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**Datasheet for the decision
of 29 March 2022**

Case Number: T 0339/19 - 3.3.06

Application Number: 14166395.5

Publication Number: 2762308

IPC: B32B27/32, B65D75/00

Language of the proceedings: EN

Title of invention:

Single polymer film structures for use in stand-up-pouches

Patent Proprietor:

Dow Global Technologies LLC

Opponent:

Borealis AG

Headword:

Film for stand-up-pouches/DOW

Relevant legal provisions:

RPBA 2020 Art. 13(1), 13(2)

EPC Art. 113, 116, 117, 125, 56, 84

Keyword:

Amendment after summons - exercise of discretion - taken into account (yes)
Inventive step - main request (yes)
Amendment to appeal case - amendment detrimental to procedural economy (no) - amendment overcomes issues raised (yes)
General principles

Decisions cited:

G 0003/14, G 0001/05, G 0002/08, R 0019/12, T 1294/16,
T 0669/90, T 2294/12, T 0855/96, T 1676/08

Catchword:

"Exceptional circumstances" in Rule 13(2) RPBA interpreted as those that compromise neither the procedural rights of the other party, nor procedural economy.



Beschwerdekammern

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Case Number: T 0339/19 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 29 March 2022

Appellant: Borealis AG
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 22 November
2018 rejecting the opposition filed against
European patent No. 2762308 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: R. Elsässer
C. Heath

Summary of Facts and Submissions

- I. The appeal of the opponent lies from the decision of the opposition division to reject the opposition against European Patent EP 2 762 308.
- II. With its grounds of appeal the appellant contested the decision inter alia on the grounds that the subject-matter of granted claim 1 lacked inventive step over the disclosure of D7 (US 2009/0029182 A1), taken together with the content of D5a (AFFINITY PL 1888 datasheet), D5b (AFFINITY™ PL 1888G), D6 (AFFINITY™ product brochure) and common general knowledge, represented inter alia by D11 (Handbook of Thermoplastics, by O. Olabisi, 1997, page 21).
- III. With its reply, the respondent filed an auxiliary request and after having received the preliminary opinion of the board, it filed auxiliary requests 2-6.
- IV. In a further submission, the appellant requested not to admit auxiliary requests 2-6 as late filed.
- V. In the course of the oral proceedings, which were held on 29 March 2022, the board decided to admit the third auxiliary request into the proceedings and the respondent made this request its new main request. The appellant objected this request under Articles 84 and 56 EPC. The final requests of the parties were established as follows:

The **appellant** requests the full revocation of the patent.

The **respondent** requests to maintain the patent in

amended form based on the new main request filed as auxiliary request 3 with submission of 23 December 2021.

VI. Claim 1 of the new main request reads as follows:

"1. A monofilm comprising at least 3 layers suitable for use in stand up pouches, wherein the monofilm is a coextruded film, comprising:

a) a first surface layer (X) comprised from 50 to 100 percent (by weight of the layer (X)) of a linear low density polyethylene having a density from 0.89 to 0.91 g/cm³ and a melt index of less than 1.3 dg/min, and a peak melting point in a range of from 85°C to 105°C, and a molecular weight distribution, Mw/Mn range of 2.0 to 3.0; and

b) a core layer (Y) comprising from 60 to 100 percent (by weight of the layer (Y)) of a first multimodal polyethylene polymer having a multimodal distribution in terms of molecular weight, wherein said first multimodal polyethylene comprises units derived from ethylene and at least one C₃-C₁₀ alpha-olefin (preferably C₆-C₈), and wherein the first multimodal polyethylene polymer has a density in the range of 0.950-0.965 g/cm³, a melt index of less than 1.20 dg/min, a peak melting point greater than 120°C, and a molecular weight distribution, Mw/Mn ratio greater than 5.0; and

c) a second surface layer (Z) which comprises:

i) 50 percent (by weight of the layer (Z)) of a second multimodal polyethylene polymer having a multimodal distribution in terms of molecular weight, wherein said second multimodal polyethylene comprises units derived from ethylene and at least one C₃-C₁₀ alpha-olefin (preferably C₆-C₈), said second multimodal polyethylene polymer having a density in the range of

0.950-0.965 g/cm³, a melt index of less than 1.20 dg/min, and a peak melting point in the range of from 120°C to 135°C, and a molecular weight distribution, Mw/Mn ratio greater than 5.0; and

ii) 50 percent (by weight of the layer (Z)) of a copolymer comprising units derived from ethylene and at least one C₃-C₁₀ alpha-olefin (preferably C₆-C₈), and wherein the polyethylene polymer has a density in the range of 0.91 to 0.95 g/cm³, a melt index of less than 1.2 dg/min, a peak melting point greater than 110°C, and a molecular weight distribution, Mw/Mn ratio greater than 3.0 wherein component (ii) is a multimodal polyethylene polymer or a monomodal polyethylene polymer."

Reasons for the Decision

1. New main request - Admissibility (Article 13(2) RPBA)
 - 1.1 This request was filed as auxiliary request 3 with letter dated 23 December 2021. Its claim 1 is based on claim 1 of the patent as granted and limits the composition of the second surface layer from 50 to 100 percent of polymer i) and from 0 to 50 percent of polymer ii) to "50 percent" of polymer i) and "50 percent" of polymer ii).
 - 1.2 According to the proprietor, the filing of the set of requests including the present main request was a response to the board's preliminary opinion, where the board set out the following (highlighting not in the original): "*The board has come to the conclusion that D7, in combination with common general knowledge (D9 and D11) and the disclosure of D6 render the subject-matter of claim 1 obvious. In order to facilitate the discussion of inventive step, the board first analyses*

the disclosure of D7: D7 discloses three-layered films, having a core layer consisting of a blend of two HDPE resins and two outer skin layers (claim 1). The core layer consists of two HDPE resins which differ in terms of their melt index and thereby also in their molecular weights (par. 0021). The appellant has equated this blend of two HDPE resins of different molecular weights with a HDPE having a multimodal distribution in the sense of layer (Y) of claim 1 and the respondent has not contested this view. According to par. 0025, this multimodal HDPE has a melt index ranging from 0.5 to 10 g/10min so that there is an overlap with the claimed range of less than 1.2 dg/min (= 1.2 g/10min). According to par. 0029-0035, the densities of both HDPE resins of the blend lie within the claimed range so that the density of the blend will also lie within the claimed range. According to par. 0036, a specific, highly preferred HDPE blend has a molecular weight distribution from 3-20. Again, there is an overlap with the claimed range of greater than 5. Undisputedly, D7 does not disclose the melting point of the blend and there is no mention of any C₃-C₁₀ comonomers being used in the core layer. With regard to the second surface layer (Z), the appellant has referred to the embodiment "Alternate 1" disclosed in table 1. In this embodiment, one of the skin layers is identical to the core layer and consists of "n.HDPE", which denotes a blend of two HDPE resins "according to the invention" (see explanations given below table 1), i.e. the blend of two HDPEs having different melt indices and densities discussed above. **As the compositions of the core layer (Y) and the second surface layer (Z) of claim 1 are largely identical, the analysis given above for the core layer (Y) equally applies to layer (Z).** With regard to the first surface layer (X), it is undisputed that the second outer layer of embodiment "Alternate 1"

is a sealant layer, which can be a plastomer (see explanations below table 1). No details about the plastomer are disclosed in D7, which therefore does not disclose a layer (X) in the sense of claim 1."

In particular, the proprietor referred to the sentence highlighted above, namely that according to claim 1, the core layer (Y) and the second surface layer (Z) could be identical.

- 1.3 Since the opponent requested not to admit this request the board had to decide on its admissibility.
- 1.3.1 According to Art. 13(2) RPBA: *"Any amendment to a party's appeal case made after the expiry of a period specified by the board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned."*
- 1.3.2 The board holds that the new request qualifies as an "amendment" to the proprietor's case, as it indeed changes the factual and legal framework thereof. While filed as a reaction to the preliminary opinion of the board, the latter did not raise any points of fact or law that had not already been discussed or addressed in the framework of the opposition proceedings. In particular, the statement to which the proprietor referred merely reformulated the subject-matter of the claim. Also the board's opinion on the relevance of document D7 was not a new issue, but had already been set out by the appellant in the grounds of appeal. The board thus cannot establish "exceptional circumstances"

when giving these words their ordinary meaning, and such reading of Art. 13(2) RPBA would lead to the result that the request should not be admitted. The board is aware that many decisions of the Boards of Appeal have indeed interpreted the term "exceptional circumstances" in this manner.

- 1.3.3 Yet this board takes the view that Art. 13(2) RPBA, as in fact all provisions of the Rules of Procedure, needs to be read and interpreted in the light of the overarching principles by which appeal proceedings are guided. In taking this approach, the board finds most helpful guidance in decision **T 1294/16** of 10 March 2021, where the board concerned was faced with a situation comparable to the one at issue.

The passages relevant to this point read as follows:
"18.2 The board also notes that neither the Article nor the explanatory remarks contained in CA/3/19 give an explanation of how to determine in general whether the circumstances are "exceptional". However, the example provided in the explanatory remarks to Article 13(2) RPBA 2020, according to which the board raising a new objection can be seen to constitute such exceptional circumstances, suggests that, in view of procedural fairness vis-à-vis the concerned party, considerations similar to those in Article 13(1) as to "the suitability of the amendment to resolve the issues ... which were raised by the board" should (exceptionally) prevail over considerations of procedural economy, although the board raising a new objection is in a situation that may not necessarily be qualified as exceptional in the (dictionary) sense of unusual or uncommon. The exceptionality is hence not necessarily linked to events being exceptional in the sense of deviating from the expected, but can also be caused by

considerations related to the legal framework, notably the principles underlying the rules of procedure.

18.3 Articles 12 and 13 RPBA 2020 implement what the explanatory remarks refer to as "convergent approach", according to which it should be the more difficult for parties to have their submissions considered the later in the appeal proceedings they are made. The major motivation for this principle is the procedural economy of the appeal proceedings. If admittance of a (late-filed) submission is not detrimental to procedural economy this board considers it appropriate to accept that "exceptional circumstances" within the meaning of Article 13(2) RPBA 2020 are present, and justified to admit the submission, provided that this does not adversely affect any other party. The exceptionality of this situation resides in that considerations related to procedural economy are not present and thus the interests of the party in overcoming objections by amendment may prevail without running counter to the principles of the convergent approach.

18.4 Moreover, the board sees that there are circumstances which are beyond the submitting party's control, namely the board's judgment as to whether it can, without undue delay, deal with the proposed submission, but also any other party's agreement to have the submission taken into account. In particular, if the board, of its own motion, finds the circumstances exceptional in view of the purpose of the convergent approach, then cogent legal reasons need not be brought forward by the party."

1.3.4 The present board finds itself in complete agreement with the above-cited passages, namely that the term "exceptional circumstances" should be interpreted in

light and in application of the principles underlying the rules of procedure. The board would like to add that these principles have been developed by the boards of Appeal in connection with the right to be heard (Art. 113 EPC), the right to oral proceedings (Art. 116) and the right to a fair hearing both under Art. 6 European Convention of Human Rights (as per decisions **G 1/05** (OJ 2007, 362), **G 2/08** of 15 June 2009, **T 1676/08** of 9 March 2012 and **R 19/12** of 25 April 2014) and Art. 125 EPC (**T 669/90** of 14 August 1991, headnote). The right to be heard also relates to the right to introduce and have heard evidence as defined in Art. 117 EPC, **T 2294/12** of 12 January 2016, point 1.1. of the reasons. Art. 114(2) EPC however clarifies that such right to introduce new facts or evidence is not unfettered, but rather limited to their timely submission.

- 1.3.5 In each case where new facts or evidence are introduced, it is thus incumbent on the deciding board to balance the right to be heard with the public interest of doing justice in good time. The board is further in agreement with decision **T 855/96** of 10 November 1999 that emphasises the position of the boards as the only judicial instance in proceedings before the European Patent Office and accentuates the need for public acceptance of its decisions: *"Es dient dem Rechtsfrieden sowie der Akzeptanz der Entscheidungen der Beschwerdekammern und trägt ihrer Bedeutung als der einzigen gerichtlichen Instanz Rechnung, die über die Patentierbarkeit des Patents mit Wirkung für alle benannten Vertragsstaaten entscheidet, wenn diese Entscheidungen den gesamten, im Beschwerdeverfahren unterbreiteten Streitstoff berücksichtigen. Ein im Beschwerdeverfahren vorgelegtes Dokument sollte daher berücksichtigt werden, wenn es*

nicht völlig irrelevant ist und seine Berücksichtigung verfahrensökonomisch vertretbar ist."

[It serves legal peace and the acceptance of decisions rendered by the boards of Appeal, and takes into account the importance of the boards' role as the only judicial instance that when deciding on the patentability of a patent with effect for all designated Member States, decisions should take into account the complete submissions made in appeal proceedings. Thus, a document submitted at the appeal stage should be taken into account unless completely irrelevant where its consideration can be justified from a point of view of procedural economy.]

1.4 Summing up, this board found the request a good-faith attempt to overcome the inventive step objection raised against the main request then on file, found that the request did not raise new issues, could be dealt within the current framework of proceedings and posed no additional difficulties or surprises for either the other party or the board.

1.5 In taking the above principles as an interpretative guidance for the term "exceptional circumstances", the board decided to admit the main request, because neither did its admittance compromise the procedural rights of the appellant/opponent in that issues beyond the current framework of appeal proceedings had to be discussed, nor did it lead to delays that would have compromised the interests of procedural economy.

