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**Datasheet for the decision
of 17 October 2022**

Case Number: T 1108/21 - 3.3.06

Application Number: 11740115.8

Publication Number: 2531020

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B32B27/36, D03D15/00, D04B21/16

Language of the proceedings: EN

Title of invention:
GREENHOUSE SCREEN

Patent Proprietor:
Aktiebolaget Ludvig Svensson

Opponents:
Ridder Climate Screens B.V.
IFG Exelto NV

Headword:
Greenhouse/Svensson

Relevant legal provisions:
EPC Art. 100(b)
RPBA 2020 Art. 11, 10(3)

Keyword:

Grounds for opposition - insufficiency of disclosure (no)
Remittal - special reasons for remittal - (yes)
Order to accelerate proceedings

Decisions cited:

G 0001/03, T 1845/14

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 1108/21 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 17 October 2022

Appellant: Aktiebolaget Ludvig Svensson
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 17 May 2021
revoking European patent No. 2531020 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: S. Arrojo
 C. Heath

Summary of Facts and Submissions

I. The appeal from the proprietor is directed against the decision of the opposition division to revoke European patent No. 2 531 020 under the opposition ground pursuant to Article 100(b) EPC. Claim 1 as granted (also **main request** in this decision) reads as follows:

"1. A greenhouse screen comprising strips (11) of film material that are interconnected by a yarn system (12, 13a, 13b; 14, 15) by means of hosiery, knitting, warp-knitting or weaving process to form a continuous product, characterized in that at least some of the strips comprise a film material in the form of a multilayer polyester film having a thickness less than 60 μm and comprising at least two layers, wherein at least one layer is white and at least one layer is black, said at least one white layer comprises polyester and a white pigment in an amount between 5 and 50 weight-% based on the total weight of said white layer, and said at least one black layer comprises polyester and a black opacifying agent."

II. In the statement of grounds of appeal, the appellant requested that the above decision be set aside and that the case be remitted to the first instance for further prosecution, or alternatively, that the patent be maintained as granted or on the basis of one of auxiliary requests 1 to 10 filed on 13 April 2021 at the oral proceedings before the opposition division, or of one of auxiliary requests 11 to 21 filed with letter dated 10 February 2021.

III. With their replies, opponents 1 and 2 (also respondents) requested that the appeal be dismissed,

arguing *inter alia* that the invention as granted was not sufficiently disclosed (reference was made to **D44** (EP 2 364 845 B1), **D45** (EP 2 364 846 B1) and **D46** (US 2007/0240075 A1). Opponent 1 also requested to accelerate the appeal proceedings and, in case the board concluded that sufficiency of disclosure was not an issue, not to remit the case to the first instance.

IV. The board issued a communication granting the request to accelerate the appeal proceedings and concluded, in its preliminary opinion, that the opposition ground under Article 100(b) EPC did not appear to prejudice the maintenance of the patent as granted. The question of inventive step was addressed but no preliminary conclusion was reached.

V. At the oral proceedings, which took place on 17 October 2022, the parties maintained their original requests.

Reasons for the Decision

1. Main request - Sufficiency of disclosure

The board has concluded that the opposition ground under Article 100(b) EPC does not prejudice the maintenance of the patent as granted for the following reasons:

1.1 The opposition division concluded that the invention was insufficiently disclosed because the claims were so broadly defined that a skilled person would be confronted with an undue burden when trying to identify and combine specific features. While there was information in the patent as to the different

alternatives which could be selected to reproduce each individual feature, the only information on how the features should be combined was given in examples 1 and 2, both of which included films which were neither commercially available nor described. The patent therefore failed to provide a single way of carrying out the invention. Since claim 1 was a generalisation of these examples, the gap of information and therefore the burden for the skilled person was thus even larger.

The opposition division also referred to the proprietor's indication that it was not obvious to achieve a film which could be used as a greenhouse screen while having such small thickness, as there were limits on how much filler could be incorporated into the layers to attain the desired properties. This argument reinforced the opponents' position that there was missing information in the patent, such as the specific type of polyester required to overcome the underlying technical challenges.

- 1.2 At the oral proceedings, the respondents contested the board's preliminary view that the claims did not define any technical effect, arguing that the reference to "a greenhouse screen" implied that the invention had to be suitable for this purpose, and so the screen needed to exhibit certain mechanical and optical properties. Obtaining such properties was not trivial, particularly considering that claim 1 required a reduced thickness and did not specify the type of polyester to be used. The specific technical challenges which a skilled person would confront to reproduce a polyester greenhouse screen having a reduced thickness were directly derivable from D44 and D45, which described the same screen as the underlying invention. In particular, document D44 (paras. [0017]-[0018])

indicated that the film had to include a particular concentration of TiO_2 (i.e. white pigment), since excessively high or excessively low amounts would lead to technical problems. By contrast, claim 1 defined a broad range of concentrations for the white pigment, namely 5 to 50 wt.-%, therefore encompassing embodiments which D44 presented as non-working. Document D44 also taught (par. [0013]) that double white-black layers as defined in claim 1 were not suitable as greenhouse screens, because the required thickness and pigment concentrations led to undesired properties. Similar conclusions could be drawn from document D45, which indicated (paras. [0016], [0018], [0023], [0030] and [0036]) that for the film to work as a blackout screen, a number of conditions should be fulfilled in terms of the amount of pigments or the SV value of the polyester. It was therefore apparent that the invention defined by the broad subject-matter of claim 1 did not include all the essential features to provide a suitable greenhouse screen. Since the only detailed description of the screens in the patent was based on commercial polyesters which were not available when the application was filed, the patent did not even provide a single way of carrying out the invention. The invention was therefore insufficiently disclosed.

1.3 The board disagrees with the respondents for the following reasons:

1.3.1 According to the jurisprudence, an invention is insufficiently disclosed if a skilled person would require inventive skills or would be confronted with an undue burden when trying to reproduce or combine the features in the claims. Problems of sufficiency of disclosure often arise from the lack of information to obtain technical effects defined in the claims, as such

effects are part of the invention and should therefore be obtainable without undue burden throughout the entire scope of protection. However, an invention should not be seen as insufficiently disclosed on the basis that it does not provide an effect which is not defined in the claims (see **T 1845/14**, reasons 9.6-9.7 and **G 1/03**, reason 2.5.2).

The board considers that reproducing the features of claim 1 as granted would simply involve carrying out well-known/trivial steps, namely manufacturing a multilayered polyester film having a small thickness, adding a pigment in the required amount and the opacifying agent, and interconnecting the strips using any of the techniques defined in the claim. The only outstanding question is therefore whether there is sufficient information in the patent to reproduce a film which is suitable to be used as a greenhouse screen throughout the entire scope of the claims.

As indicated by the appellant, the condition of "suitability" for a greenhouse should not be narrowly interpreted, because greenhouse materials can be exposed to a wide set of conditions (e.g. due to different geographical locations, dimensions or to more or less demanding applications). In this respect, even though documents D44 and D45 concern a blackout screen as defined in the invention, they are not representative of the more flexible requirements which can be associated with a general suitability for a film to be used as a greenhouse screen. More specifically, the screens in D44 and D45 are intended to exhibit high degrees of opacity and whiteness (see par. [0010] of D44 and D45), which is desirable for having an efficient screen, but not mandatory for the screen to be simply suitable. Thus, it cannot be concluded that

the screens of the invention are insufficiently disclosed on the basis that they would not provide the same effects as the screens in D44 and D45.

Furthermore, even if for the sake of the argument it was assumed (in the respondents' favour) that the information in D44 and D45 implies that the subject-matter of claim 1 encompasses non-working embodiments (e.g. due to the resulting brittleness or low opacity), this would not necessarily lead to a problem of sufficiency of disclosure, provided that a skilled person (in view of the patent or of its own general knowledge) is able to identify working alternatives over the claimed range with a reasonable effort (see **G 1/03**, reason 2.5.2). As the board indicated at the oral proceedings, the adjustment of those features regarded as essential in D44 and D45 (e.g. the SV value of the polyester or the amount of pigment) to obtain appropriate mechanical and optical properties would not represent a technical challenge for a person skilled in the art, because the effects of these parameters are generally known in the field or can at least be easily established by conventional experimental means. The board therefore concludes that the skilled person would not require an unreasonable effort to identify working alternatives over the whole claimed range.

It is also not apparent why the disclosure of polyester films which were not commercially available as part of the examples should lead to a problem of sufficiency of disclosure. Here, the opposition division appears to implicitly rely on the assumption that the polyester used in the invention should include some special properties in order to overcome the technical challenge of achieving an effective light assimilation while maintaining a small bundle size. This assumption is

again incorrect, because as indicated above, the invention defined in the claims does not require a minimum opacity or degree of whiteness, so it cannot be considered as insufficiently disclosed on the basis that there is not enough information to obtain those undefined effects.

The board therefore considers that the invention defined in the claims as granted is sufficiently disclosed.

2. Remittal

2.1 Since the board disagrees with the opposition division's conclusion that the patent is insufficiently disclosed, a decision had to be taken as to whether the case should be remitted to the first instance for further prosecution.

2.2 The respondents argued that inventive step should be dealt with before the board, because all parties presented their case on this issue and the opposition division issued a preliminary opinion in this respect. Furthermore, opponent 1 had a special commercial interest in an early resolution of this case.

2.3 According to Article 11 RPBA 2020, the board shall not remit a case to the department of first instance for further prosecution, unless special reasons present themselves for doing so.

The wording of this Article is interpreted as an indication that the boards should strive to bring cases to a final decision whenever possible in order to avoid unnecessary delays of the proceedings before the EPO. In view of the convergent approach followed in Articles

12 and 13 RPBA 2020, the intention is to facilitate dealing with more issues at the appeal stage (see explanatory remarks of the amendment to Article 11 RPBA 2020). More specifically, the requirement to present the entire case with the statement of grounds of appeal or the reply (Article 12(2) RPBA 2020) and the discretion of the boards to disregard any subsequent amendment to the case, should normally be sufficient to ensure that a final decision can be reached under most circumstances.

2.4 In the present case, the issue of inventive step has however only been partially addressed by the different parties. In particular, opponent 1 did not present any specific argumentation but simply filed some observations and referred to its submissions during first instance proceedings (see points 43 to 50 in the reply dated 23 December 2021), opponent 2 copy-pasted the inventive step objections against the main request presented before the opposition division but did not address the question of inventiveness of auxiliary requests 1 to 21, and the proprietor did not provide any indication as to why auxiliary requests 1 to 21 met the requirements of Article 56 EPC. Furthermore, the objections against the main request rely on several public prior uses as closest prior art, whose public availability is contested by the proprietor.

2.5 Although in its preliminary opinion the board pointed out that there were still several open questions which prevented the board from reaching a conclusion in the question of inventive step (e.g. the public availability of the prior uses or the problem solved by the invention), no further arguments were filed by the parties before the oral proceedings in this respect.

- 2.6 At the oral proceedings, the respondents indicated that they intended to request (for the first time in the appeal proceedings) that the auxiliary requests not be admitted into the proceedings. The proprietor, on the other hand, argued that the inventive step objections filed by reference to the submissions during first instance proceedings should also not be admitted, and that any objection raised for the first time at the oral proceedings should be regarded as an amendment to the case, whose admissibility should be assessed under the stringent requirements of Article 13(2) RPBA 2020.
- 2.7 In view of the above described outstanding issues, the board considered three possible courses of action and presented them to the parties: i) to discuss inventive step of all requests despite the lack of arguments and substantiation from both sides for auxiliary requests 1 to 21; ii) to discuss inventive step of the main request assuming that the public prior uses were publicly available and to remit the case to the opposition division if it was concluded that the main request was not inventive; iii) to remit the case to the opposition division for further prosecution.
- 2.8 The respondents requested to reach a final decision, arguing that there were at least some objections on the table to initiate the discussion on inventive step. On the other hand, the proprietor reiterated its main request to remit the case to the first instance for further prosecution, arguing that this would also be in the interest of the respondents, because either the patent would be maintained as granted or the case would have to be remitted anyway, as there was not enough time at that point to address all the outstanding issues.

2.9 After deliberation, the board reached the following conclusions: option i) was not considered to be appropriate because, as indicated above, there were neither objections against the auxiliary requests nor a substantiation of why these requests were inventive, so that no meaningful discussion appeared to be possible. Option ii) could lead to a final decision (to maintain the patent as granted if claim 1 was considered inventive) or to a remittal of the case (if the main request was considered not inventive). This option was however discarded because following it would have gone against the main request of the appellant without a real possibility of actually satisfying the main request of the respondents to reach a final decision and dismiss the appeal (i.e. the only possible outcomes in this option would have been the maintenance of the patent as granted or a remittal of the case for further prosecution).

2.10 In view of the above, the board has concluded that there are special reasons under Article 11 RPBA 2020 to justify the remittal to the first instance (i.e. option iii) above), as this is the only way to guarantee a fair and meaningful discussion of the question of inventive step.

3. Accelerated proceedings

In response to the legitimate and reasoned interest of opponent 1 to bring the proceedings to an end as soon as possible (see points 6 to 11 of its reply dated 23 December 2021), the board accelerated the proceedings under Article 10(3) RPBA 2020. In view of the circumstances presented in point 2. above, the board decided to remit the case for further prosecution, which will inevitably prolong the

proceedings. However, to partially mitigate the negative impact of this course of action on opponent 1, the board has decided to explicitly order an acceleration of the opposition proceedings.

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 for further prosecution.
3. The opposition division is requested to accelerate the proceedings.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated