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**Datasheet for the decision
of 20 April 2022**

Case Number: T 1205/17 - 3.2.03

Application Number: 10706370.3

Publication Number: 2382362

IPC: E04F15/02, B32B29/00

Language of the proceedings: EN

Title of invention:

FLOOR PANEL AND METHOD FOR MANUFACTURING LAMINATE PANELS.

Patent Proprietor:

Flooring Industries Limited, SARL

Opponent:

Flooring Technologies Ltd.

Headword:

Relevant legal provisions:

RPBA Art. 12(4)

EPC Art. 56

Keyword:

Late-filed evidence - should have been submitted in first-
instance proceedings (yes) - justification for late filing (no)
- admitted (no)
Inventive step - main request (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1205/17 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 20 April 2022

Appellant: Flooring Technologies Ltd.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 May 2017
rejecting the opposition filed against European
patent No. 2382362 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman B. Miller
Members: B. Goers
E. Kossonakou

Summary of Facts and Submissions

- I. European patent No. 2 382 362 relates to a floor panel and a method for manufacturing panels, the panels consisting of at least a substrate, a top layer comprising a printed decor and one or more material sheets provided with synthetic material and a balancing layer at the underside of the substrate.
- II. The opposition division's decision to reject the opposition against the patent was appealed by the opponent ("the appellant").
- III. With the consent of the parties, oral proceedings before the Board were held on 20 April 2022 by videoconference using the Zoom platform.
- IV. At the end of the oral proceedings, the appellant requested that the decision under appeal be set aside and that the patent be revoked.

The patent proprietor ("the respondent") requested that the patent be maintained on the basis of either the main request or of one of auxiliary requests 1 to 7 or on the basis of the method claims of the highest ranking allowable request (numbered by the Board as auxiliary requests 8 to 14), all filed with the reply to the grounds of appeal dated 22 January 2018. Further alternatively, the respondent requested maintenance of the patent on the basis of one of the alternative main and auxiliary requests 1 to 5 filed with the submission of 15 September 2021.

V. The following evidence, which was relied on in the decision under appeal, is relevant for the present decision:

E1: JP 2000 170361 A
E1a: Translation of E1 provided by the JPO as filed
by the appellant
E2: WO 99/17930 A1
E3: DE 10 2005 006 599 A1

The appellant further submitted the following document, which is prior art according to Article 54(3) EPC, with the statement of grounds of appeal:

E6: EP 2 030 786 A2

VI. The independent claims of the main request addressed in this decision read as follows (feature numbering added in "[]").

(a) Claim 1 (corresponds to claim 1 as granted):

"[a] *Floor panel of the type consisting at least of a substrate (2) and a provided-thereon top layer (3) on the basis of synthetic material,*
[b] *wherein said top layer (3) comprises a printed decor and one or more material sheets (6) provided with synthetic material (9),*
[c] *and wherein the floor panel (1) is provided with a balancing layer (5) at the underside of said substrate (2),*
characterized in that
[d] *said balancing layer (5) substantially consists of a synthetic material layer (5) which is free from material sheets (6) and in that,*

[f] as the synthetic material (9), at least one thermo-hardening resin is applied in the top layer (3) as well as in the balancing layer (5)."

(b) Claim 8 (corresponds to claim 8 as granted with the addition of feature [A1]):

"[A] Method for manufacturing panels, wherein these panels (1) are of the type consisting at least of a substrate (2)

[A1] having a thickness between 5 and 15 mm,

[B] a provided-thereon top layer (3) on the basis of synthetic material (9)

[C] and a balancing layer (5) on the basis of synthetic material (9) provided at the underside (4) of the substrate (2), wherein the method comprises at least the steps of:

[D] - providing one or more material sheets (6) with synthetic material (9);

[E] - realizing the top layer (3) by bringing at least said material sheets (6) and the substrate (2) in a press device (7);

[F] wherein these material sheets (6), by a press treatment (P) performed by means of said press device (7), are bonded to the upper side (8) of said substrate (2);

[G] - realizing a balancing layer (5) at the underside (4) of said substrate (2), characterized in that

[H] for realizing said balancing layer (5), prior to said press treatment (P), a synthetic material layer (13) is formed at the underside (4) of said substrate (2),

[I] wherein this synthetic material layer (13) also is subjected to said press treatment (P) and in that,

[J] *as the synthetic material (9), at least one thermo-hardening resin is applied in the top layer (3) as well as in the balancing layer (5)*

[K] *wherein the finally obtained balancing layer (5) substantially consists of said synthetic material layer (13) and is free from material sheets (6)."*

VII. The appellant's arguments relevant to the present decision may be summarised as follows.

(a) Admittance of E6

E6 should be admitted into the proceedings. It was filed in direct reaction to a surprising reasoning in the appealed decision with respect to the "*balancing layer*" feature. In the contested decision, the opposition division concluded that "*the skilled person receives no hint of and would even be surprised that a balance layer of thermo-hardening resin free from material sheet could be adapted as balancing layer for a top layer comprising a thermo-hardening resin and a material sheet*". Only after receipt of the decision the appellant realised why the opposition division came to the conclusion that it was not obvious to use a balancing layer free of material sheets in combination with a top layer comprising material sheets.

At the time of filing the opposition, the appellant conducted three prior art searches, with E6 not being found in any of them. Furthermore, due to personnel changes in the appellant's IP department E6 was not considered despite it being an application of the appellant.

E6 was *prima facie* relevant since it anticipated the subject-matter of both claims 1 and 8 under novelty. While not explicitly referring to a floor panel, the suitability of the panels disclosed in E6 for such a purpose was implicitly disclosed. This was also supported by the fact that corundum particles were disclosed in paragraph [0004] of E6 as a measure to increase wear resistance. Furthermore, the fact that in the bibliographic data of E6 "Flooring Technologies Ltd." was mentioned as the applicant clearly indicated that floor panels were the main application. In addition, E6 disclosed in paragraph [0035] a substrate thickness of 20 mm before pressing, which inevitably resulted in a thickness in the range defined by feature [A1] of claim 8 in the final product.

(b) Main request - Inventive step

The subject-matter of claims 1 and 8 did not involve an inventive step in view of any of the combinations of teachings of E1 and E2, E1 and E3, E2 and E1, and E2 and E3.

Both E1 and E2 disclosed a substrate with a top layer comprising a printed decor and one or more material sheets provided with synthetic material.

E2 disclosed as balancing layer either a PVC layer which was also free of material sheets or a paper impregnated with a thermo-hardening resin ("thermoset"). The objective technical problem to be solved with regard to E2 was to reduce production costs. The solution as proposed by the patent was made obvious either by E3 suggesting to

use thermoset resin balancing layers with particles and free of material sheets to save costs or by E1 disclosing both material-sheet-free balancing layers comprising pulp and thermosets. It was evident for a skilled person that the pulp particles had to be bonded in a thermoset matrix.

E1 disclosed balancing layers comprising pulp or consisting of PVC, i.e. a sheet-free layer or a paper impregnated with a thermoset or a fibre layer. Since the material-sheet-free embodiments were known from E1 it was obvious to use a thermoset matrix instead as suggested in E2 or, in particular, in E3.

VIII. The respondent's arguments relevant to the present decision may be summarised as follows.

(a) Admittance of E6

E6 and the novelty objection based on E6 should not be admitted into the proceedings. E6 should have been filed in the opposition procedure. The adverse decision of the opposition division on the objection of lack of inventive step had to be expected. Furthermore, neither the appellant's internal organisational problems nor the fact that E6 was not found by the appellant in any of the searches conducted in preparation for the opposition constituted valid reasons justifying the late filing.

The disclosure of E6 was also *prima facie* not relevant since it did not anticipate either claim 1 or claim 8 for novelty. E6 as a whole did not mention the application as floor panels.

Furthermore, the skilled person did not directly and unambiguously associate the embodiment of a plate having dimensions of 207 x 560 cm as disclosed in paragraph [0035] with a floor panel. Thus, a floor plate is also not implicitly disclosed in E6. In addition, the thickness of the precursor substrate disclosed in E6 did not allow any conclusions with respect to the final thickness after pressing. Therefore, feature [A1] was not clearly and unambiguously disclosed.

The name of the applicant was neither part of the disclosure of the application documents of E6, nor did it allow any conclusions about the content of the application.

(b) Main request - Inventive step

The subject-matter of claims 1 and 8 involved an inventive step.

The objective technical problem starting from E2 was to provide an alternative balancing layer. The skilled person, when considering the alternatives in E2, e.g. a thermoset impregnated paper instead of PVC was not motivated to consider material-sheet-free alternatives.

Also E3 did not point towards the solution since it disclosed a material-sheet-free balancing layer only in combination with a material-sheet-free top layer. It was therefore not apparent that such a layer was also suitable to prevent curling for top layers with material sheets.

E1 disclosed in the context of embodiments with balance layers at the bottom of the substrate the possibility to provide a balance layer solely made of PVC, fibres or a thermoset impregnated layer. Pulp was disclosed as a further alternative only in the context of balancing layers between the substrate and the top layer. In addition, no information about the presence of a thermoset in the pulp was provided in E1.

Hence, starting from E2 and considering in addition E1 or E3, the subject-matter of claims 1 and 8 was not obvious.

For the same reasons, nor did the combination of E1 with E2 or E3 render the subject-matter of claims 1 and 8 obvious.

Reasons for the Decision

Applicable version of the Rules of Procedure

1. The statement of grounds of appeal was filed before the entry into force of the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020) on 1 January 2020. In accordance with the transitional provisions laid down in Article 25(2) RPBA 2020, Article 12(4) to 12(6) RPBA 2020 do not apply. Instead, Article 12(4) RPBA 2007 applies.

Admittance of E6 and the objection of lack of novelty

2. E6 and the objection of lack of novelty based on E6 are not admitted into the proceedings under Article 12(4) RPBA 2007. The reasons are as follows.

2.1 Document E6 was filed by the appellant only with the statement of grounds of appeal and is not part of the evidence on which the decision under appeal is based. Under Article 12(4) RPBA 2007 the Board has the discretion to hold inadmissible evidence which could have been presented already in the first-instance proceedings. The appellant did not provide convincing reasons for the filing of E6 only at the appeal stage. E6 and the novelty objection is therefore considered not to have been filed in due time. Furthermore, E6 is *prima facie* not relevant for the discussion of patentability since it does not take away the novelty of claims 1 and 8 of the main request and is not, as being state of the art under Article 54(3) EPC, relevant for the discussion of inventive step.

2.2 Late filing

2.2.1 The appellant's argument that the filing of E6 was only occasioned by the surprising reasoning on inventive step provided in the decision under appeal is not persuasive. Beside the fact that a party always has to expect an adverse decision on the merits of its case, the opposition division had preliminarily concluded in the communication attached to the summons to oral proceedings that "*it was not predictable that a thermo-hardening resin free from material sheets is adapted as balancing layer for a top layer comprising a material sheet*".

2.2.2 The reasons for not being able to provide E6, which is a patent application of the appellant, at the time of filing the opposition are also not convincing. Any organisational problems in the appellant's IP department (as the asserted change of responsibilities) allegedly hindering the appellant from becoming aware of this document (despite three independent searches of allegedly being carried out) can not be considered, as a rule, as a justification for the late filing of E6. It is the responsibility of a party to ensure that all activities relating to building and supporting its case are conducted, such as, *inter alia*, ensuring continuity in their execution. Moreover, this assertion was not supported by evidence demonstrating a disruption in activities sufficient to serve as justification for the late presentation of crucial evidence.

2.2.3 To conclude, the filing of E6 only with the statement of grounds of appeal is considered late. This is to the detriment of procedural economy and the obligation of parties to submit relevant facts, evidence, arguments and requests as early and completely as possible (see also Case Law of the Boards of Appeal, 9th edition 2019, V.A.4.2.1).

2.3 *Prima facie* lack of relevance of E6

2.3.1 It is common ground that no explicit reference is made in E6 to a "floor panel" and that there is no mention of an application of the disclosed coated wooden plates ("beschichtete Holzwerkstoffplatte") for covering floors either.

2.3.2 The appellant's argument that the plates disclosed in E6 were inherently suitable as floor panels, thus implicitly disclosing feature [a] of claim 1, is not

convincing. While it seems trivial that every plate can be laid onto a floor as argued by the appellant, this is not what the skilled person understands when addressing a "floor panel". Certain design constraints are implied for use as floor panel, including the capability to withstand load and wear conditions to which a floor panel is subjected. It is not sufficient that E6 mentions corundum particles as a possible additive to increase wear resistance of a coated wooden plate. This mention is not related to a specific use or to specific wear conditions in connection with floors. In addition, in the example of E6, a plate with the dimensions of 207 x 560 cm is produced. The respondent's argument that such a size can relate at most to a precursor of a floor panel makes technical sense and is thus found convincing.

Also, the reference to various applications ("verschiedene Anwendungen") in paragraph [0003] of E6 amounts only to a generic statement. To conclude, even in the absence of a closed definition of a floor panel in the patent or in any of E1 to E3 (all explicitly directed to floor panels), the choice of a plate suitable as a "floor panel" according to feature [a] of claim 1 is a selection from the generic class of coated wooden plates or panels disclosed in E6 and therefore a distinguishing feature.

2.3.3 The applicant's name on the bibliographic data sheet of E6 is neither suitable nor sufficient to establish that the disclosure of E6 is directed towards floor panels. It is established case law that not even the abstract or title of an application allows determining the disclosure of an invention (Case Law of the Boards of Appeal, 9th edition 2019, II.E.1.2.2). The applicant's

name or its main field of business has no link to the disclosure of E6 at all.

2.3.4 Claim 8 defines in feature [A1] a range for the thickness of the substrate. It was common ground between the parties that this range refers to the substrate thickness of the final product, i.e. after the pressing step. Since this thickness feature is a compulsory result of the process claimed, it is a limiting feature of claim 8 and cannot be disregarded for the assessment of novelty as asserted by the appellant. While it is agreed that due to the compression the 2 cm thick precursor disclosed in E6 ("Pressgut", including, *inter alia*, the substrate, see paragraphs [0034] and [0035]) will become thinner, no information is provided (such as the applied pressure, the material strength or a compression factor) allowing conclusions about the actual thickness of the substrate in the final product, which could lie well outside the claimed range. It is thus not apparent why it should "inherently" fall within the claimed range as suggested by the appellant.

2.3.5 To conclude, E6 *prima facie* fails to disclose feature [a] of claim 1 and feature [A1] of claim 8. Hence, the late-filed document E6 is not *prima facie* relevant for the claims of the main request.

Main request - Inventive step

3. The subject-matter of claims 1 and 8 is not rendered obvious by the prior art held against it.

The appellant considered that the subject-matter of claims 1 and 8 did not involve an inventive step in view of:

- E1 as the starting point combined with the teaching of E2 or E3
- E2 as the starting point combined with the teaching of E1 or E3

It was not disputed that both documents, E1 and E2, are suitable starting points for the assessment of inventive step.

4. Interpretation of feature "balancing layer"

The opposition division concluded in the decision under appeal that *"from the prior art, it is traditionally accepted that the balancing layer of such floor panel should have physical properties similar to the top layer to avoid warping of the floor panel due to dissimilar elongation or shrinking of the top or balancing layers"*. This understanding of the "balance layer" feature is agreed to. It is in accordance with the disclosure of E1 (E1a, page 15, lines 16 to 21), E2 (page 7, lines 26 to 28) and E3 ("Ausgleichsstrich" to prevent undesired deforming, paragraph [0012]).

5. E2 as the starting point

5.1 E2 discloses a polymeric substrate layer, a top layer comprising a printed decor ("decorative layer") and one or more material sheets provided with synthetic material and a balancing layer ("balance layer") laminated onto the bottom surface of the substrate. As the balancing layer, E2 suggests either

- (a) a paper treated with a thermoset resin
- (b) a thermoplastic (PVC) layer free of material sheets

For the embodiment (a), feature [d] of claim 1 is the distinguishing feature, while for embodiment (b), feature [f] is the distinguishing feature.

5.2 Objective technical problems

Paragraph [0009] of the patent describes how to restrict the "cost price for manufacturing" of the floor panel by omission of the material sheet in the balancing layer. Starting from embodiment (a) this can be considered the objective technical problem. However, since E2 already teaches an embodiment free of material sheets, this effect described in the patent is not relevant for determining the objective technical problem to be solved by embodiment (b). For embodiment (b), the objective technical problem thus has to be reformulated and concerns the provision of an alternative balancing layer.

5.3 Obviousness of embodiment (a)

5.3.1 When starting from the embodiment (a) of E2, the skilled person gets no suggestion from E1 to omit the material sheets in the thermoset, since E1 discloses solely thermosets in combination with a paper sheet. Furthermore, E2 itself discloses as an alternative the material-sheet-free embodiment (b) which, however, uses thermoplastic PCV as the balancing layer, thus pointing the skilled person away from using a thermoset.

5.3.2 With respect to the combination of E2 with the teaching of E3, the Board agrees with the conclusion in the decision under appeal that with respect to the design of the balancing layer, E3 discloses solely that a balancing layer comprising a thermoset with particles instead of material sheets "is adapted to compensate

the warping tendency resulting from a top layer of the same kind, i.e. comprising thermo-hardening resin mixed with loose fibers, and not from a top layer comprising a material sheet". Even though the use of particles instead of material sheets in E3 is motivated by the desire to reduce the costs and complexity of manufacture (E3, paragraph [0005]), it is not taught in E3 or is obvious from it that the balancing layer with particles is also a suitable alternative for a floor panel with a top layer comprising material sheets as in E2, i.e. that it acts sufficiently to prevent warping.

5.4 Obviousness of embodiment (b)

5.4.1 E1 does not disclose that the thermoplastic PVC layer can be replaced with a thermoset resin free of material sheets. The appellant's assertion that E1 discloses pulp as a material-sheet-free form of a balancing layer and that the skilled person would inherently use a thermoset as the binding phase for the pulp is not persuasive. Firstly, although E1 mentions "pulp" as a possible material for the balance layer (see E1a, page 9, line 11 and page 18, line 12; none of the examples in E1 use pulp), no information is provided on what is encompassed by the term "pulp" or in which form and with which additives the pulp is to be applied. Secondly, pulp is only mentioned in the context of a balancing layer arranged between the top and substrate layer. The remaining disclosure of E1 (Figure 14 and E1a, page 26, lines 8 to 11) in which the balancing layer is arranged at the bottom of the substrate as required by claims 1 and 8 of the patent does not mention pulp. Here, the balancing layer is described as being either an impregnated paper, a PVC sheet, or a woven or non-woven fibre-based layer without further additives. The sole example applies a polypropylene

non-woven as a balancing layer (see E1a, Examples 4 and 9).

5.4.2 The "backing layer 110" further mentioned in various embodiments of E1 as the bottom layer does not point towards the invention either. The materials suggested (see E1a, page 15, lines 1 to 4) do not encompass a material-sheet-free thermoset. Moreover, the backing layer does not have the function of a balancing layer either since it is always disclosed in combination with an additional balance layer 140.

5.5 Consequently, the subject-matter of claims 1 and 8 is not obvious starting from either embodiment (a) or (b) of E2.

6. E1 as the starting point

6.1 E1 discloses a PVC substrate layer and a top layer comprising a printed decor and one or more material sheets provided with synthetic material. As argued above, according to the embodiment of Figure 14 and Example 9, a balancing layer 140 can be envisaged at the bottom of the substrate. This balancing layer is disclosed to be either (see E1a, page 26, lines 8 to 11):

- (a) a thermoset impregnated paper
- (b) a woven or non-woven fibre material
- (c) a flexible PVC sheet, alternatively with fibres

Contrary to the appellant's assertion, pulp is not disclosed as an alternative balancing layer at the bottom of the substrate, let alone pulp in a thermoset matrix (see point 5. above).

- 6.2 Independent of the underlying objective technical problem, the invention is not rendered obvious by the disclosure of E2, since it only discloses the use of a PVC layer or thermoset impregnated paper as a balancing layer and therefore does not provide any prompt to use a material layer free thermoset for the balancing layer.
- 6.3 The top layer in E1 includes material sheets similar to those used for the floor panels disclosed in E2. Hence, the conclusions on the relevance of the teaching of E3 in the context of E2 apply *mutatis mutandis* for the floor panel according to E1.
7. Neither the appellant nor the Board had any objections to the amendments made for the adaptation of the description.
8. It follows that the main request is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended on the basis of the following documents:
 - claims 1 to 13 of the main request of 22 January 2018
 - description pages 2 and 4 to 7 of the patent specification and page 3 as filed at the oral proceedings before the Board
 - Figures 1 to 6 of the patent specification

The Registrar:

The Chairman:



C. Spira

B. Miller

Decision electronically authenticated