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**D E C I S I O N**  
**of 22 July 1999**

**Case Number:** T 0090/98 - 3.2.1

**Application Number:** 93306885.0

**Publication Number:** 0586232

**IPC:** B65D 81/41

**Language of the proceedings:** EN

**Title of invention:**

Impact resistant wrapping system

**Applicant:**

Jaszai, Zoltan Kazmer, et al

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 84  
EPC R. 71(2)

**Keyword:**

"Lack of clarity"  
"Oral proceedings continued without party"

**Decisions cited:**

-

**Catchword:**

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Boards of Appeal

Chambres de recours

Case Number: T 0090/98 - 3.2.1

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.1**  
**of 22 July 1999**

**Appellant:**

Jaszai, Zoltan Kazmer  
9-8, Kita-Aoyama 3-chome  
Minato-ku  
Tokyo (JP)

and

Burlington Consolidated Limited  
85 Upper Drumcondra Road  
Dublin 9 (IE)

**Representative:**

Ben-Nathan, Laurence Albert  
Urquhart-Dykes & Lord  
91 Wimpole Street  
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**Decision under appeal:**

**Decision of the Examining Division of the  
European Patent Office posted 8 September 1997  
refusing European patent application  
No. 93 306 885.0 pursuant to Article 97(1) EPC.**

**Composition of the Board:**

**Chairman:** F. Gumbel  
**Members:** S. Crane  
J. Willems

## Summary of Facts and Submissions

- I. European patent application No. 93 306 885.0 was refused by the decision of the Examining Division posted on 8 September 1997.

The reason given for the decision was that the subject-matter of claim 1 lacked novelty with respect to US-A-5 129 519 (document D1).

This claim read as follows:

"An impact resistant package for containing an article or articles, comprising wall portions formed of a flexible inner membrane (2) having gas barrier properties, a flexible outer membrane (3) having gas barrier properties and being opposed to said inner membrane (2) in a double-ply state to define in an airtight manner a cavity (4) therebetween, sheet-like sponge foam material (5) placed in between said two flexible membranes (2,3) in its compressed state, and an air valve (15) disposed on one of said flexible membranes (2,3), through which said cavity (4) can be opened to introduce air into said cavity thereby to allow said compressed sponge foam material to expand, characterized in that said package is formed as a generally flat sheet-like wrapping body which is capable of being wrapped around an article or articles to form the package, and has fastening means (7,8,9,10,11,12,13,14) for retaining the sheet-like wrapping body in its state of being wrapped around an article or articles."

Dependent claims 2 to 15 related to preferred

embodiments of the package according to claim 1.

- II. An appeal against this decision was filed on 4 November 1997 and the fee for appeal paid at the same time.

The statement of grounds of appeal was filed on 9 January 1998. With the statement of grounds the appellants (applicants) submitted sets of claims according to main and auxiliary requests for the grant of a patent. Claims 1 to 15 according to the main request corresponded to the claims underlying the contested decision; an independent method claim 16 to the forming of a package had also been added. In claims 1 and 16 of the auxiliary request it had been specified that the fastening means were "releasable".

- III. In a communication of the Board pursuant to Article 11(2) RPBA dated 17 February 1999, in preparation for oral proceedings to be held on 22 July 1999, the Board raised the issue of the clarity of claim, in particular whether the subject-matter of the claim was a "package" or a "wrapping body", and pointed out that several of the described embodiments of the claimed invention did not appear to constitute "packages". With respect to the arguments of the appellants concerning the novelty of the claimed subject-matter the Board also pointed out that the embodiment of Figures 46 and 47 of the application was constituted by an envelope essentially equivalent in its general form to the envelope disclosed in document D1.

- IV. At the time appointed for the oral proceedings the appellants were not present. The registrar of the Board

contacted the representative of the appellants who said that he had sent a fax the previous evening to inform the Board that no one would be attending the oral proceedings. After receipt of this information the oral proceedings were opened, it was established that the appellants had been duly summoned and were not present and in accordance with Rule 71(2) EPC the oral proceedings were continued in their absence. After deliberation of the Board the decision was announced that the appeal was dismissed and the oral proceedings were closed.

Subsequently in the course of the day the fax sent by the representatives of the appellants reached the Board. In addition to the statement that no one would be attending the oral proceedings, the fax also included the request that the oral proceedings be cancelled and further progress of the appeal be by written procedure, together with submissions concerning the issues raised in the communication of 17 February 1999.

### **Reasons for the Decision**

1. The appeal complies with the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC; it is therefore admissible.
  
2. Claim 1 of the main request is directed to "an impact resistant package for containing an article or articles". In the characterising clause of the claim it is then stated that the package is "formed as" a generally flat sheet-like wrapping body which "is

capable of being wrapped around an article or articles to form the package". It is therefore unclear whether the subject-matter of the claim is a package made up from this flat wrapping body or the flat wrapping body **per se**.

Furthermore, several of the disclosed embodiments of the claimed invention relate to artefacts which do not constitute "packages" in any normal sense of the term. In particular, Figures 33 to 39 relate to corner protectors for box-shaped articles and Figures 62 to 70 to arm and finger splints. This inconsistency between the terms of claim 1 and the description of the claimed invention throws doubt on the meaning of the former.

For the above reasons claim 1 according to the main request is unclear and cannot be allowed (Article 84 EPC).

The same objections apply to the wording of claim 1 of the auxiliary request which is therefore also unallowable.

3. In the communication of the Board in which the above objections to the terms of claim 1 were made the appellants were instructed that any written submissions should reach the Board at least one month before the date of the oral proceedings. They did not pay any heed to this. Nor, when sending a fax on the evening before the oral proceedings, did they use the special fax number indicated on the summons for use in urgent situations. As a consequence, the Board could take no account of the submissions of the appellants before reaching its decision at the oral proceedings. For

completeness the Board nevertheless wishes to confirm that there is nothing in those submissions which could have led it to a different conclusion on the question of the clarity of claim 1. Indeed, the statement of the appellants that the wrapping body with fastening means forming the package of claim 1 is "a package when wrapped around an article and secured by the fastening means or when not in use with the fastening means undone" only serves to illustrate rather than clarify the difficulties in determining what the true subject-matter of the claim is. Furthermore, the submissions do not deal with the question of the several disclosed embodiments which do not constitute packages. The request of the appellants to delete the embodiment of Figures 46 and 47 (which certainly is a package) is in response to comments of the Board on the novelty or the subject-matter of the claim.

Lastly, even if the request of the appellants to cancel the oral proceedings and continue the procedure in writing had arrived in due time the Board, in the circumstances, would have seen no good reason for doing so.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel