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D E C I S I O N
of 8 June 1999

Case Number: T 0177/97 - 3.2.1

Application Number: 92907131.4

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F25C 1/24

Language of the proceedings: EN

Title of invention:
A freezing mould bag

Applicant/Patentee:
Schur Consumer Products A/S

Opponent:
Lindknud Plast A/S

Headword:
-

Relevant legal provisions:
EPC Art. 108
EPC R. 65(1)

Keyword:
"Admissibility of appeal (no, insufficient statement of grounds)"

Decisions cited:
T 0220/83

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0177/97 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 8 June 1999

Appellant: Lindknud Plast A/S
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Respondent: Schur Consumer Products A/S
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Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 16 December 1996 rejecting the opposition filed against European patent No. 0 574 496 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: F. Gumbel
Members: S. Crane
V. Di Cerbo

Summary of Facts and Submissions

- I. European patent No. 0 574 496 was granted on 28 September 1994 on the basis of European patent application No. 92 907 131.4.

Claim 1 of the granted patent reads as follows:

"A freezing mould bag comprising:

two sheets (12, 14) of a foil material, said sheets being of substantially identical geometrical shape and defining an outer periphery,

a peripheral joint (20) extending along the majority of said outer periphery of said sheets, except for a peripheral area constituting an inlet opening (26) of said bag (10), said peripheral joint joining said sheets together in substantially overlapping relationship and defining an inner space within the interior of said bag (10), said inner space constituting at least one mould compartment (24), and preferably a plurality of mould compartments (24) being interconnected and being defined by separate joints (28) of said sheets,

an inlet channel defined by separate joints of said sheets and extending from said inner space of said bag to said inlet opening (26) so as to provide access from the environment to said inner space of said bag through said inlet channel,

two closure valve flaps (16,18) connected to said sheets (12,14) at said inlet opening (26) and extending from said inlet opening (26) within the interior of said bag towards said inner space of said bag along said inlet channel, said closure valve flaps (16,18) being joined together and being joined to said sheets

(12,14) through said separate joints defining said inlet channel so as to provide two closure pockets being open towards said inner space of said bag,

said inlet channel comprising a first segment and a second segment, said first segment being provided adjacent to said inlet opening (26), and said second segment interconnecting said first segment and said mould compartment or mould compartments (24), said first segment tapering towards said second segment, said first segment and said second segment defining at their transition a constriction,

said inlet channel defining a first direction constituting the longitudinal direction of said inlet channel, and a second direction in a plane parallel with said two sheets perpendicular to said first direction, and

said closure valve flaps (16,18) extending from said inlet opening (26) beyond said constriction at said transition,

CHARACTERIZED by said second segment comprising a compartment defined by joints adjacent to said constriction diverging substantially along said second direction, linked by side joints to further joints being adjacent to said mould compartment or mould compartments, said further joints converging along said second direction to at least one passage into the inner space of said bag,

said second segment having a maximum dimension along said second direction of a least 2 times the dimension of said constriction along said second direction for providing a liquid or water reservoir, from which liquid or water without hindering may flow towards the inlet opening through said constriction after the freezing mould bag (10) has been filled with

liquid or water through said inlet opening (26) in a first position, in which said inlet opening faces upwardly, and after the freezing mould bag (10) has been turned to a second position, in which said inlet opening (26) faces downwardly, and

said constriction at said transition providing a venturi effect for generating a pressure drop at said constriction for closing said inlet channel at said constriction as liquid is flowing from said second segment towards said first segment through said constriction so as to generate a self-closing effect."

Dependent claims 2 to 15 relate to preferred embodiments of the bag according to claim 1.

II. The granted patent was opposed by the present appellants on the grounds that its subject-matter lacked novelty and/or inventive step with respect to the state of the art (Article 100(a) EPC) and that the claimed invention was insufficiently disclosed (Article 100(b) EPC).

As state of the art were cited in the notice of opposition the following documents:

(D1) US-E-0 031 890

(D2) EP-A-0 264 407

With the notice of opposition were also filed as "Enclosure D" and "Enclosure E" copies of photographs of two mould bags. The bag shown in Enclosure D was stated to be configured in accordance with the contested patent. The bag shown in Enclosure E was

stated to be configured in accordance with document D2 and to have been marketed before the priority date of the contested patent.

III. With its decision posted on 16 December 1996 the Opposition Division rejected the opposition.

In the reasons given for the decision the Opposition Division dealt with the objection under Article 100(b) EPC and stated in detail why in its opinion the subject-matter of granted claim 1 was novel with respect to both documents D1 and D2 and could not be derived in an obvious manner from the state of the art. Starting from document D2 as closest state of the art the Opposition Division identified two distinguishing features, corresponding to the first two sub-paragraphs of the characterising clause of the claim, concerning the shape and size of the second segment, see point 4.2 of the decision. There then follows an analysis of the technical problem to be solved and the findings that the claimed solution involved an inventive step.

IV. An appeal against this decision was filed on 14 February 1997 and the fee for appeal paid at the same time.

With the notice of appeal the appellants submitted further copies of Enclosure D and Enclosure E. Under the heading "Preliminary grounds of appeal" it was stated that on the basis of these two enclosures alone it was difficult to identify a genuine technical difference between "these two embodiments" and, in any case, it was difficult to identify a patentable distinction. The appellants also stated that the

claimed invention lacked novelty with respect to document D2 and that the "inventive features" were directed to non-existent drawbacks of the prior art, with the consequence that there was no inventive step. Finally the appellants stated that the patent did not fulfil the demands of Articles 83 and 84 EPC.

They therefore requested that the patent be revoked.

A statement of grounds of appeal was filed on 15 April 1997. With this statement the appellants submitted evidence (Exhibits F to I) that the bag shown in Enclosure (or "Exhibit") E had been made available to the public by sale before the priority date of the contested patent. They also submitted a hand-drawn sketch (Exhibit J) of the joints at the valve end of the bag shown in Enclosure E. Marked on Exhibit J are two measurements of 20 mm for the width of the constriction and 35 mm for the maximum dimension of the second segment in the second direction. In the paragraph bridging pages 3 and 4 of the English translation of the statement of grounds the features distinguishing the subject-matter of claim 1 from document D2, as identified in point 4.2 of the contested decision are repeated. There then follows a statement, with reference to Exhibit J, that it is the opinion of the appellants that these features are substantially known, the "main difference being that the second segment is 5 mm from being 2 x the dimension of the constriction". The appellants add that since the problem to be solved has been "so entirely solved by the known bag ... (they) are not of the opinion that the bag described in the patent differs substantially from the known bag". The grounds of appeal then

conclude with the statement that "The conditions of novelty, Articles 52(1) and 54 EPC and inventiveness, Articles 52(1) and 56 EPC are therefore in our view not complied with wherefore the patent should be invalidated in its entirety."

- V. In a counterstatement to the grounds of appeal the respondents (proprietors of the patent) argued that the late filing of evidence concerning the alleged prior use constituted an abuse of the procedure, that this evidence was in any case irrelevant to the patentability of the claimed subject-matter and that the statement of grounds of appeal was inadequate.

They therefore requested that the appeal be rejected as inadmissible and that they be awarded all costs incurred in connection with the appeal.

- VI. In a communication dated 5 March 1998 the Board indicated, *inter alia*, its provisional opinion that the appeal was inadmissible.

In a reply to this communication dated 5 February 1999 the appellants observed that the claimed invention was "implied" by joints below the constriction in Exhibit E which diverge (substantially) along the second direction. Accordingly the claimed subject-matter did not meet the requirements of Articles 52(1) and 56 EPC with respect to inventive step.

Reasons for the Decision

1. The appeal complies with the requirements as to

admissibility set out in Articles 106, 107, 108, first and second sentences, and Rules 1(1) and 64 EPC. With regard to the requirement of Article 108, third sentence, EPC that a written statement of grounds of appeal be filed within four months after the date of notification of the decision, it belongs to the established case law of the Boards of Appeal, see for example decision T 220/83 (OJ EPO 1986, 249), that the grounds for appeal should specify the legal or factual reasons on which the case for setting aside the decision is based. The arguments must be clearly and concisely presented to enable the board and the other party or parties to understand immediately why the decision is alleged to be incorrect, and on what facts the appellant bases its arguments, without first having to make investigations of their own.

2. In the present case evidence has been filed with the statement of grounds of appeal in support of the allegation that a bag as shown in "Exhibit E" had been made available to the public by prior use this bag being a development of the bag described in document D2 which was the state of the art essentially relied upon in the opposition proceedings. As far as the Board can determine the form of the joints defining the inlet channel of the bag of Exhibit E these differ somewhat from those of document D2 but not to any such extent that it could be argued - and indeed the appellants do not attempt to do so in their statement of grounds, that the features identified in the contested decision as distinguishing the claimed bag from that of document D2 are known from the allegedly prior used bag.

Nevertheless, without indicating why the bag of

Exhibit E should be considered as having joints below the constriction which diverge "substantially along the second direction", ie transverse to the length of the bag, which joints are linked by side joints to further joints converging along the second direction, as required by the first sub-paragraph of the characterising clause of granted claim 1, the appellants simply state that the main difference between the claimed bag and the allegedly prior used bag is that the second segment of the latter is "5 mm from being 2 x the dimension of the constriction". From this the appellants conclude, again without further detailed explanation, that the claimed bag is not novel and inventive.

It is apparent from the above that the statement of grounds of appeal contains nothing which could be seen as a substantiated challenge to the correctness of the findings of the Opposition Division as to what distinguished that claimed bag from the closest state of the art (whether that be represented by document D2 or Exhibit E) or as a coherent argument that these distinguishing features could be derived in an obvious manner from the state of the art. In view of this inadequacy of the statement of grounds the appeal must be rejected as inadmissible with Rule 65(1) EPC. There is nothing in the submission of the appellants dated 5 February 1999 which can lead the Board to a different conclusion.

3. According to Article 104 EPC each party to the proceedings should normally meet its own costs. Exceptionally, for reasons of equity, a different apportionment of costs incurred during taking of evidence or in oral proceedings may be ordered. Since

there has been no taking of evidence or oral proceedings in the present case it is apparent that the request of the respondents for apportionment of their costs must fail for this reason alone.

Order

For these reasons it is decided that:

1. The appeal is rejected as inadmissible.
2. The request of the respondents for apportionment of costs is rejected.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel