

Infringement and claim construction - marks are available from infringement and validity (40)	Overall standard of answers
<p><b>Claim 1</b></p> <p>Infringed.</p> <p>Key issues: "first wall", "pocket wall", "joining", "bonded directly" "bottom joining first and second walls". Looking for ability to spot issues, construe claim terms, find corresponding integers in B, apply Catnic <i>reasonably</i>.</p>	Average/Good
<p><b>Claim 10</b></p> <p>Claim 10 may also be infringed.</p> <p>Key conclusion: infringed or not very clear cut.</p> <p>Key issues: The claim isn't clear where blank stops and assembled begins, "longitudinal alignment". Several confusing typos</p>	Average/Poor
<p><b>Dependent Claims</b></p> <p>Key conclusion: Apart from claim 8 the other claims aren't infringed.</p> <p>Claim 8: The word "join" again (see discussion of claim 2 below). "Joins" is not the same as "joined" and no "intimately" or "surface" to support a narrower meaning.</p> <p>Claim 5: seems may be infringed but drawing is deceptive – regarding height of walls. Actually not infringed. Candidates should at least get the translation right. Front wall does not mean first wall, and isn't linked to first wall in the claim.</p> <p>Claim 2: "Pocket sheet" v "pocket wall" – a discussion of "sheet" should decide this. "intimately joined to the inner surface" vs folding around the back. There is contact where they butt together but not joining. There is a question of the vertical glue lines at the sides, but these are between the front and back walls, not between the pocket wall and the back wall. Ultimately I believe the use of "surface" in the phrase counts against infringement.</p> <p>Claim 6 or 7: Candidates may wish to comment on these because they stand out. Obvious non-</p>	Poor

infringement.

Claim 9: Clear cut – candidates could note that this claim reinforces the broad use of "first wall" in claim 1.

## Validity (40)

### Prior Use

Average/Poor

Timeline indicates possible prior use by offer for sale to BFG. Prior use depends on losing the priority date. Prov is not strong. Single statement supporting wide breadth of claim 1. Arguable that that is subsidiary to earlier narrow statement. Strong, but not conclusive case of lack of external fair basis.

### Prior publication

Average/Good

No direct anticipation? The conical version (D) has no bottom, the chip scoop (F) has the pocket in one side. The other containers have no pocket. Others have no pocket.

### Obviousness/lacks inventive step

Average/Poor

Windsurfer.

Possible but not certain based on D. Likely to succeed in revocation, but not in opposition.

For example: the invention is having a pocket wall against the front or back face of a chip scoop, which can be flipped out to form a condiment pocket.

What is the skilled person/CGK combination? Reasoned statement that particular prior art (pre existing chip containers – such as A) is in the CGK in NZ.

Build a case for why the claimed invention is obvious: The person skilled in the art, presented with the problem identified in the background of the patent would have realised that the configuration in D had the immediate solution – starting with A, (with some slight reshaping of the top edged of the container) an extension from the top edge of the back wall (such as in D) could be folded over and glued prior to assembling the container.

But what about the claims to the blank, or to the pocket wall extending to adjacent the side walls? This would require a broader argument of the skilled person applying additional CGK. The obviousness ground is more suspect for these claims.

An obviousness finding is less likely when based on F. NO chance at opposition, small chance at revocation.

F is the admitted prior art. The solution in F doesn't simplify construction, doesn't meet the object.

Would need to redraw the problem/motivation of the skilled person: for example supported by a reason to move the pocket to the front or back and increase size.

### Clarity

Very poor

Claim 10: issue of whether the pocket wall limitation is in the blank or in the assembled

product. probably sufficient to force correction at opposition, particularly together with the typos.

#### **Fair basis**

Very poor

Claim 1 is too broad and covers things that bear little relation to the inventive contribution. Supported by the way the claim departs from the statements of invention. Particularly pg 6. Good in theory, little consistent precedent in support though.

#### **Utility**

Very poor

- Claim 1 is so broad it must cover things that don't meet the objects. What are the objects: "significant and practical improvement" over "difficult operation to automate or perform quickly by hand".
- The claim doesn't exclude embodiments that would be just as "difficult" as the prior art. For example a pocket wall could extend from the side edge of a wall 150 in E and across the back wall, being glued on its lower and far side edge. This can't be pre-assembled in the flat container, and would have to be secured across the inside of the back wall 144 of the container during or after assembly. This isn't an outlandish or deliberately obtuse embodiment. - the shape of the blank would probably nest well enough that it remains economical. Seems a reasonable prospect on revocation – certainly can be part of a squeeze for interpretation of "pocket wall".

## Other (20)

Amendment options. Should focus on possible options that would validate patent and leave B an infringement. Average

Must recognise that the opposition window is still open. Extension, opportunity to gather evidence or negotiate Average

Discuss issues of choice between opposition and revocation. Poor

Opposition not a great option: obviousness argument may be required here, utility not available, no estoppel based on arguments in opposition Revocation as defence to infringement: can run utility can run obviousness without handicap can squeeze the patentee on interpretations

After grant issues Poor

Should note that if the opposition fails then CRP will have the patent and be able to sue. Prospect of interim injunction being granted are high (based on historical cases – NZ judges favor patentee on balance of convenience). Damages calculation

Bonus for strategy: What about only running the prior use case in opposition and only running the prior publication and inventive step case later in revocation? Poor

No copyright – in either direction Poor

TSC not registered owner Poor