2. Article 84 EPC

The appellant argued that according polymers i) and ii) could be identical so that it was unclear whether the

claim required layer (Z) to contain two polymers or only one. This lack of clarity was caused by the amendment since in granted claim 1, polymer (ii) was only optional so that it did not matter whether it could be identical to polymer i) or not.

This argument does not convince the board since the embodiment where component (ii) makes up 50 wt% of layer Z was already part of granted claim 1. It might be that the amendment rendering component ii) non-optional made the alleged lack of clarity relevant for the appellant's case because the previously attacked embodiment having 100 % of polymer i) is no longer part of claim 1, but this does not mean that the amendment *caused* the alleged lack of clarity.

Therefore, even if the presently claimed embodiment was indeed unclear as alleged by the appellant, this lack of clarity would already have been present in granted claim 1, so that the board would not be empowered to examine claim 1 of the new main request under Article 84 EPC (as per **G 03/14**) since it is based entirely on granted claim 1.

3. Article 56 EPC

The board has come to the conclusion that the subject-matter of claim 1 involves an inventive step.

3.1 The invention concerns multilayer films based on polyethylene for use in packaging applications, in particular in stand-up pouches (par. 0001, 0005, 0006).

3.2 The board agrees with the appellant that D7 represents the closest state of the art since, like the patent in suit, this document is directed to multilayer

polyethylene films used in packaging applications. Within document D7, the appellant relied on the embodiment "Alternate 1" (table 1), which is a three-layered film comprising a core layer made from "n-HDPE", a blend of two HDPE resins according to the invention of D7. It has not been disputed that this polymer blend is equivalent to a bimodal polymer. In addition to the core layer, the film of "Alternate 1" has a first skin layer of the same "n-HDPE"-material and a second skin layer of a sealant resin which might be a plastomer. The density, melt index, peak melting point and molecular weight distribution of "n-HDPE" are not disclosed. Likewise, there is no disclosure of "n-HDPE" containing any co-monomers.

- 3.3 It is undisputed that for the invention as now claimed no effect has been shown, so that the problem to be solved can only be formulated as the provision of an alternative film to the three-layered one of Alternate 1 known from document D7.
- 3.4 The appellant's attack in this regard is based on the understanding that claim 1 encompasses an embodiment where multimodal polymer i) and polymer ii) are the same, so that layer (Z) can comprise one multimodal polymer only, namely the "n-HDPE" of Alternate I. The board does not subscribe to this view, as the wording of the claim clearly requires the presence of a second polymer ii), in addition to polymer i) in layer (Z). As the appellant has not provided any argument as to why it would have been obvious to add such a second polymer to the "n-HDPE" of the first skin layer, the attack fails already for this reason.
- 3.5 Even accepting the appellant's interpretation (quod non), the subject-matter of claim 1 is not obvious

either for the following reasons:

- 3.5.1 It is evident that polymers i) and ii) of surface layer (Z) can only be identical if both have a density of 0.950 g/cm^3 . However, in view of par. 0020 of D7, the provision of a polymer blend "n-HDPE" having a density of only 0.950 g/cm^3 does not appear to be an obvious choice because said paragraph explicitly teaches that higher densities are preferred. This teaching is also in line with the examples where a blend having a density greater than 0.965 g/cm^3 is used (par. 0068). Therefore the board holds that it would not have been obvious in the first skin layer of Alternate 1 to use a resin having a density of 0.950 g/cm^3 .
- 3.5.2 In addition, there appears to be no incentive to include comonomers into polymer blend "n-HDPE". While it has not been contested that the copolymers as such are commonly known, as shown by D11, par. 0020 of D7 teaches that the most preferred resins used in the core layer (and thereby in blend "n-HDPE" used also in the skin layer of "Alternate 1") are homopolymers. Again, this is confirmed by the examples (par. 0068). During the oral proceedings, the appellant argued that PE-resins having a density as low as 0.95 g/cm could only be made as copolymers, an allegation that has not been backed up by any evidence. After all, D11 only concerns HDPE having densities of between 0.960 and 0.980 g/cm^3 . Therefore, the board holds that it would not have been obvious for the skilled person to incorporate comonomers into the blend "n-HDPE".
- 3.6 For these reasons, the board has come to the conclusion that starting from "Alternate 1" of D7, it would not have been obvious to arrive at a film having a second surface layer (Z) as defined in claim 1. In this

situation, it is not necessary to examine whether it would have been obvious to arrive at the other features of the claim. The same conclusion applies to dependent claims 2 and 3.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of the claims filed as auxiliary request 3 with letter dated 23 December 2021, and a description to be adapted thereto.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated