) and said dry materials (4) between said first and second continuous sheets (20, 30) such that said flap (5) is positioned coinciding with said third opening (21a) of said first continuous sheet (20), said dry materials (4) are positioned in stacked relation with said first container (1) on the surface thereof opposite to said flap (5, 16) and in correspondence with said second opening (36) in said second continuous sheet (30);

sealing longitudinal edges (24) of said first and second continuous sheets (20, 30) with each other; and sealing said continuous sheets (20, 30) in a transverse direction."

II. The Appellant (Opponent) filed an opposition against the European patent on the grounds that the subject-matter of the patent lacked an inventive step having regard in particular to:

D1: EP-A-0 119 314
D2: NL-A-8 301 128
D3: US-A-4 004 711
D4: NL-A-6 413 335
D5: DE-A-2 847 560
D6: US-A-4 495 748.

III. By a decision dated 7 November 1991 the opposition was rejected.

The Opposition Division held that starting from the closest prior art as disclosed in D1 none of the other cited documents could be considered to give a lead to the characterising features of Claim 1. The subject-matter of Claim 1 therefore comprised an inventive activity.

The independent Claims 12, 14 and 16 define methods of obtaining the product as defined in Claim 1. Because the product was considered to be novel and inventive it was concluded that a process for producing the same must be novel and inventive too.

IV. The Appellant filed a notice of appeal against the decision on 13 December 1991 and paid the appeal fee on the same day.

He requested setting aside of the impugned decision and revocation of the patent in its entirety.

The Statement of Grounds of Appeal was filed on 29 February 1992.

V. At the auxiliary request of the Appellant oral proceedings took place on 5 August 1993.

VI. At the oral proceedings and in his written submissions, respectively, the Appellant essentially relied upon the following submissions in support of his request:

In accordance with D1 a re-sealable dispenser-container is provided with two compartments and an example is given that dry and wet tissues may be packed together in such a container. The skilled person would immediately recognise the problems as regards spilling of liquid referred to in the patent when manufacturing such packages. In fact the single possibility to avoid leaking of liquid from the wet tissues is to prepack them in a separate container, such as known from D2, and then pack this container together with the dry tissues in another container.

In this respect D3 already shows in Figures 1 and 3 the principle adopted in the patent in suit. In these embodiments a liquid is separately packed and put together with the dry content in a further container. Moreover, in the embodiment of Figure 2 a combined packing of a dry and a wet towel is shown packed in the manner as known from D1 and therefore the skilled person would immediately be confronted with the alternative solution shown in the embodiments of Figures 1 and 3 leading to the claimed subject matter of the patent in suit. In this respect it is considered immaterial whether or not the embodiments of Figures 1 and 3 comprise wet and dry tissues; the skilled person would immediately grasp the essential teaching in that two materials which should be kept away from each other should already in the manufacturing process be treated as separately packed objects to avoid any interference of their contents.

The provision of dispensing openings is already known from D1 and the skilled person would not need any

inventive activity to provide an opening in the second container at the position where the wet tissues should be taken out of the container. In this respect it would be quite obvious to provide a dispenser opening at the location of the dispenser opening of the first container.

Therefore, when considering the relevant prior art, the documents D1, D2, and D3 already contain all the necessary teachings to arrive in an obvious manner at the subject-matter of Claim 1 of the patent in suit.

As regards the independent method claims the opposition Division had solely argued that since the product of Claim 1 is novel and inventive, the methods for manufacturing such a product should necessarily be novel and inventive too. This argumentation could not be accepted and as the Opposition Division did not at all take into account the arguments put forward by the Appellant the decision under appeal did not meet the requirement of Rule 68(2) EPC in that decisions should be reasoned.

The view is maintained that all the method steps are standard manufacturing measures and thus the methods do not differ from what is commonly done by the skilled person. Moreover, the method steps of the different method claims are in themselves known from D1, D2 and D5 and it would be obvious to the skilled person to apply these commonly known manufacturing processes for manufacturing the alternative packages shown in D3 in Figures 1 and 3, which did not differ in an inventive manner from the packages arrived at when applying the methods of Claims 12, 14 and 16.

VII. The Respondent (Proprietor) requested that the appeal be dismissed. In support of his request he submitted in particular the following arguments:

When starting from the closest prior art shown in D1 the problem to be solved by the patent is not only related to avoidance of wetting of the dry contents and the parts of the sheets to be sealed. The characterising features of Claim 1 would also result in an improvement of the production of the type of product disclosed in D1, in particular as regards manufacturing speed (since no leakage occurs the handling forces may be relatively high), accuracy of positioning of the contents with respect to each other and the sheets comprising the dispenser openings. These features would also allow the use of a different, cheaper material for the outer container. All of these aspects would result in substantial savings.

None of the above problems is addressed in the cited prior art. The documents D2, D4 and D5 concern single package containers which have no relevance to the claimed subject-matter.

D3 concerns a heating arrangement without any dispensing openings in the container and D6, as far as it discloses a container enclosed by another container, relates to a mixing device for liquids.

It must be considered that the invention is not merely a combination of a first container within a second container but concerns also the alignment and positioning of the openings therein so that either the wet or dry tissues can be removed. This is clearly not shown or even remotely suggested in D3.

In particular, at least the features that the second container has two openings and that the "third" opening is in line with the first opening have no antecedent in the prior art.

Although D3 discloses one embodiment with an enclosed container for a liquid, when looking for a solution to the problem of the patent which relates to packing of wet and dry fibrous materials the skilled person would rather focus on the embodiment of Figure 2, which is however not principally different from the configuration used in D1 and would therefore not be of any help to the skilled person seeking for a solution to the stated problem.

In the present case it may be that the expert **could** have arrived at the invention when considered by hindsight, but the Appellant failed to prove that he **would** have arrived at the invention in an obvious manner having regard to the pertinent prior art.

When attacking the method claims the Appellant, after having derived a general principle from the references, had applied different aspects from completely different references in an attempt to arrive at the present invention. However, not only is there no disclosure in D3 as to how the packages are made but also the problems associated with the positioning and arranging of the elements are nowhere suggested in D3. In this respect also D6 cannot provide any applicable teaching to the skilled person because this prior art relates to packing of liquids only and thus there is no stacking of tissue material or a necessity for providing different dispensing openings.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is admissible.

2. *Prior art*

2.1 The Board agrees with the parties that D1 discloses the closest prior art. The re-sealable dispenser-container shown in D1 comprises a container body made of three layers of impervious sheet-like material the peripheries of which are sealed together in a superimposed condition so that two spaces, containing material for cosmetic or toilet use, are formed. On both sides of the container body re-sealable openings are provided. This known container may be produced in a continuous manner and is convenient for containing two different kinds of contents, for example dry tissue and wet tissue (see page 7, lines 22 to 25).

This prior art discloses in combination the precharacterising features of Claim 1 of the patent in suit.

2.2 D2 relates to a re-sealable dispenser container for impregnated materials and a method for manufacturing such a container. The container is formed from an impervious sheet material which is folded around the content to be packed in a tubewise manner, is longitudinally sealed and also at regular intervals in the transverse direction to form individual packages.

The sheet material is provided with opening strips which are adhesively attached to the sheet material and sealed at one end thereto.

This document shows a container of the type of the first container in accordance with Claim 1 of the patent in suit.

2.3 The subject-matter of D3 relates to a disposable towel provided in a container together with material to evolve heat when the towel and the material are put together.

In two embodiments (Figures 1 and 3) an impregnated towel is packed together in one container with a small pod containing an liquid oxidising agent.

In another embodiment (Figure 2) one container comprising two compartments is used for packing two towels each with a chemical substance to generate heat when the towels are put together.

In neither of the embodiments re-sealable dispenser-openings are provided.

2.4 D4 relates to re-sealable pressure sensitive opening flaps for containers.

In the appeal proceedings D4 was not any longer referred to by the Appellant.

2.5 D5 discloses a container made of sheet material comprising a longitudinal opening which is folded to keep it closed.

2.6 D6 concerns the manufacturing of containers for liquids which in the embodiment shown in Figures 5, 6 and 7 may comprise a second bag within an outer bag. In order to mix the contents of the bags a straw or stylus is pierced through a valve member seam providing a connection between the different compartments of the container. The container is re-sealable, the valve

member being closed by pressure of the remaining liquid against the sides of the valve member.

3. *Novelty*

3.1 Novelty of the subject-matter of the independent Claims 1, 12, 14 and 16 of the patent in suit can be concluded simply for the reason that at least the feature that the first container has a third opening (21a) or a third weakened line for forming an opening at a position corresponding with the first opening which feature is contained in all independent claims is not derivable from any of the cited documents.

3.2 Although it was admitted that the subject matter of Claim 1 was novel, in the oral proceedings the Appellant challenged the novelty of the methods in accordance with the independent Claims 12, 14 and 16.

However, for the reason set out above (point 3.1) and since none of the cited documents discloses a method by which a dispenser-container in accordance with Claim 1 of the patent in suit is produced, which was also admitted by the Appellant, the method claims must be considered as novel. In the absence of any proof to the contrary the allegation that the method Claims 12, 14 and 16 lack novelty is to be dismissed as not substantiated.

4. *Inventive Step*

4.1 In the manufacturing process of the known dispenser-container disclosed in D1 a number of problems are encountered. Firstly, it is not easy to supply the contents and sheets so that their relative positions are kept correct and to transport such a stacked arrangement to the heat sealing station. Thus, the process requires

delicate setting, controlling and adjusting to ensure perfect alignment of the stacks and dispenser openings.

Furthermore, when contents of one type are impregnated with liquid, some liquid may leak out during transport to the sealing station giving rise to wetting of the dry content and difficulties at the heat sealing step.

Moreover, since the materials of the three sheets are necessarily the same so as to facilitate easy heat sealing the costs of the sheet material are relatively high (see the patent, column 2, line 45 to column 3, line 5).

4.2 Hence, in accordance with column 3, lines 8 to 17, the objective problem underlying the subject-matter of the independent claims of the patent in suit is to provide a dispenser-container containing wet and dry material by which the above described problems inherent in the prior art can be obviated and the continuous manufacture of which can be done easily with low manufacturing costs and to provide methods for producing such dispenser-container.

4.3 The solution proposed in the independent claims of the patent in suit essentially concerns the forming of a sealed first container containing the wet material and packing this first container together with the dry material in a second container having in addition to the dispensing opening for the dry material an opening or means for forming an opening at a position corresponding with the dispenser-opening of the first container (first opening).

As was convincingly explained by the Respondent in the oral proceedings not only can leakage be avoided during the manufacturing process, but solely the first

container needs to be made of more expensive impervious sheet material thus leading to a substantial saving. Moreover, the handling forces during positioning of the wet and dry material can be increased so that both the speed of manufacturing and accuracy of alignment may be improved when compared to the conventional manufacturing process apparently used in D1.

4.4 Considering the cited documents, no incentive can be derived from this prior art to modify the dispenser-container known from D1 in the manner as claimed in Claim 1 of the patent in suit.

D2, D4 and D5 concern single content packages and none of the problems referred to above occur during the manufacture of these known dispenser-containers.

D3 and D6 show containers having another container enclosed therein but these documents do not relate to re-sealable dispenser-containers for wet and dry fibrous materials.

In the embodiments shown in Figures 1 and 3 of D3 a small extra bag (pod) with a liquid chemical substance is incorporated in the container for the towel. If wet and dry contents are concerned, such as in the embodiment of Figure 2, a package construction very similar to the one known from D1 is used, e.g. a construction in which the container sheets and wet and dry contents must be stacked before the sheets are sealed. Moreover, the reference D3 relates to one or two towels for a single use with rupture of the container material: the container has no dispensing opening(s) at all.

The structure according to the reference D6 concerns packing of liquids and presents the same difficulties as

D1 with respect to the aspect that a plurality of layers of sheets of polymeric material must be sealed at one location. Moreover, D6, in the embodiment of Figures 5 and 6, which is the single embodiment to show a container having a second bag within the outer bag, is essentially related to containers for liquids and its objects are mainly the easy access to the contents and effective resealing and mixing of the contents within the container (see column 1, lines 34 to 43). Opening of this known container is carried out by pushing a straw into the container and thus there is no plurality of dispensing openings in the meaning of Claim 1 of the patent in suit.

Therefore, when starting from the prior art according to D1 and the problems related thereto and objectively assessing the teachings of D3 and D6, the skilled person is not lead to the specific design claimed let alone to the feature of a third opening in the second container which is centered with respect to the first dispensing opening of the first container as defined in Claim 1 of the patent in suit.

Clearly the methods in accordance with the independent Claims 12, 14 and 16 lead to the products falling within the cope of the product Claim 1. Since the product is considered novel and inventive these methods being specifically adapted in order to arrive at the inventive product must necessarily also contain novel and inventive manufacturing steps.

4.5 The Appellant argued that it would be obvious to the skilled person to provide a container such as shown in D2 for the wet material first in order to be able to form a stack of dry material and a sealed container comprising wet material so as to avoid the wetting of

the dry material and the sealing areas during the manufacturing process.

In his opinion such a teaching could be derived from D3, in particular since the embodiments of Figures 1 and 3 having a separate bag within the container for the dry towel were shown together with the embodiment of Figure 2 showing two separate towels, the latter providing an obvious link of the teachings of D3 with the container of D1. However, not only is the problem addressed to in D3 (the manufacture of a disposable towel with the ability to evolve heat immediately prior to use or in use) totally different from the problem to be solved by the patent in suit, but also in the embodiments of Figures 1 and 3 no stack of material is formed prior to enclosing the two contents of the container but rather a packing of a towel and a small amount of liquid, which must of course always be prepacked, separated from another is provided. Remembering that the present patent concerns a dispenser-container containing wet fibrous materials and dry materials the skilled person would, in the Board's opinion, certainly disregard the embodiments of Figures 1 and 3 and would come across the embodiment of Figure 2 in which such a stack of wet and dry material is formed but which is not principally different from the package of D1 and therefore cannot bring him any further to the solution proposed in the patent.

4.6 The Appellant considered the provision of a "third" opening obvious in order to be able to take the content out of the first container. In this respect he referred to an example of a sports bag containing wet and dry clothes and in which the wet clothes can either be put into a separate bag in the sports bag or in an extra compartment of the sports bag. However, also in such example there is no need for a "third" opening in line

with the opening of the "first" container containing the wet clothes which "third" opening is specific for the arrangement chosen for the dispenser-container defined in Claim 1 of the patent in suit. Moreover, this example does not have any relationship with the other problems to be solved by the subject-matter of the patent in suit as referred to above and in the absence of any other disclosure or hint to such a "third" opening in the cited documents the arrangement of Claim 1 of the patent must be considered to comprise inventive step.

4.7 The Appellant further considered the Opposition Division's statement that since the product of Claim 1 is novel and inventive a process for producing same must evidently be novel and inventive too, incorrect. In this respect the Board fully concurs with the Opposition Division's view (see also the Guidelines for examination Part CIV, 9.5a); in order to be able to manufacture a novel and inventive product at least one or more features or steps in the manufacturing process must necessarily be novel and inventive too. Moreover, the finding of this manufacturing process presupposes the concept of the inventive product and thus any inventive step with the product must necessarily be attributed to the process.

Consequently, it cannot be accepted either that the Opposition Division's decision is not reasoned with regard to inventive step of the subject matter of the method claims in accordance with Rule 68(2) EPC, as was also submitted by the Appellant.

4.8 As regards the Appellant's submission that all the manufacturing steps are in fact already known from D1, D2, D3 and D5 with the exception of the provision of a third opening, which manufacturing step must however be considered as evident to the skilled person it is noted

that as is already referred to above, having regard to the underlying problem of the present patent the skilled person did not have any reason to combine the teachings of these documents in the manner as proposed by the Appellant. The Appellant's considerations are thus clearly based on knowledge of the invention and cannot be accepted as valid arguments as to why the skilled person would have arrived in an obvious manner at the claimed subject-matter.

4.9 Summarising, in the Board's judgment, the subject-matter defined in the independent Claims 1, 12, 14 and 16 is inventive and therefore these claims as well as their dependent claims relating to particular embodiments of the invention in accordance with Rule 29(3) EPC are acceptable.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

S. Fabiani F. Gumbel