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**Datasheet for the decision
of 29 October 2021**

Case Number: T 0117/19 - 3.3.03

Application Number: 11750042.1

Publication Number: 2606091

IPC: C08L23/10

Language of the proceedings: EN

Title of invention:

POLYPROPYLENE RESIN SUITABLE FOR SOFT NONWOVEN APPLICATIONS

Patent Proprietor:

Braskem America, Inc.

Opponent:

Basell Poliolefine Italia S.r.l.

Relevant legal provisions:

EPC Art. 123(2)

EPC R. 139

Keyword:

Amendments - extension beyond the content of the application
as filed (yes)

Correction of error - immediately evident that nothing else
could have been intended (no)

Decisions cited:

G 0003/89, G 0011/91



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Case Number: T 0117/19 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 29 October 2021

Appellant: Braskem America, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 October 2018
revoking European patent No. 2606091 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman D. Semino
Members: M. Barrère
W. Ungler

Summary of Facts and Submissions

I. The appeal of the patent proprietor lies against the decision of the opposition division posted on 15 October 2018 revoking European Patent number 2 606 091.

II. Claim 1 as granted read as follows:

"1. A polypropylene impact copolymer composition comprising:

a) from 60 to 90 percent by weight of the impact copolymer composition of a matrix phase, said matrix phase comprising a homopolymer polypropylene or random polypropylene copolymer having from 0.1 to 7 mol percent of units derived from ethylene or C₄ - C₁₀ alpha olefins; and

b) from 10 to 40 percent by weight of the impact copolymer composition of a dispersed phase, said dispersed phase comprising a propylene/alpha-olefin copolymer having from 6 to 40 mol percent of units derived from ethylene or C₄ - C₁₀ alpha olefins, wherein the dispersed phase has a comonomer content which is greater than the comonomer content in the matrix phase;

wherein the impact copolymer is characterized by having a beta/alpha ratio of 0.9 or less, with

$$\beta/\alpha = \frac{(MFR1/MFR2)^{0.213} - 1}{Fc/100} + 1$$

where *MFR* means melt flow rate and is determined according to ASTM D1238 (230°C, 2,16 kg), and *MFR1* is that of the first reactor (matrix phase only), *MFR2* is that of the second reactor (overall impact copolymer), and *Fc* is the percent by weight of the dispersed phase in the impact copolymer composition, determined by mass balance, the polypropylene impact copolymer composition further being characterized as having a melt flow rate in the range of from 25 to 65 g/10 min."

The other granted claims are not relevant to the present decision.

- III. A notice of opposition was filed against the patent, requesting the revocation of the patent in its entirety.
- IV. The decision under appeal was based on the patent as granted as main request and on eleven sets of claims filed as auxiliary requests 1 and 3 with the reply to the notice of opposition and as auxiliary requests 2 and 4 to 11 with letter of 10 July 2018.

Claim 1 of auxiliary requests 1 to 3 included the formula defining the β/α parameter unamended. Auxiliary requests 4 to 11 are not relevant to the present decision.

The following documents were *inter alia* cited in the decision under appeal:

US5258464 (not numbered in the decision, cited as D3 in examination proceedings and referred to as D3 in the following)
D4: WO 00/22057

V. The contested decision, as far as it is relevant to the present appeal, can be summarized as follows:

- Claim 1 as granted did not comply with Article 123(2) EPC because the formula relating to the definition of the β/α parameter found no basis in the application as filed. Furthermore the correction of said formula was not allowable under Rule 139 EPC since no evidence was provided that the formula belonged to common general knowledge. In particular, D3 and D4 could not be considered as evidence of common general knowledge.
- The same conclusion applied to claim 1 of auxiliary requests 1 to 3.
- Claim 1 according to auxiliary requests 4 to 11 did not meet the requirements of Article 123(2) and (3) EPC.

Therefore, the patent was revoked.

VI. With the statement setting out the grounds of appeal the patent proprietor (appellant) defended the patent as granted (main request) and according to auxiliary requests 1 to 3 filed during opposition proceedings.

The following documents were filed by the appellant with the statement of grounds of appeal:

D6: EP 0 457 455 B1

D7: EP 0 911 363 A1

VII. With the rejoinder to the statement of grounds of appeal, the opponent filed the following documents:

D8: printout of the <http://www.unioncarbide.com/History> web page
D9: US 6 599 985 B2
D10: Čapla et al., European Polymer Journal, Vol. 16, page 611

VIII. Oral proceedings were held before the Board on 29 October 2021 by video conference.

IX. The appellant's arguments, insofar as relevant to the decision, may be summarised as follows:

(a) Main request

(i) Article 100(c) EPC - Basis for the β/α formula in claim 1

The β/α formula found basis on page 7, first paragraph of the application as filed. It was clear for a person skilled in the art that the formula on page 7 was erroneous, in particular when looking at the data in tables 1 and 2. Moreover, it was also clear that the only possible correction was the formula as it stood in granted claim 1. The correct formula was common general knowledge as evidenced by documents D3, D4, D6 and D7. Furthermore, although the formula in D7 was erroneous, the person skilled in art knew how to correct it. The replacement of the formula of page 7 as filed ("wrong formula") by the formula of granted claim 1 ("correct formula") was therefore the correction of an obvious error under Rule 139 EPC, which was not objectionable under Article 123(2) EPC.

(b) Auxiliary requests 1-3

The arguments brought forward with respect to the main request equally applied to auxiliary requests 1-3.

- X. The respondent's arguments, insofar as relevant to the decision, may be summarised as follows:

(a) Main request

(i) Article 100(c) EPC - Basis for the β/α formula in claim 1

The β/α formula of claim 1 found no basis in the application as filed. Furthermore, the correction of the formula as set out on page 7, first paragraph of the application as filed was not allowable under Rule 139 EPC for the following reasons:

First, it was not clear whether the alleged error was in the β/α formula or not. Although the values of β/α parameter in tables 1-2 did not correspond to the formula on page 7, the error could be related to the fact that the data in the tables were incorrect but not the formula.

Secondly, it was not immediately evident that nothing else would have been intended than what was offered as the correction. The evidence provided by the appellant could not be considered as proof that the formula of granted claim 1 was common general knowledge on the filing date of the patent in suit. Besides D3, D4, D6 and D7 offered different options to correct the formula.

Therefore the correction of the β/α formula did not comply with the requirements of Rule 139 EPC and the subject-matter of claim 1 extended beyond the content

of the application as filed contrary to the requirements of Article 123(2) EPC.

(b) Auxiliary requests 1-3

The arguments brought forward with respect to the main request equally applied to auxiliary requests 1-3.

- XI. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or in the alternative that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 3 filed during opposition proceedings, i.e. auxiliary requests 1 and 3 filed with the reply to the notice of opposition and auxiliary request 2 filed with letter of 10 July 2018.

- XII. The respondent requested that the appeal be dismissed. Furthermore, the respondent requested remittal of the case to the department of first instance should the Board come to the conclusion that the main request met the requirement of Article 123(2)EPC.

Reasons for the Decision

- 1. Main request (patent as granted)
 - 1.1 Article 100(c) EPC
 - 1.1.1 During examination proceedings the following formula was introduced into claim 1 in order to define the β/α parameter:

$$\beta/\alpha = \frac{(MFR1/MFR2)^{0.213} - 1}{Fc/100} + 1$$

1.1.2 It was not disputed that the application as filed contained at page 7, first paragraph a different formula which read as follows:

$$\beta/\alpha = [(MFR_1/MFR_2)^{0.213} - 1]/[(Fc/100) + 1]$$

1.1.3 However, according to the appellant, the above amendment was the correction of an obvious error under Rule 139 EPC in which the "wrong formula" of page 7 as filed was replaced by the "correct formula".

In particular it would be immediately evident for the person skilled in the art that an error was present and that nothing else would have been intended than what was offered as the correction.

1.1.4 In order for a correction in the description, claims or drawings to be allowable under Rule 139, second sentence, EPC, and consequently not to infringe the prohibition of extension under Article 123(2) EPC, the case law foresees the application of a two-step approach. It must be established

- (a) that it is obvious that an error is in fact present in the document filed with the EPO, the incorrect information having to be objectively recognisable by the skilled person using common general knowledge (G 3/89, OJ EPO 1993, 117 and G 11/91, OJ EPO 1993, 125, points 2 and 5 of the Reasons), and
- (b) that the correction of the error is obvious in the sense that it is immediately evident, also on the basis of common general knowledge at the date of filing, that nothing else would have been intended

than what is offered as the correction (G 3/89 and G 11/91, point 6 of the Reasons).

- 1.1.5 With regard to the first criterion (criterion (a)), the following formula was allegedly erroneous:

$$\beta/\alpha = [(MFR_1/MFR_2)^{0.213} - 1]/[(Fc/100) + 1]$$

("wrong formula")

As pointed out by the appellant, the above formula does not lead to the calculated values of the β/α parameter in tables 1 and 2. For that reason, the Board agrees with the appellant that the person skilled in the art would have identified that an error is present in the application as filed. It remains to be assessed whether the correction offered in granted claim 1 fulfils the second criterion.

- 1.1.6 The correction offered in granted claim 1 is the following formula:

$$\beta/\alpha = \frac{(MFR_1/MFR_2)^{0.213} - 1}{Fc/100} + 1$$

("correct formula")

The appellant argued that the above formula would be common general knowledge for a person skilled in the art as evidenced by D3, D4, D6 and D7 (see D3, column 7, lines 38-47; D4, page 3, lines 8-15; D6, page 5, lines 31-41; D7, page 2, paragraph [0009]).

The Board cannot follow this line of arguments for the following reasons:

Firstly, as argued by the respondent, the documents cited by the appellant are patent specifications, which

are normally not considered as common general knowledge (see Case Law of the Boards of Appeal, 9th edition 2019, I.C.2.8.2). This is further confirmed by the fact that D3, D4, D6 and D7 have been filed by the same applicants/inventors (see rejoinder to the statement of grounds of appeal, section 3.7). Thus said documents are not suitable evidence to show that the formula in granted claim 1 was common general knowledge on the filing date of the opposed patent.

Secondly, as pointed out by the respondent, the formulae in D3, D4, D6 and D7 are not identical. According to D3, D4 and D6, the formula is:

$$\text{Ratio} = 1 + \frac{\left[(\text{MF}_{\text{homo}}/\text{MF}_{\text{whole}})^{0.213} - 1 \right]}{F_c}$$

while D7 suggests:

$$\beta / \alpha = 1 + \left[\frac{1}{F_c} \left[\frac{\text{MF homopolymer}}{\text{MF copolymer}} \right]^{0.213} - 1.0 \right]$$

At the oral proceedings, the appellant further argued that the formula of D7 would also be erroneous and that the man skilled in the art would have known how to correct it. The Board is not convinced that the person skilled in the art, who is possessed of average knowledge and ability, would have immediately identified that the formula of D7 and not the one of D3, D4 and D6 is erroneous. The person skilled in the art would have been at loss in view of the discrepancies and could have even thought that according to the circumstances one or the other formula should have been used.

Thus, following the submissions of the appellant, the Board is of the opinion that at least 2 corrections are possible.

1.1.7 In conclusion, the Board considers that there is no suitable evidence on file that the formula of granted claim 1 was part of common general knowledge at the filing date of the patent in suit. Since the person skilled in the art would not know how to correct the error present in the application as filed, the second criterion for allowability of a correction under Rule 139 EPC is not met. It follows that the Board does not see any reason to depart from the conclusion of the opposition division in view of granted claim 1 (see contested decision, point 9.2). Thus, the ground for opposition under Article 100(c) EPC prejudices maintenance of the granted patent.

2. Auxiliary requests 1-3

Claim 1 of auxiliary requests 1 to 3 comprises the corrected definition of the β/α parameter:

$$\beta/\alpha = \frac{(MFR1/MFR2)^{0.213} - 1}{Fc/100} + 1$$

Consequently, the conclusion under point 1.1.7 applies *mutatis mutandis* to auxiliary requests 1 to 3.

3. Since all the requests of the appellant are not allowable, the appeal is to be dismissed and there is no need for the Board to deal with any other issues.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated