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**Datasheet for the decision
of 18 May 2022**

Case Number: T 0541/17 - 3.3.09

Application Number: 07811755.3

Publication Number: 2061831

IPC: C08J3/22

Language of the proceedings: EN

Title of invention:

A METHOD FOR PREPARING HIGH CONCENTRATION PELLETIZED ADDITIVE
CONCENTRATES FOR POLYMER

Patent Proprietor:

Ingenia Polymers Inc.

Opponents:

BASF Schweiz AG
Clariant Produkte (Deutschland) GmbH
The Dow Chemical Company
A. SCHULMAN PLASTICS

Headword:

Preparation of polymer additives/INGENIA

Relevant legal provisions:

EPC Art. 116(1), 123(2)
RPBA 2020 Art. 15a(1)

Keyword:

Oral proceedings to be held by videoconference without the consent of the patent proprietor - (yes)

Main request and auxiliary requests 1 to 6: added matter - (yes)

Decisions cited:

G 0001/21

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0541/17 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 18 May 2022

Appellant: Ingenia Polymers Inc.
(Patent Proprietor) 3200 Southwest Freeway, Suite 1250
Houston TX 77027 (US)

Representative: Tomkins & Co
5 Dartmouth Road
Dublin 6 (IE)

Respondent: BASF Schweiz AG
(Opponent 1) Klybeckstrasse 141
4057 Basel (CH)

Representative: Maiwald Patent- und Rechtsanwalts-gesellschaft mbH
Elisenhof
Elisenstraße 3
80335 München (DE)

Respondent: Clariant Produkte (Deutschland) GmbH
(Opponent 2) Patente, Marken, Lizenzen
Am Unisys-Park 1
65843 Sulzbach (DE)

Representative: Mikulecky, Klaus
Clariant Produkte (Deutschland) GmbH
Patent & License Management Chemicals
Industriepark Höchst, G 860
65926 Frankfurt am Main (DE)

Respondent: The Dow Chemical Company
(Opponent 3) 2030 Dow Center
Midland, MI 48674 (US)

Representative: Boulton Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Respondent: A. SCHULMAN PLASTICS
(Opponent 4) Pedro Colomalaan 25
2880 Bornem (BE)

Representative: LyondellBasell
c/o Basell Poliolefine Italia
Intellectual Property
P.le Donegani 12
44122 Ferrara (IT)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 January 2017
revoking European patent No. 2061831 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: A. Veronese
F. Blumer

Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietor (appellant) against the decision of the opposition division revoking European patent No. 2 061 831.
- II. In its decision the opposition division found, *inter alia*, that claim 1 of the main request and of auxiliary requests 1 to 8 filed during the opposition proceedings either lacked clarity or lacked novelty over the cited prior art.
- III. With its grounds of appeal the appellant filed a main request and six auxiliary requests. None of these requests corresponds to any of the requests filed during the opposition proceedings.
- IV. Claim 1 of the main request reads:

"1. A method of preparing a masterbatch, comprising at least one primary polymer additive present in a total amount of between greater than 20 wt.% but below 90 wt.% of the masterbatch, and the primary polymer additive having a primary polymer-additive melting temperature of between 80°C and 210°C, and at least one primary carrier polymer, the primary carrier polymer having a primary carrier-polymer melting temperature below the primary polymer-additive melting temperatures,

wherein any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch,

characterised in that the masterbatch is prepared at a temperature above the melting temperature of the

primary carrier polymer but below the melting point of each primary polymer additive

wherein the primary polymer additive is a hindered phenol, a phosphite, a phosphonites [sic], a hindered amine, a triazine, a benzophenone, a hydroxybenzoates [sic], or a metal stearate, and

wherein the at least one primary carrier polymer is polyethylene, polypropylene, ethylene-propylene copolymers, ethylene-alphaolefin copolymers, polystyrene, polybutene, ethylene vinyl acetate copolymers, ethylene vinyl alcohol copolymers, styrene-butadiene copolymers, or blends thereof."

- V. Claim 1 of auxiliary requests 1 to 6 differs from claim 1 of the main request in at least one of the following: the wording "melting point" is used instead of "melting temperature"; the melting temperature of the primary additive is more narrowly defined; the nature of the carrier and of the polymer additive is more specifically defined; the masterbatch is prepared in an extruder.
- VI. However, claim 1 of all the auxiliary requests contains the feature "wherein any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch".
- VII. The arguments of the appellant which are relevant to the present decision can be summarised as follows:
- the oral proceedings had to be conducted in person before the board, and not by videoconference

- paragraph [0027] of the description of the patent application as originally filed provided a basis for the feature "wherein any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch".

VIII. The arguments of the respondents/opponents which are relevant to the present decision may be summarised as follows:

- the application for the patent as originally filed did not provide any basis for the feature "wherein any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch".

Requests

IX. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or, alternatively, on the basis of any one of the first to sixth auxiliary requests, all requests as filed with the statement setting out the grounds of appeal.

X. The respondents/opponents 1, 2 and 4 requested that the appeal be dismissed.

Reasons for the Decision

1. *Oral proceedings conducted by videoconference*

1.1 With a communication dated 22 March 2022 the board informed the parties that the oral proceedings scheduled to take place on 18 May 2022 were to be held by videoconference.

- 1.2 The appellant objected to the oral proceedings being conducted in the format of a videoconference.
- 1.3 In its letter dated 14 April 2022 the appellant referred to the ruling of the Enlarged Board of Appeal in decision G 1/21, that during a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, the conduct of oral proceedings before the boards of appeal in the form of a videoconference was compatible with the EPC, even if not all of the parties to the proceedings had given their consent to the conduct of oral proceedings in the form of a videoconference.
- 1.4 The appellant further considered that at the time when the board communicated its intention to hold the oral proceedings by videoconference there were no circumstances impairing the ability of the parties to attend oral proceedings in person, and that there were no quarantine, testing or registration requirements for parties wishing to enter Germany. In the absence of other case-specific circumstances affecting the parties' ability to attend the oral proceedings, these had to be held in person before the board.
- 1.5 The board does not find these arguments convincing.
- 1.6 As it appears from the history of the present case, the board has endeavoured to arrange oral proceedings for several years, but without success. Oral proceedings scheduled a first time for 27 October 2020, a second time for 22 April 2021 and a third time for 1 July 2021 were cancelled and postponed at the request of the appellant. The postponements were granted because when the requests were made health risks existed and travel restrictions applied due to the COVID-19 pandemic, and

furthermore because there was still legal uncertainty as to whether oral proceedings could be carried out by videoconference where not all parties agreed.

1.7 It is true that, as noted by the appellant, neither travel restrictions nor quarantine requirements were in force in Germany in March 2022, when the board communicated its intention to hold the oral proceedings by videoconference. However, in that period the Omicron variant of COVID-19 was spreading at a high rate in Germany. The pandemic situation was still highly uncertain and no forecasts could be made as to its evolution. Experience in the preceding two years had shown that restrictions could be reintroduced by health authorities at short notice to react to new waves of infection. Therefore in March 2022 there were good reasons for the board to convert the oral proceedings scheduled for 18 May 2022 into the videoconference format provided for by new Article 15a(1) RPBA 2020.

1.8 There were also good reasons not to grant the appellant's later request dated 14 April 2022 that the oral proceedings be reverted to the in-person format. In the first place, the aforementioned uncertainties associated with the pandemic still existed. Furthermore, the change of format would have obliged the board to postpone the oral proceedings for the fourth time, because not enough time was left for the parties to arrange for travel and accommodation.

1.9 The board considers that there are no further reasons of a technical nature, or associated with the specific nature of the present appeal case, which speak against conducting the oral proceedings by videoconference either.

1.10 For these reasons the board has decided that, in the specific circumstances of the present case, it was appropriate to conduct the oral proceedings in the format of a videoconference.

Main request and auxiliary requests 1 to 6

2. *Added subject-matter*

2.1 Claim 1 of the main request has been amended, *inter alia* introducing the feature wherein "any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch" (emphasis added).

2.2 According to the respondents/opponents, this feature goes beyond the content of the application as filed.

2.3 As the basis for the amendment, the appellant referred to paragraph [0027], page 8, lines 7-8 of the patent application as filed, which reads: "Optionally there may be one or more additional common polymer additives present at a low concentration (<20%) chosen from any of the polymer additives and or fillers known to one skilled in the art" (emphasis added).

2.4 This passage provides for the optional presence of additional additives. However, it does not disclose an embodiment excluding the presence of 20 wt.% or more of additional additives which differ from those identified as primary additives in claim 1.

2.5 No further teaching for excluding the presence of these additional additives can be found in the application as filed. It is worth noting that the application defines the composition of the invention using the word "comprising". This allows for the presence of

additional additives, in addition to the at least one primary additive and at least one primary carrier polymer: page 5, paragraph [0015] and claim 1 of the application as originally filed.

- 2.6 There are also further reasons why the feature "any additional polymer additive is present at a concentration of below 20 wt.% of the masterbatch" adds subject-matter.
- 2.7 This feature implies that any additional additive in the composition must be present at the given concentration of below 20 wt.%. This means that, if the composition comprises more than one additional additive, each of them individually must be present below that amount.
- 2.8 This teaching differs from that of paragraph [0027] of the application as filed. This states that "Optionally there may be one or more additional common polymer additives present at a low concentration (<20%)". From this sentence the skilled person would assume that, if two or more additional additives are present, their total amount must be below 20 wt.%. This change in technical teaching creates originally undisclosed subject-matter.
- 2.9 For these reasons it is concluded that claim 1 of the main request, as well as of auxiliary requests 1 to 6, which are characterised by the same added feature, contain subject-matter which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated