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**Datasheet for the decision  
of 3 February 2023**

**Case Number:** T 0523/18 - 3.3.02

**Application Number:** 10747108.8

**Publication Number:** 2467456

**IPC:** C10M159/22, C10M159/24,  
C10N10/04, C10N30/06,  
C10N40/25, C10N40/26

**Language of the proceedings:** EN

**Title of invention:**  
Lubricating method

**Patent Proprietor:**  
The Lubrizol Corporation

**Opponent:**  
Infineum International Limited

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56, 108  
EPC R. 99(2)  
RPBA Art. 12(4)

**Keyword:**

Admissibility of appeal - appeal sufficiently substantiated  
Late-filed evidence  
Inventive step

**Decisions cited:**

T 0192/82

**Catchword:**



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Case Number: T 0523/18 - 3.3.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.02**  
**of 3 February 2023**

**Appellant:** Infineum International Limited  
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**Respondent:** The Lubrizol Corporation  
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**Representative:** D Young & Co LLP  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
18 December 2017 concerning maintenance of the  
European Patent No. 2467456 in amended form.**

**Composition of the Board:**

**Chairman** M. O. Müller  
**Members:** P. O'Sullivan  
P. de Heij

## Summary of Facts and Submissions

I. The appeal of the opponent (hereinafter appellant) lies from the decision of the opposition division according to which European patent 2 467 456 in amended form met the requirements of the EPC.

II. The following documents *inter alia* were cited in opposition proceedings:

D2: EP 1 903 093 A1

D3: Chemistry and Technology of Lubricants, R.M. Mortier *et al.*, (1997), pages 82-86

D4: Pereira *et al.*, Tribology 2007, Vol. 1, No. 1, pages 4-17

D6: WO 2008/147701

D7: EP 1 624 044 A1

D10: Declaration of Patrick Mosier dated 12 July 2017

III. With the statement of grounds of appeal, the appellant submitted document D12 and its English language translation D12a:

D12/D12a: Hao *et al.*, Lubrication Engineering, September 2007, Vol. 3, No. 9, 100-102.

IV. Both parties in appeal proceedings referred to test data submitted by the patent proprietor (hereinafter respondent) during opposition proceedings, included within the letter dated 12 July 2017 (page 5, points 26-28). This data is referred to hereinafter as the "respondent's test data".

V. In preparation for oral proceedings, scheduled according to the parties' requests, the board issued a communication pursuant to Article 15(1) RPBA 2020. Therein the board *inter alia* expressed the preliminary view that the appeal was admissible, and that documents D12/D12a were not to be admitted into the proceedings. The board also provided the preliminary opinion that the objective technical problem underlying contested claim 1 starting from D4 as closest prior art was the provision of a lubricating composition with improved wear performance in a method of lubricating an aluminium-alloy surface of an internal combustion engine.

VI. Mixed mode oral proceedings before the board took place as scheduled on 3 February 2023 in the presence of both parties.

VII. Requests relevant to the present decision

The appellant requested:

- that the contested decision be set aside and that the patent be revoked in its entirety; and
- that documents D12 and D12a be admitted into the proceedings.

The respondent requested:

- that the appellant's appeal be rejected as inadmissible; or
- alternatively, that the appeal be dismissed, both implying maintenance of the patent in the form found allowable by the opposition division (second auxiliary request filed with the letter dated 10 March 2016); and

- that documents D12 and D12a not be admitted into the proceedings.

VIII. For the text of claim 1 of the second auxiliary request filed with the letter dated 10 March 2016 (present main request), reference is made to the reasons for the decision below.

IX. The appellant's submissions relevant to the present decision are summarised as follows. For further details, reference is made to the reasons for the decision below.

#### Admittance - documents

- D12/D12a were submitted in reaction to the reasoning of the opposition division set out in the contested decision, and hence were to be admitted into the proceedings pursuant to Article 12(4) RPBA 2007.

#### Inventive step - Article 56 EPC

- The claimed subject-matter lacked inventive step over D4 as the closest prior art.

X. The respondent's submissions relevant to the present decision are summarised as follows. For further details, reference is made to the reasons for the decision below.

#### Admissibility of the appeal

- The appeal was to be rejected as inadmissible.

Admittance - documents

- Pursuant to Article 12(4) RPBA 2007, D12/D12a were not to be admitted into the appeal proceedings.

Inventive step - Article 56 EPC

- The claimed subject-matter involved an inventive step starting from D4 as the closest prior art.

## **Reasons for the Decision**

1. Admissibility of the appeal

1.1 The respondent submitted that the appellant's statement of grounds of appeal did not meet the requirements of Article 108 EPC, third sentence in conjunction with Rule 99(2) EPC. The appeal was thus to be rejected as inadmissible pursuant to Rule 101(1) EPC.

During oral proceedings, the board came to the conclusion that the appeal is admissible.

Since the present decision (*infra*) is in the respondent's favour, there is no need for the board to provide its reasons in this regard.

2. Admittance of D12/D12a

2.1 Journal article D12 and associated translation D12a were submitted by the appellant with the statement of grounds of appeal.

- 2.2 The respondent requested that these documents not be admitted into the appeal proceedings pursuant to Article 12(4) RPBA 2007.
- 2.3 According to Article 12(4) RPBA 2007, the board has discretion *inter alia* not to admit into the proceedings evidence which could have been presented in opposition proceedings.
- 2.4 The appellant submitted that D12/D12a was submitted in the context of inventive step as a secondary document in combination with D4 as closest prior art. The filing thereof with the statement of grounds of appeal was a direct reaction to the reasoning of the opposition division set out in the contested decision, according to which D4 failed to disclose a calcium sulphurised-phenate as required by contested claim 1 (contested decision, page 6, third and fourth paragraphs). The purpose thereof was to demonstrate the anti-wear protection of overbased calcium sulphurised-phenate detergents (statement of grounds of appeal, page 5, first full paragraph).
- 2.5 As noted by the respondent however, granted claim 1 concerns a calcium sulphurised-phenate, and the issue of wear performance was addressed throughout opposition proceedings. Indeed, as argued by the respondent, the wear performance of lubricant compositions comprising calcium sulphurised-phenate detergents is addressed in the examples of the patent itself, and was specifically addressed in written proceedings with the respondent's reply to the notice of opposition dated 10 March 2016 (e.g. points 38 and 54-56).

Hence D12/D12a could and should have been submitted during opposition proceedings, at the latest with the



letter dated 12 July 2017, the final date for making written submissions in accordance with Rule 116 EPC.

Consequently, pursuant to Article 12(4) RPBA 2007, the board decided not to admit D12/D12a into the proceedings.

Second auxiliary request - Inventive step (Article 56 EPC)

### 3. Background

#### 3.1 The patent concerns a method of lubricating an aluminium-alloy surface of an internal combustion engine (paragraph [0001]).

According to the patent, a common antiwear additive for engine lubrication is zinc dialkyldithiophosphate (ZDDP). The use of additives such as ZDDP is however believed to result in poorer engine wear performance in aluminium-alloy based engines compared with ferric based engines (paragraphs [0002] and [0003]).

The patent thus aims to provide a method of lubricating an aluminium-alloy surface of a combustion engine comprising supplying thereto a lubricating composition comprising an oil of lubricating viscosity and a calcium sulphurised-phenate detergent (paragraph [0012]).

#### 3.2 Claim 1 of the second auxiliary request reads as follows:

*"A method of lubricating an aluminium-alloy surface of an internal combustion engine comprising supplying to the aluminium-alloy surface a lubricating composition*

*comprising an oil of lubricating viscosity and an alkali or alkaline earth metal phenate detergent,*

*wherein the alkali or alkaline earth metal phenate detergent delivers 0.75 wt % to 2 wt % of hydrocarbyl-substituted phenol to the lubricating composition;*

*wherein the aluminium alloy is a eutectic or hyper-eutectic aluminium alloy;*

*wherein the internal combustion engine has part or all of a cylinder bore, cylinder block, or piston ring composed of an aluminium alloy; and*

*wherein the phenate detergent is a calcium sulphurised-phenate."*

4. Closest prior art

It was not disputed in appeal that D4 represented the closest prior art. D4 is a journal article and concerns *inter alia* the mechanical properties of lubricants comprising calcium phenate detergent additives on Al-Si alloys (abstract). D4 discloses lubricant compositions comprising an oil of lubricating viscosity ("MCT-10 base", page 6, table 3, legend). Two varieties of commercial overbased calcium phenate detergents (abbreviated as "DET" in D4) were compared, each with a different total base number (TBN), namely "135 DET" having a TBN of 135 and "250 DET" having a TBN of 250 (D4, page 6, right hand column, first full paragraph; table 1, legend). The structures of the specific calcium phenate detergents employed is not provided. Lubricant compositions were prepared (table 3): tribofilms (i.e. compositions) A and E each comprised 1% 135 DET, while tribofilm B comprised 1% 250 DET.

5. Distinguishing features

According to the contested decision, the subject-matter of contested claim 1 was distinguished from D4 in that:

- D4 did not explicitly recite the amount of hydrocarbyl-substituted phenol provided by the calcium phenate detergent, and
- D4 did not explicitly describe that the calcium phenate detergent disclosed therein is sulphurised.

5.1.1 In appeal proceedings, the appellant argued that both features were not in fact distinguishing features, implying therefore that they were at least implicitly disclosed in D4. Each feature is addressed in turn in the following.

5.2 The amount of hydrocarbyl-substituted phenol

5.2.1 Contested claim 1 stipulates that the calcium sulphurised-phenate detergent "*delivers 0.75 wt% to 2 wt% of hydrocarbyl-substituted phenol to the lubricating composition*".

5.2.2 The appellant argued that it was "more likely than not" that the examples of D4 provided amounts of hydrocarbyl-substituted phenol to the lubricating composition thereof within the range recited in contested claim 1. The appellant acknowledged that this could not be calculated from the information within D4, in particular because the structure of the phenate detergents employed was not provided. However, although neither the patent nor D4 provided the specific structures of the calcium phenate detergents employed,

it could be assumed that both employed commercially available materials, which could be assumed to be similar chemical species. Hence, conclusions regarding the amount of hydrocarbyl-substituted phenol delivered to the lubricating composition by the calcium phenate detergents used in D4 could be derived from a comparison of the relative amount of calcium sulphurised-phenate detergent required in the patent to deliver a specific amount of hydrocarbyl-substituted phenol within the claimed range. For example, 1.9 wt% of overbased calcium sulphurised-phenate in EX1 of the patent (paragraph [0072]) was required to deliver 1 wt% of hydrocarbyl substituted phenol to the lubricating composition (table in paragraph [0073], third column, second entry), thus representing 53% of the initial weight ( $1/1.9 \times 100$ ). From this relative relationship, it could be derived that the lubricant compositions of D4 comprising 2 wt% of 135 DET or 250 DET (D4, tables 1 and 3) would also deliver 53% of their initial weight as hydrocarbyl-substituted phenol to the lubricant composition, which when calculated fell within the range recited in contested claim 1.

- 5.3 The board disagrees. Whether it is likely or reasonable to conclude that D4 discloses the delivery of an amount of hydrocarbyl-substituted phenol within the range recited in contested claim 1 is not a deciding factor in the assessment of whether said feature is distinguishing. Rather, said feature must be either explicitly or implicitly, but nevertheless directly and unambiguously disclosed. Such a disclosure in D4 has however not been demonstrated by the appellant. As stated by the respondent, the amount of hydrocarbyl-substituted phenol delivered by a calcium phenate detergent corresponds to the soap content of the detergent. This is also derivable from EX1 of the

respondent's test data, in which 1.37 wt% of "sulfur-coupled calcium phenate detergent" had a soap content of 0.9 wt% (respondent's test data, table, first column). Indeed, the soap content of a detergent is a known parameter addressed in D3, which also provides the formula for calculating soap content from the effective formula weight (D3, section 3.2.3, pages 85-86 and in particular the formula on the top of page 86). As further noted by the respondent, there is no evidence to support the appellant's allegation that all commercial calcium phenate detergents at e.g. 2 wt% as disclosed in D4 will necessarily have the same relative soap content as e.g. EX1 of the patent, and thereby deliver an amount of hydrocarbyl-substituted phenate within the claimed range.

5.4 The appellant further argued that it was evident from the entire disclosure of D4 that the compositions disclosed therein including "135 TBN" and "250 TBN" detergents reduced wear on aluminium surfaces, and therefore already solved the alleged objective technical problem underlying contested claim 1, namely of providing improved wear performance. Therefore, either the composition of D4 delivered an amount of hydrocarbyl-substituted phenol within the range of contested claim 1, or the feature was not critical to the invention, in which case it could not contribute to inventive step.

5.5 The board is not convinced by this argument. The effect of the invention as alleged by the respondent and accepted by the board is one of improved wear performance (see point 6.9, below), which does not presuppose that the prior art lubricant compositions are devoid of wear performance properties. Therefore, the fact that a certain level of wear resistance is

demonstrated for the lubricant compositions of D4 does not imply that the extent of the wear resistance demonstrated in D4 is the same as that obtained by the claimed subject-matter. Therefore this certain level of wear performance in D4 does not and cannot indicate that the amount of hydrocarbyl-substituted phenol comprised within the compositions thereof is inevitably within the range of contested claim 1.

Consequently D4 fails to disclose the amount range of hydrocarbyl-substituted phenol as required by contested claim 1.

5.6 Calcium sulphurised-phenate detergent

5.7 It was not disputed by the appellant that D4 fails to explicitly disclose a lubricant composition comprising a calcium **sulphurised**-phenate detergent as required by contested claim 1. Rather, the appellant argued that the term "calcium phenate detergent" was used in the art as shorthand when referring to sulphurised materials. As evidence, the appellant referred to the respondent's declaration D10, in which the expert referred to calcium sulphurised-phenates (denoted by the expert as "dimer phenate substrate") as "calcium phenate detergent" (points 10, 12 and 13), and concluded that the skilled reader of D4 would not exclude sulphurised species. It was therefore likely that the skilled reader of D4 would assume that the detergents used therein were indeed sulphurised.

5.8 The board disagrees. The fact that a single expert used this term in a declaration is not sufficient evidence that the shorthand to which the appellant refers is part of the common general knowledge of the skilled person. Therefore, as conceded by the appellant, the

skilled person may interpret the term "calcium phenate detergent" in D4 as referring both to sulphurised or non-sulphurised phenates. Consequently, there is no direct and unambiguous in D4 of a calcium sulphurised-phenate detergent as required by contested claim 1.

- 5.9 The appellant also argued, in the same manner as for the feature related to the amount of hydrocarbyl-substituted phenol, above, that it was evident that the compositions of D4 reduced wear on aluminium surfaces, thereby solving the alleged objective technical problem of providing improved wear performance. Hence, either the composition of D4 employed calcium sulphurised phenate detergents as required by contested claim 1, or the feature was not critical for inventive step.

For the same reasons as provided above, this argument must fail.

- 5.10 Consequently D4 fails to disclose calcium sulphurised-phenate detergents as required by contested claim 1.

- 5.11 The subject-matter of contested claim 1 is consequently distinguished from the disclosure in D4 in that the latter fails to disclose:

- an amount of hydrocarbyl-substituted phenol provided by the calcium phenate detergent with the range recited in contested claim 1, and
- a composition comprising a calcium sulphurised-phenate detergent.

6. Objective technical problem

6.1 The respondent submitted that the test data (submitted with the letter of 10 July 2017) demonstrated an improvement in wear performance linked to the distinguishing features over D4. In these tests, a lubricating composition comprising 1.37 wt% of a calcium-sulphurised phenate detergent, providing 0.9 wt% hydrocarbyl-substituted phenol ("% Soap") to the composition (Example 1, EX1 in the table in the respondent's data) was tested against a lubricating composition (Example 2, EX2 in the table) comprising 1.63 wt% of a calcium phenate detergent, and providing 0.7 wt% hydrocarbyl-substituted phenol to the composition. Hence, the calcium phenate detergent in example 1 is sulphurised and delivers an amount of hydrocarbyl-substituted phenol as required by claim 1, while the calcium phenate detergent in example 2 is not sulphurised, and delivers an amount of hydrocarbyl-substituted phenol below the amount required by claim 1.

6.2 As stated by the respondent, this data demonstrates that the composition of EX1 (according to contested claim 1) has better wear performance than the composition of EX2 in which the calcium phenate is not sulphurised, and which delivers an amount of hydrocarbyl-substituted phenol below the lower end of the claimed range (table in the respondent's tests, final row).

6.2.1 The appellant argued that it could not be concluded from the respondent's test data that the observed improvement had its origin in the individual distinguishing features over D4. Specifically, the examples differed from each other in more than one



feature, namely in the amount of hydrocarbyl-substituted phenol as well as whether the phenate was sulphurised. Furthermore, the comparison was equally not valid because the TBN of the detergents used was different. Specifically, EX1 used a detergent with a TBN of 145, while EX2 used a detergent with a TBN of 115 (table in respondent's data, third and fourth row). The observed effect on wear was to be expected in view of D4, which taught that a higher detergent TBN led to better wear performance (D4, page 15, "Summary and conclusion", point 5; table 8b). The objective technical problem underlying contested claim 1 was thus the provision of an alternative lubricating composition.

6.3 The board disagrees. As set out above, there is not one but two features which distinguish the claimed subject-matter over D4. Hence, to prove an effect over D4, an example according to the claims must be compared with an example reflecting the teaching of D4, and thus differing from said example not by one, as alleged by the appellant, but by the two distinguishing features. The argument that one or the other distinguishing feature does not contribute to the effect demonstrated amounts to a mere allegation, unsupported by evidence.

6.4 The board acknowledges that in fact, in view of the TBN of the detergents used in EX1 and EX2 of the respondent's tests, these examples differ by a third feature, namely the TBN. However, as explained by the respondent, its tests were planned such that the "treat rate" (i.e. the amount of phenate detergent added) of the non-sulphurised calcium phenate of EX2 (TBN = 115) was set to balance *inter alia* the higher TBN of the sulfur-coupled calcium phenate of EX1. Thus, 1.63 wt% of non-sulphurised phenate of TBN 115 was added in EX2

to offset 1.37 wt% of sulphurised phenate having a higher TBN of 145 in EX1 (table in respondent's data, third and fourth entry), and hence to provide lubricant compositions having comparable overall TBN (2.0 for EX1 compared to 1.9 for EX2). Hence, while the TBN values of the detergents used in EX1 and EX2 are different, the overall TBN of the lubricant compositions of EX1 and EX2 were comparable.

6.5 The appellant argued that such a balancing of the TBN of the overall lubricant composition was not appropriate for demonstrating the alleged effect. Specifically, it was known from D4 (page 15, "Summary and conclusions", point 5) that *"an increase in the TBN of the **phenate** was found to further decrease the wear compared to lower TBN and ZDDP alone"*. This was demonstrated in figure 8b of D4, which showed that the wear scar width (WSW; vertical axis) was lower for "250 TBN" than for "135 TBN" at any given rubbing time (horizontal axis). Therefore, it was the TBN of the phenate, not of the overall composition which influenced the wear. The improved wear demonstrated in the respondent's tests was therefore attributable to the higher TBN of the sulfur-coupled phenate, and not to the distinguishing features of contested claim 1 over D4, despite the overall TBN of the respective compositions being comparable.

6.6 The board does not agree. Although the conclusions in D4 cited by the appellant indeed refer to the phenate, it is evident in the context of D4 that the link between TBN and wear is demonstrated for the lubricant composition as a whole. Thus, D4 discloses that the solutions tested were prepared from a desired concentration of the additive concerned, diluted with "MCT-10 base" oil (page 6, right hand column, first

full paragraph; table 3, legend). In table 8b of D4, it is stated that both detergents 135 TBN and 250 TBN are present in an amount of 1%. Therefore, the results depicted in the table relate to lubricant compositions having different overall TBN values, which lies in contrast to the situation in the respondent's test data, as set out above.

6.7 Indeed, as noted by the board at oral proceedings, had the TBN of the overall compositions not been balanced in the respondent's tests as explained by the respondent, the overall TBN values of the two compositions would have been different. In this case, it could have validly been argued that any effect shown could be linked to the difference in overall TBN of the lubricant composition as a whole, and not necessarily to the distinguishing features of contested claim 1 over D4.

6.8 Furthermore, as also noted by the board at oral proceedings, since sulphurisation is likely to influence the TBN of any given phenate, in order to prepare sulphurised and unsulphurised phenates having the same TBN for the purpose of comparison, the use of phenates having different chemical structures would be required. In such a situation however, it could equally be argued that any effect would not have its origins in the distinguishing features over contested claim 1, since the phenates compared would differ structurally, and hence not only in the distinguishing features of contested claim 1 over D4.

6.9 Consequently, the differing TBN of the calcium phenate detergents in the respondent's test data is not sufficient ground for rejecting the tests as unsuitable for demonstrating an effect linked to the

distinguishing features of contested claim 1 over D4. Indeed, as argued by the respondent at oral proceedings, the burden of proof remains with the appellant, and no evidence was submitted in this regard.

6.10 Consequently, the respondent's data demonstrates an improved wear performance linked to the claimed amount of hydrocarbyl-substituted phenol provided by the calcium phenate detergent, and to the use of a calcium sulphurised phenate detergent as claimed, when compared to a similar composition with an amount outside the claimed range, comprising a non-sulphurised calcium phenate detergent.

6.11 In view of the foregoing, the objective technical problem is that proposed by the respondent, namely the provision of a lubricating composition with improved wear performance in a method of lubricating an aluminium-alloy surface of an internal combustion engine.

7. Obviousness

7.1 The appellant argued that even if the objective technical problem were to be the provision of a lubricating composition with improved wear performance as set out above, the solution would have been obvious in view of D4. Specifically, in order to solve the problem, the skilled person would have chosen calcium sulphurised-phenate detergents, a standard detergent, in a standard amount, to provide a hydrocarbyl-substituted phenate in the amounts provided in contested claim 1.

7.2 The board disagrees. As argued by the respondent, there is no pointer in D4 which would lead the skilled person seeking to solve the above objective technical problem to the subject-matter of contested claim 1, in particular to the two distinguishing features, nor did the appellant argue that a pointer to the solution was to be found elsewhere.

7.3 The appellant also argued in writing that the skilled person faced with the above objective technical problem would have had an incentive to choose sulphurised detergents. Specifically, D3 (page 84, fourth paragraph) taught that introducing sulphur into phenates lowers corrosivity and improves oxidation stability, and D2 (paragraph [0131]) taught that better acid neutralisation was obtained by minimising the amount of unsulphurised metal phenate present. Since the properties mentioned in D3 and D2 were desirable for any lubricating oil, the skilled person would have employed calcium sulphurised-phenate detergents and thereby would have arrived at the subject-matter of claim 1.

The appellant with this argument hence effectively submits that the effect of improved wear performance is a mere bonus effect.

7.4 However, as noted by the respondent, in line with decision T 192/82, the improved wear performance demonstrated in the respondent's test data cannot be considered a bonus effect which the skilled person would inevitably obtain in carrying out the teaching of D4, since a situation in which the skilled person is faced with a lack of alternatives, leading to a "one-way-street" situation, does not arise. Specifically, the skilled person starting at the disclosure of D4 and

wishing to solve the above-mentioned problem would have had many potential options, such as the provision of a composition comprising a tartrate as disclosed in D6 (paragraphs [0093] - [0095], the provision of a molybdenum dithiocarbamate as disclosed in D4 (e.g. abstract), or a trinuclear molybdenum dithiocarbamate such as that disclosed in D7 (graph 2 on page 55, composition (2), and paragraph [0065], composition 2). The appellant's argument in this regard therefore must fail.

Consequently, the subject-matter of contested claim 1 involves an inventive step pursuant to Article 56 EPC.

8. In the absence of any further objections by the appellant, the set of claims of the second auxiliary request (i.e. the present main request) is thus allowable.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated