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**Datasheet for the decision
of the Enlarged Board of Appeal
of 3 June 2009**

Case Number: R 0006/09
Appeal Number: T 0326/07 - 3.2.06
Application Number: 97950996.5
Publication Number: 0953074
IPC: D04H 1/54
Language of the proceedings: EN

Title of invention:

Process for manufacturing a band-shaped non-woven product with increased tensile strength

Patentee:

Wattex

Opponents:

Freudenberg Politex s.r.l.
Johns Manville International, Inc.

Headword:

Fundamental width of Article 113 EPC/WATTEX

Relevant legal provisions:

EPC Art. 112a, 113, 122(1)
EPC R. 106, 107, 108(2), 109(1), 136

Relevant legal provisions (EPC 1973):

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Keyword:

"Petition for review - clearly inadmissible"

Decisions cited:

R 0001/08, R 0004/08

Catchword:

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Case Number: R 0006/09

D E C I S I O N
of the Enlarged Board of Appeal
of 3 June 2009

Petitioner: Wattex
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Decision under review: Decision of the Technical Board of Appeal
3.2.06 of the European Patent Office of
2 December 2008.

Composition of the Board:

Chairman: P. Messerli
Members: C. Rennie-Smith
P.-P. Bracke

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 326/07 of Board of Appeal 3.2.06, announced at the end of oral proceedings on 2 December 2008, to revoke European Patent No. 0953074 ("the patent") which concerned a process for manufacturing a band-shaped non-woven product with increased tensile strength. The petitioner (Wattex) was the patent proprietor and respondent in the appeal proceedings. The appellant was the opponent 01 (Freudenberg Politex s.r.l.) and the opponent 02 (Johns Manville International, Inc.) was a party as of right but took no part in the appeal proceedings. The appeal was against the decision of the Opposition Division of 27 December 2006 to maintain the patent in amended form with an independent claim 1 of which the characterising feature read "...characterised in that said strengthening threads and filaments are laid tensionless on to the fleece". The appeal proceedings were largely concerned with the consequences for patentability of the meaning of the word "tensionless".
- II. The petition for review was filed on 18 March 2009 and the petition fee was paid on the same date. The petition requested the Enlarged Board of Appeal to review the decision of 2 December 2008, order reimbursement of the appeal fee and, if the Enlarged Board of Appeal intended to reject the petition, oral proceedings.
- III. On 1 April 2009 the Enlarged Board issued a summons to oral proceedings accompanied by a communication containing its provisional and non-binding opinion that

the petition might be inadmissible because it did not contain the name and address of the petitioner. The communication invited the petitioner to remedy this deficiency within one month of the deemed date of receipt of the communication. The communication further observed that it appeared Rule 106 EPC could have been, but had not been, complied with and that, if the petition was not clearly inadmissible, it appeared to be clearly unallowable.

IV. On 2 June 2009 the petitioner, by a faxed letter from its representative, filed a request for re-establishment of its rights into the time for remedying the deficiency noted in the communication. The fee for such a request was also paid on 2 June 2009. The request also gave the name and address of the petitioner.

V. The petitioner's arguments can be summarised as follows.

(a) As regards the re-establishment request, in the faxed letter of 2 June 2009 and at the oral proceedings before the Enlarged Board the petitioner's representative said he had on reading the Enlarged Board's communication noted the one month time limit for remedying the deficiency in the petition. However, for an unknown reason he failed to reply in time. The only explanation was an oversight. He only realised his mistake when preparing on 2 June 2009 for the oral proceedings on 3 June 2009. The case was very important for the patent proprietor which gave instructions that everything should be done to save the patent, so the petitioner itself had taken all due care. The petitioner's name and address were given in the fax of

2 June 2009, thereby completing the omitted act. The request was filed and substantiated within the required time.

(b) As regards Rule 106 EPC, the petitioner argued at the oral proceedings before the Enlarged Board that the exception in Rule 106 EPC should apply. The Board of Appeal only made known its definition of "tensionless" after having heard the submissions of the parties about, and after deliberating on, the issue of novelty. So no objection could have been made before then.

The petitioner referred to the passage in the Board of Appeal's decision (see Reasons, point 2.1) which said that because, on the Opposition Division's straightforward approach of taking "tensionless" at face value (i.e. zero tension), this feature was the only basis for novelty and could become decisive for inventive step, further investigation was needed to establish the exact meaning of "tensionless" in the context of the subject-matter claimed. If the Board considered such further investigation was necessary it should have said so in its communication or during the discussion of novelty.

In answer to the Enlarged Board's question why no objection was made after hearing the Board of Appeal's definition, the petitioner's representative said he expressed disagreement with the Board's definition but did not raise an express objection under Rule 106 EPC.

(c) As regards the alleged fundamental procedural defect and allowability of the petition, the petitioner argued, in the petition and at the oral proceedings

before the Enlarged Board, that the appeal proceedings all boiled down to the meaning of "tensionless"; this was the key word in the case. The appellant had provided no real argument on inventive step. At the oral proceedings on 2 December 2008, the Board of Appeal adopted its own definition of the word "tensionless" after having decided (in the petitioner's favour) during the oral proceedings on novelty and before deciding (against the petitioner) on inventive step with the result that the patent in suit was revoked. The Board thereby showed partiality to the appellant and did not treat the parties equally (see T 922/05 of 7 March 2007, Reasons, points 9, 15 and 16). Such injustice towards the petitioner was a fundamental violation of the EPC.

By adopting this meaning of "tensionless" at a very late stage without having informed the parties of its new assessment of the case, the Board effectively deprived the petitioner of any opportunity to comment on the new arguments before the decision was taken contrary to Article 113(1) EPC. Failure to comply with Article 113(1) EPC is a substantial procedural violation which may entail reimbursement of the appeal fee (see T 1235/01 of 26 February 2004, Reasons, point 4.2).

In answer to the Enlarged Board's questions about the reference to "tensionless" in the Board of Appeal's communication, and whether the Board had not just decided on the meaning when, after hearing the parties, an issue which depended on that meaning had to be decided, the petitioner's representative said the point was that this meaning should have been mentioned

earlier. It was decisive for the issue of inventive step which then followed. The petitioner had argued its case on inventive step but had the feeling it did not matter what it said because of the Board's definition of "tensionless".

- VI. Oral proceedings before the Enlarged Board were held on 3 June 2009. The petitioner requested re-establishment of its rights into the time for remedying the deficiency noted by the Enlarged Board's communication, that the Enlarged Board set aside the decision of 2 December 2008 and re-open the proceedings before the Board of Appeal, and that it order reimbursement of the petition fee.

Reasons for the Decision

1. The petition was filed within two months of notification of the decision in question, the petitioner was adversely affected thereby, the prescribed fee was paid in time, and (subject to what is mentioned in point 2 below) the petition complied with Article 112a(2) and Rule 107(1)(b) and (2) EPC.
2. The petition did not state precisely which of the grounds for review contained in Article 112a(2) and Rule 104 EPC it relied on. The only use of the words "fundamental violation" in the petition was in the context of the Board's alleged partiality but it appears that no ground was thereby invoked and indeed no such ground is mentioned in Article 112a(2) or Rule 104 EPC. However, it can be inferred from the reference to Article 113(1) EPC (see petition, top of

page 3) that the petition alleged a fundamental violation of that Article under Article 112a(2)(c) EPC.

3. As regards Rule 107(1)(a) EPC, the petition did not contain the name and address of the petitioner and the Enlarged Board invited the petitioner to remedy this deficiency within one month of the deemed date of receipt of its communication as provided in Rule 108(2) EPC, first sentence. The deemed date of receipt was 11 April 2009 (see Rule 126(2) EPC), so the time limit expired on 11 May 2009. The one month period, shorter than the usual minimum of two months provided by Rule 132(2) EPC, is permitted in proceedings under Article 112a EPC (see Rule 109(1) EPC, first sentence). The consequence of failure to remedy a deficiency under Rule 107(1)(a) EPC is that "the Enlarged Board shall reject the petition as inadmissible" (Rule 108(2) EPC, second sentence). In this case however such rejection is subject to the petitioner's request for re-establishment of rights.

4. The request for re-establishment of rights is itself admissible. The non-observance of the time limit would lead to the loss of a means of redress (Article 122(1) EPC); whenever the removal of the cause of non-observance might be considered to have occurred, it could not have been prior to 11 April 2009, so the request filed on 2 June 2009 was filed within two months of such removal and the fee was also paid in time (Rule 136(1) EPC); and the grounds and facts relied on were stated in the request (Rule 136(2) EPC).

5. However, the re-establishment request is not allowable. While the letter of 2 June 2009 states that the petitioner itself exercised all due care, it also makes clear that it was not the petitioner itself but its representative who by his oversight was responsible for the non-observance of the time limit (see section V(a) above). The representative is also responsible for taking due care and his very candid admission, in the oral proceedings before the Enlarged Board, of his oversight makes it impossible to find, in the light of the case law of the Boards of Appeal (see "Case Law of the Boards of Appeal of the European Patent Office", 5th edition 2006, at VI.E.6.2 and 6.3), that he took all due care. The request for re-establishment of rights must therefore be refused with the consequence that the petition is clearly inadmissible under Rule 108(2) EPC (see point 3 above).
6. The Enlarged Board further notes that, had the petition not been so inadmissible, it would have been clearly inadmissible because Rule 106 EPC was not complied with (see R 4/08 of 20 March 2009, Reasons, points 2.1 and 2.2). According to the petition, which is silent as to Rule 106 EPC, the principal factual event complained of (the definition by the Board of Appeal of the word "tensionless") occurred after the Board decided the issue of novelty and before it decided the issue of inventive step (see the petition, page 2, third full paragraph and last paragraph). It was thus possible for the petitioner to raise an objection in respect of the procedural defect now alleged during the appeal proceedings. However, at the oral proceedings before the Enlarged Board, the petitioner's representative confirmed that, at the oral proceedings before the

Board of Appeal, he did not make an express objection of a procedural defect after hearing the Board's definition of "tensionless" and before the final decision in the appeal proceedings was taken (see section V(b) above).

7. Further, even if the petition had not been clearly inadmissible, it would have been clearly unallowable. As the petition itself made clear, the key event relied on (the definition by the Board of Appeal of the word "tensionless") occurred during and before the end of the oral proceedings. Thus there was in fact an opportunity for the petitioner to comment before the Board's decision ending the appeal proceedings was taken. Indeed, on the petitioner's own submissions, it did in fact express its disagreement with the Board's definition (see again section V(b) above). Accordingly, the Enlarged Board would have found that there was no violation of Article 113(1) EPC, let alone a violation with a causal link to the final decision such that it could be considered decisive and hence fundamental (see R 1/08 of 15 July 2008, Reasons, point 3).

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly inadmissible.

The Registrar:

The Chairman:

W. Roepstorff

P. Messerli