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Datasheet for the decision of 26 February 2014

Case Number: T 1314/12 - 3.3.06

Application Number: 07000199.5

Publication Number: 1942213

IPC: D01F6/46, D01F8/06

Language of the proceedings: EN

Title of invention:
Fiber comprising an ethylene copolymer

Patent Proprietor:
Borealis Technology Oy

Opponent:
Ineos Sales (UK) Limited

Headword:
Copolymer fibre/BOREALIS

Relevant legal provisions:
EPC Art. 114(2)
EPC R. 99
RPBA Art. 12(4)

Keyword:
Admissibility of appeal - (yes)
Late-filed evidence - admitted (no) -
entirely fresh factual framework

Decisions cited:
T 0724/08, T 0389/95

Catchword:

Europäisches Patentamt
European Patent Office
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Case Number: T 1314/12 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 26 February 2014

Appellant: (Opponent)	Ineos Sales (UK) Limited Hawkslease Chapel Lane Lyndhurst Hampshire SO43 7FG (GB)
Representative:	Smith, Julian Philip Howard Mathisen & Macara LLP Communications House South Street Staines-upon-Thames Middlesex, TW18 4PR (GB)
Respondent: (Patent Proprietor)	Borealis Technology Oy P.O. Box 330 06101 Porvoo (FI)
Representative:	Maiwald Patentanwalts GmbH Elisenhof Elisenstrasse 3 80335 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 10 April 2012 rejecting the opposition filed against European patent No. 1942213 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman: B. Czech
Members: E. Bendl
U. Lokys

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division to reject the opposition against the European patent No. 1 942 213.

II. The independent claims as granted read as follows:

"*1. Fiber, comprising a first polymer component and a second polymer component, wherein the first and second polymer components differ at least with respect to one property, wherein the first polymer component is selected from the group consisting of polypropylenes and polyesters, wherein the weight ratio between the first and the second polymer component is from 30:70 to 70:30, and wherein the second polymer component comprises an ethylene-α-olefin copolymer having a density of from 0.945 to 0.965 g/cm^3, an MFR_2 of from 15 to 45 g/10 min, and an amount of α-olefin of from 1 to 7 wt%.*"

"*10. Non-woven fabric comprising the fiber of any of claims 1 to 9.*"

"*11. Process for preparing a fiber in accordance with any of claims 1 to 9, comprising the steps of providing the first polymer component and providing the second polymer component, melting the first and second polymer component and extruding the first and second polymer component through a spinnerette to produce a fiber.*"

"*12. Process for preparing a non-woven fabric in accordance with claim 10, comprising the steps of providing a fiber in accordance with any one of claims 1 to 9 and bonding in order to provide a non-woven fabric.*"

"*13. Use of an α-olefin copolymer as defined in any one of claims 1 to 6 for the preparation of a bicomponent fiber.*"

Claims 2 to 9 are dependent on claim 1 and relate to preferred embodiments of the invention.

III. In the contested decision the opposition division concluded that the claimed subject-matter was novel and inventive in view of prior art relied upon by the opponent.

IV. In its statement of grounds of appeal the appellant (opponent) neither referred to the reasons given in the contested decision nor to any of the prior art documents that had been cited in the course of the opposition procedure. Instead, it invoked, for the first time, an alleged prior use to be proven by the newly cited documents

D9a = Product Technical Information sheet concerning "RIGIDEX® HD5218EA-Y", printed date April 2005;

D9b = Product Technical Information sheet concerning "RIGIDEX® HD5218EA-Y", printed date March 2007;

D9c = Declaration of Mr Jean-Jacques Kuhlburger regarding the properties of "RIGIDEX® HD5218EA-Y";

D10 = "Bulletin d'analyse" dated 9 May 2006 and concerning product "HD5218EA-Y", lot 064A0304-4;

D11 = Invoice issued by INEOS (bill to FIBERVISIONS A/S) dated 31 July 2006;

D12 = "SPINDERECEPT" and "RECEPT STRÆKANLÆG" (two sheets);

D13 = Invoice issued by ES FIBERVISIONS dated 06.07.25 and concerning a product designated as "AL-Adhesion-C phil 65/35...", customer name blackened and

D14 = Product leaflet "AL-Adhesion-C - Improved Airlaid Fiber" of ES FIBERVISIONS, printed date May 2004.

It argued that the subject-matter of some of the granted claims lacked novelty or inventive step in view of the documented commercial sale of the product "AL-Adhesion-C".

Following the novelty attack on claim 1 based on said prior use, the statement of grounds contains the following sentences (page 3, top paragraph):

"Our comments on the validity of the subclaims filed with our initial statement of opposition still apply. Comments on those claims where the above prior art is of additional relevance are given below."

V. In its letter of 28 February 2013 the respondent (proprietor of the patent) held that the appeal was inadmissible since it was not substantiated and should therefore be dismissed. The prior use, allegedly evidenced by documents D9 to D14, should be disregarded since it was invoked for the first time with the statement of grounds of appeal. The objections based thereon could have been raised and the corroborating documents could have been filed much earlier. Moreover, the documents filed as evidence were not *prima facie* relevant and the allegation of prior use based thereon was not sufficiently substantiated. Even if they were considered admissible, they did not meet the standard of proof required for establishing the alleged prior

use. As a matter of precaution, the respondent nevertheless submitted six sets of amended claims as auxiliary requests 1 to 6.

VI. The parties were summoned to oral proceedings, as requested by both parties. In a communication issued in preparation for the oral proceedings the board indicated the issues likely to be addressed at the oral proceedings including, *inter alia* the admissibility of the alleged prior use into the proceedings.

VII. In its letter of 24 January 2014 the appellant rebutted the respondent's arguments and announced that it would not attend the oral proceedings. With said letter, it submitted documents

D12a = Enlarged copies of D12 (two pages) and
D15 = Copies of two invoices, an Advice of payment and an Email (4 pages), allegedly relating to the sale according to D13

as additional evidence for the alleged prior use.

VIII. The oral proceedings took place on 26 February 2014 in the previously announced absence of the appellant.

The debate focused on the issues of admissibility of the appeal and admissibility of the new objection and of the documents supposed to prove the alleged public prior use.

IX. The appellant requested in writing that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed or the patent be maintained on the basis of one of the auxiliary requests 1 to 6, filed with letter dated 28 February 2013.

X. The **appellant's** arguments of relevance here can be summarised as follows:

The appeal was admissible.

The new evidence was highly relevant and the Board should use its discretion under Article 114(1) EPC to admit it.

The evidence submitted proved that fibres as defined in claim 1 of the patent in suit were sold commercially and therefore were available to the public in 2006. Accordingly, the subject-matter of claims 1, 5 and 7 to 9 as granted lacked novelty and the subject-matter of claims 6 and 10 as granted did not involve an inventive step.

The **respondent's** arguments of relevance here can be summarised as follows:

Admissibility of the appeal

- In the statement of grounds of appeal no reference was made as to why the decision of the opposition division was erroneous. The appeal was exclusively based on an objection and documents presented for the first time in appeal. Since these documents had to be disregarded in view of their late filing, the appeal was not substantiated and therefore neither admissible nor allowable.

Admissibility of documents D9 to D15

- No reason was given by the appellant why documents D9 to D15 had been filed only in the appeal proceedings.
- Since they could have been filed already before the first instance, they should not be admitted into the proceedings.

Reasons for the Decision

Admissibility of the appeal

1. Rule 99(1),(2) EPC stipulates the mandatory contents of a notice of appeal and the corresponding statement of grounds of appeal. For an appeal to be admissible within the meaning of Article 110 and Rule 101 EPC, the following elements must be provided within the relevant time limits:

(a) name and address of the appellant,
(b) an indication of the decision impugned,
(c) a request defining the subject of the appeal,
(d) the reasons for setting aside the decision impugned, or the extent to which it has to be amended, and
(e) the facts and evidence on which the appeal is based.

1.2 Concerning the compliance of the present appeal with these requirements, the board notes the following:

1.2.1 Ad items (a) and (b):

The appellant and the appealed decision are identified in the notice of appeal.

1.2.2 Ad item (c):

The notice of appeal contains a request defining the subject of the appeal, i.e. "that the decision of the Opposition Division be set aside and the patent be revoked".

1.2.3 Ad item (d):

In its statement of grounds of appeal (see last paragraph of page 2; page 3, second to seventh paragraphs) the appellant objected that claim 1 as granted lacked novelty in view of a a public prior use and that dependent claims 5 to 10 lacked either novelty or inventive step.

1.2.4 Ad item (e)

With its statement of grounds of appeal, the appellant filed documents D9 to D14 as evidence for the alleged public prior use.

1.3 Thus, the Board is satisfied that the requirements of Rule 99(1),(2) EPC are met.

2. The respondent held, however, that no reasons were given in the statement of grounds of appeal as to why the impugned decision was erroneous. The appellant provided an entirely fresh case based exclusively on late-filed, newly cited evidence and arguments never mentioned before. Therefore, the appeal was not substantiated and, consequently, not admissible.

3. This argumentation does not convince the board in view of the following considerations:

3.1 The very general and vague sentence reading "Our comments on the validity of the subclaims filed with our initial statement of opposition still apply" which is contained in the statement setting out the grounds of appeal cannot be considered to constitute reasons for setting aside the contested decision. However, the appellant expanded the factual basis beyond the one underlying the opposition division's decision by presenting further facts and arguments as to why some of the claimed subject-matter lacked novelty and/or inventive step.

3.2 According to the case law of the Boards of Appeal of the EPO (see e.g. decisions T 389/95 of 15 October 1997, point 1 of the reasons), an appeal invoking a ground for opposition already invoked in opposition proceedings, i.e. remaining within the same legal framework, albeit being based on a completely fresh factual framework does not *ipso facto* lead to an inadmissible appeal.

3.3 Accordingly, in the board's judgement, the present appeal is admissible (Article 110 and Rule 99(1)(2) EPC).

4. However, this finding does not necessarily mean that the new items of evidence only filed during the appeal procedure may not be disregarded by the board pursuant to Article 114(2) EPC (see e.g. T 0389/95, point 2.14 of the reasons).

Amissibility of late filed evidence - Documents D9 to D15

5. Documents D9 to D15, all supposed to prove the alleged public prior use, were filed long after the expiry of the nine month opposition period. D9 to D14 were filed

under cover of the statement setting out the of grounds of appeal, and documents D12a and D15 even later, after the issuance of the summons to oral proceedings and of the communication of the board.

6. Pursuant to Article 114(2) EPC, the board may disregard facts or evidence which are not submitted in due time by the parties concerned. More precisely, pursuant to Articles 12(4) RPBA, the board has the power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings.

7. In first instance (opposition) proceedings the opponent is expected to present all relevant facts and evidence. If it was not up to the board's discretion to admit or disregard evidence filed only at the appeal stage, depending on the circumstances even without considering the relevance thereof, an appealing opponent could submit allegedly highly relevant documents at any time in the expectance that they would have to be taken into account by the board (see e.g. decision T 0724/08 of 16 November 2012, point 3.4 of the reasons). This would mean that a proprietor could be obliged to repeatedly defend its patent against new attacks throughout the entire opposition and opposition appeal procedure. However, such a course of action clearly does not comply with the requirement of the EPC and the RPBA to present all relevant information within certain time limits (Articles 99 and 108 EPC, Rules 76 and 99 EPC, Articles 12(4) and 13(1),(3) RPBA).

8. In its assessment of the admissibility of the new late-filed evidence the board took into account the following:

8.1.1 Documents D9 to D14, allegedly evidencing a public prior use, were submitted with the statement of grounds of appeal, i.e. a long time after the expiry of the opposition period.

8.1.2 The only comment of the Appellant in this respect (see statement of grounds, page 1, middle of the page) reads as follows:

"Since the Opposition was filed, the Appellants have been able to obtain proof of sale of a fibre made from a composition satisfying the requirements of claim 1 of the Patent".

For the board, this statement as such cannot be considered as an explanation possibly justifying why the evidence and the objection based thereon had not already been submitted in the opposition proceedings.

8.1.3 Even after the respondent submitted that the late filing the new evidence amounted to "an abuse of procedure" (letter of 28 February 2013, paragraph III.1), no explanation in this respect was given by the appellant, who only emphasised the allegedly high *prima facie* relevance of the new evidence (reply of 24 January 2014) and referred to Article 114(1) EPC.

8.1.4 In this connection, it is noted that the possibility of a(n) (allegedly) novelty-destroying public prior use of bi-component fibres according to claim 1 was apparently never before alluded to by the opponent in a way that could be considered to foreshadow the objection raised for the first time in the statement of grounds of appeal, although (as apparent from its statement of grounds page 1, last paragraph, page 2, fourth paragraph) the appellant itself and its predecessor

companies had produced a copolymer ("Rigidex® HD5218-EA-Y") allegedly meeting the definition of the second polymer component as given in claim 1 for many years, and sold it to "the world's largest producer of speciality polyolefin monocomponent (mono) and **bicomponent** (bico) staple fibres" (emphasis added).

Not least in the light of this statement of the appellant, it appears rather unlikely to the board that the appellant could not, already at the opposition stage, have become aware of and considered invoking a prior use as invoked in the grounds of appeal.

8.1.5 Absent any convincing reason possibly justifying the late filing of documents D9 to D15, the board concludes that the admissibility of said documents is more than questionable, already for this reason alone, irrespective of their possible relevance.

8.2 Moreover, for the board, the required degree of convergence of the debate, in the sense of a manifestly conclusive challenge to the validity of the opposed patent (see T 0389/95, points 2.14 and 2.15 of the reasons) is also not given.

8.2.1 Instead, reasonable questions and doubts were raised by the respondent as to conclusiveness of the evidence supposed to prove the alleged prior use, some of which even remained unresolved after the appellant completed his case by filing documents D12a and D15 in response to the reply of the respondent and the board's communication.

8.2.2 For instance, document D12, supposed to prove that the "Rigidex® HD5218-EA-Y" copolymer, batch 064A0304, was spun together with a polypropylene polymer into the

bi-component fibre "AL-Adhesion-C" commercialised by the company Fibrevisions A/S gives rise to a number of questions.

i) D12 consists of two sheets bearing printed text in Danish and comprising several blackened regions and fields filled with hand-written indications.

From the document per se it is not derivable that a fibre as claimed was actually produced and that the process/es referred to in D12 was/were carried out by the company Fibrevisions as alleged by the appellant, since this company name does not appear on either of the two sheets making up D12, and a product "AL-ADHESION-C" is only mentioned on the second sheet.

ii) According to the appellant's explanations (letter of 24 January 2014, page 2, last paragraph) the first sheet of D12 refers to the production (spinning) process of the fibre produced and the second sheet relates to the stretching process of said fibre material ("AL-ADHESION-C"). The appellant held that both sheets were linked by the "Batch nr." 192825 visible on the first sheet and, allegedly, also on the second sheet.

However, the board does not accept the appellant's view that the two hand-written batch numbers ("Batch Nummer") on the second sheet are clearly legible as 192825. This issue is not even resolved by the enlarged copy D12a filed in reply to the respondent's criticism.

iii) Likewise, for the Board, the two relevant hand-written lot numbers ("lot nr.") of the polymer Rigidex® HD5218-EA-Y copolymer used appearing on the first sheet of D12 are not clearly legible.

Due to the poor legibility of these two hand-written indications, the Board does not accept that they unequivocally designate the batch number 064A0304 referred to in Mr Kuhlburger's declaration D9c. Even the submission of a further, enlarged copy of D12, referred to as D12a, did not resolve this issue.

iv) Moreover, as pointed out by the respondent, the two sheets of D12 respectively appear to indicate production dates (22-09-2005 and 19-04-2006) about seven months apart and the invoice D13, allegedly concerning fibres produced according to D12, is dated 20 April 2006 (see "Date of Order 06.04.20"), i.e. the product allegedly sold appears to have been produced before it was actually ordered.

For the board, the appellant's mere statement that the typed dates appearing on the two sheets of D12 were of "no relevance" since they were "unconnected with production of the individual batch number 192825" (letter of 24 January 2014, paragraph bridging pages 2 and 3), is not *prima facie* sufficient to dispel the doubts voiced by the respondent concerning the identity of or the link between the materials respectively referred to in the two sheets of D12.

9. Taking into account all the specific circumstances of the case addressed above, the board, in the exercise of its discretion under Article 114(2) EPC and Article 12(4) RPBA, thus decided not to admit any of documents D9 to D15 and, hence, to disregard their contents.

Conclusions

10. As a consequence of the non-admission of documents D9 to D15, the grounds of appeal invoked are deprived of

their entire evidential basis and are, therefore, unpersuasive.

11. It follows that the appellant's request to revoke the patent in suit must be refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

D. Magliano B. Czech

Decision electronically authenticated