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**Datasheet for the decision
of 15 January 2024**

Case Number: T 1567/21 - 3.3.05

Application Number: 15800917.5

Publication Number: 3221277

IPC: C04B28/14, E04C2/04

Language of the proceedings: EN

Title of invention:

CONSTRUCTION PANEL HAVING IMPROVED FIXING STRENGTH

Patent Proprietor:

SAINT-GOBAIN PLACO

Opponent:

Knauf Gips KG

Headword:

CONSTRUCTION PANEL/SAINT-GOBAIN PLACO

Relevant legal provisions:

EPC Art. 123(2), 56
RPBA 2020 Art. 12(6)

Keyword:

Late-filed evidence - admitted (yes)

Amendments - added subject-matter (yes)

Inventive step - main request (no) - auxiliary request (no) -
reformulation of the technical problem - obvious alternative

Decisions cited:

Catchword:



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Case Number: T 1567/21 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 15 January 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 July 2021 concerning maintenance of the
European Patent No. 3221277 in amended form.**

Composition of the Board:

Chairman T. Burkhardt
Members: J. Roider
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeals by the opponent (appellant 1) and the patent proprietor (appellant 2) lie from the interlocutory decision to maintain the patent on the basis of auxiliary request II.
- II. The following documents are relevant:
- | | |
|-----|---|
| D1 | WO 2014/188168 A2 |
| D2 | WO 2005/060628 A2 |
| D19 | Untersuchungsbericht 15/18, Knauf Integral KG |
| D20 | Felix Friedel, <i>"Report: Determination of slump spread of gypsum slurries and screw-pullout strength of gypsum plasterboards"</i> , Research Area Gypsumboards, RnD Knauf Group |
- III. In the communication under Article 15(1) RPBA, the board expressed the opinion that the patent should be revoked.
- IV. By letter of 31 October 2023, the patent proprietor indicated that it would not attend the oral proceedings and wished to rely on its written submissions. The patent proprietor provided no further comments on the merits of the case.
- V. Since the board saw no reason to deviate from the preliminary opinion, which was in line with the opponent's main request, the oral proceedings were cancelled.
- VI. Claim 1 of the main request reads as follows:

"1. A plasterboard comprising a gypsum matrix having a polymeric additive distributed therein in an amount of at least 1 wt% relative to the gypsum, the gypsum matrix further having a first group of fibres and a second group of fibres embedded therein, wherein the fibres of the first group of fibres have an average length that is at least three times the average length of the fibres of the second group of fibres."

VII. The auxiliary requests differ as follows (unless stated otherwise, amendments are compared to the main request):

Auxiliary request I

At the end of claim 1 of auxiliary request I, the following text was added:

", and wherein the plasterboard has paper facings or a mat partially or fully embedded at its surface"

Auxiliary request II

At the end of claim 1 of auxiliary request II, the following text was added:

", wherein the first group of fibres have an average length less than 8 mm"

Auxiliary request IIa

Auxiliary request IIa combines the features added in auxiliary request I and auxiliary request II.

Auxiliary request III

At the end of claim 1 of auxiliary request III, the following text was added:

", and wherein the fibres of the second group of fibres have a thickness greater than 20 microns"

Auxiliary request IV

At the end of claim 1 of auxiliary request IV, the following text was added:

" , and wherein the second group of fibres comprises cellulose fibres and the cellulose fibres have a thickness in the range of 20-60 microns "

Auxiliary request V

At the end of claim 1 of auxiliary request V, the following text was added:

" , and wherein the first group of fibres comprises glass fibres and the glass fibres have an average length less than 8 mm "

Auxiliary request VI

Claim 1 was amended as follows (marked additions and deletions are compared to the main request):

"1. A plasterboard comprising a gypsum matrix having an ethylated starch ~~polymeric additive~~ distributed therein in an amount of ~~at least 1~~ 10 wt% relative to the ~~gypsum stucco~~, the gypsum matrix further having glass fibres and cellulose fibres ~~a first group of fibres and a second group of fibres~~ embedded therein, wherein the glass fibres of the first group of fibres have an average length of 6mm and ~~the~~ that is at least three times cellulose fibres have an ~~the~~ average length of ~~the fibres of the second group of fibres~~ 500 microns."

VIII. The key arguments of appellant 1 (opponent) can be summarised as follows.

Admission of D20

D20 was filed as a reaction to appellant 2's change of interpretation of the experimental data during the oral proceedings before the opposition division.

Main request, claim 1, Article 56 EPC

The subject-matter of claim 1 did not involve an inventive step because it was an obvious alternative starting from D2, Example 6.

The technical problem stated by appellant 2 was not solved as shown in D20. The alternative plasterboard was obvious to the skilled person.

Auxiliary request I, claim 1, Article 56 EPC

The subject-matter of claim 1 was an aggregation of features which did not provide an effect in combination.

Auxiliary request II, claim 1, Article 56 EPC

The shorter fibre length did not yield a significant difference of screw pull-out performance. The tests in D20 showed that slurries with a fibre length ratio falling within the claimed range did not have a lower viscosity than slurries having a ratio outside the claimed range. The technical problem was therefore to provide an alternative. Starting from D2, Example 6, in view of D19, the claimed subject-matter was obvious.

Auxiliary request IIa, claim 1, Article 56 EPC

The subject-matter of claim 1 was an aggregation of features which did not provide an effect in combination. It lacked an inventive step for the same reasons as auxiliary requests I and II.

Auxiliary request III, claim 1, Article 56 EPC

As apparent from the examples in D20, the fibre thickness did not provide an effect. The technical problem was therefore to provide an alternative. Starting from D2, Example 6, in view of D19, the claimed subject-matter was obvious.

Auxiliary request IV, claim 1, Article 123(2) EPC

Cellulose-based fibres, as disclosed in the description as originally filed, were different from cellulose fibres. The requirements of Article 123(2) EPC were not met.

Auxiliary request V, claim 1, Article 56 EPC

The subject-matter of claim 1 was an aggregation of features which did not provide an effect in combination. Starting from D2, Example 6, in view of D19, the claimed subject-matter was obvious.

Auxiliary request VI, claim 1, Article 123(2) EPC

Only some features were extracted from Examples 1 and 2. This violates the requirements of Article 123(2) EPC.

- IX. The key arguments of appellant 2 (patent proprietor) can be summarised as follows.

Admission of D20

D20 was late filed and should not be admitted. Appellant 1 had had enough time to file the required evidence.

Main request, claim 1, Article 56 EPC

The technical problem the patent aims to solve is how to use fibres to improve the strength of the plasterboard while avoiding the increase in viscosity accompanied with the use of longer fibres. The examples and comparative examples in the patent in suit showed that the technical problem was solved. Starting from D2, the claimed subject-matter was not obvious in view of D19 and any other document.

Auxiliary request I, claim 1, Article 56 EPC

The subject-matter of claim 1 involved an inventive step for the same reasons as claim 1 of the main request.

Auxiliary request II, claim 1, Article 56 EPC

The problem the patent aimed to solve was to provide a gypsum plasterboard with improved performance and easier manufacture.

In appellant 2's reply (pages 3-5) to appellant 1's appeal, tests were included showing that by including short fibres within the claimed ratio, more fluid slurry was obtained without sacrificing screw pull-out performance. The presence of an inventive step was demonstrated.

Auxiliary request IIa, claim 1, Article 56 EPC

Reference was made to the arguments submitted in support of auxiliary request II (reply to appellant 1's appeal, page 6).

Auxiliary request III, claim 1, Article 56 EPC

The examples provided by appellant 1 could not show that the fibre thickness did not provide an effect. The selection was thus not obvious in view of the cited prior art. The presence of an inventive step had to be acknowledged.

Auxiliary request IV, claim 1, Article 123(2) EPC

The basis for the amendment was paragraph [0017] of the patent in suit.

Auxiliary request V, claim 1, Article 56 EPC

Reference was made to the arguments submitted in support of auxiliary request II (reply to appellant 1's appeal, page 9).

Auxiliary request VI, claim 1, Article 123(2) EPC

Examples 1 and 2 as originally filed provided the basis for this amendment (see letter of appellant 2 dated 1 June 2020, page 4 on the seventh auxiliary request at that time).

- X. The requests of the parties as to the substance are as follows.
- (a) Appellant 1 (opponent) requests that the decision under appeal be set aside and the patent be revoked.
 - (b) Appellant 2 (patent proprietor) requests that the decision under appeal be set aside and the opposition be rejected, or in the alternative a patent be granted based on one of auxiliary requests I to VI filed on 1 June 2020, during the opposition proceedings or based on auxiliary request IIa, first filed with the reply to appellant 1's appeal.

Reasons for the Decision

1. Admission of D20

D20 was first filed by appellant 1 with the statement setting out the grounds of appeal. It contains tests which assess, besides the pull-out strength, the viscosity.

It needs to be assessed whether D20 should have been filed during the opposition proceedings (Article 12(6) RPBA).

For the reasons set out below, the filing of D20 is a reaction to a new development during the oral

proceedings at the opposition stage.

At the oral proceedings before the opposition division, it was found that the experimental data filed during the opposition proceedings in appellant 2's letter of 19 March 2021 could not support its conclusion on the viscosity of the slurry. It supported the contrary (minutes, point 20). Appellant 2 alleged an error in the presentation of the data (minutes, point 22). The correction completely reversed the conclusion which could be drawn from the tests on the viscosity of the slurry, one of the purported effects of the invention.

In view of the experimental data in appellant 2's letter of 19 March 2021, there was no apparent need for appellant 1 to file further tests at the opposition stage.

The filing of D20 at the beginning of the appeal stage is thus a legitimate reaction to appellant 2's alleged correction in the oral proceedings before the opposition division.

These circumstances justify the admittance of D20. Therefore, D20 is admitted into the proceedings.

2. Main request
- 2.1 Inventive step, Article 56 EPC
- 2.1.1 The patent in suit is for a gypsum plasterboard.
- 2.1.2 Appellant 1 argued that the subject-matter of claim 1 did not involve an inventive step because it was an obvious alternative when starting from D1.

At the opposition stage, it was already indicated that document D1 is a document under Article 54(3) EPC, i.e. it cannot be used in an inventive-step objection. In view of the impugned decision, the minutes and appellant 1's statement of grounds of appeal, the objection only makes sense if appellant 1 referred to document D2 instead, more precisely, Example 6 of D2.

The parties did not object to this interpretation.

The parties thus consider D2, in particular Example 6, to constitute the closest prior art. D2, Example 6 discloses a gypsum plasterboard containing glass fibres with a length of 12.7 mm ($\frac{1}{2}$ inch) and wet recycled paper pulp. D2, Example 6 does not disclose the fibre length of the wet recycled paper pulp.

- 2.1.3 Since D2 is in the same technical field, it is an appropriate starting point for assessing inventive step.
- 2.1.4 The technical problem the patent aims to solve is, according to appellant 2 in reference to paragraph [0014] of the patent in suit, how to use fibres to improve the strength of the plasterboard while avoiding the increases in viscosity accompanied with the use of longer fibres.
- 2.1.5 The solution to this problem proposed in the patent was the plasterboard of claim 1 characterised in that the fibres of the first group of fibres have an average length at least three times the average length of the fibres of the second group of fibres.

Appellant 1 disputed that the problem was solved.

Paragraph [0014] of the patent in suit discloses that by including shorter fibres in addition to longer fibres, it may be possible to increase the strength of the plasterboard while avoiding increases in viscosity of the stucco slurry used to produce the plasterboard. However, the patent does not include any tests on the viscosity of the slurry.

Moreover, neither the first group of tests submitted with appellant 2's letter of 19 March 2021 nor the second group of tests submitted with appellant 2's reply at the appeal stage shows this effect.

These tests compare the slump spread and the pull-out strength of two or three slurries. According to appellant 2's evaluation of the tests, the pull-out strength showed no significant difference (letter 19 March 2021, page 5, 2nd paragraph; appellant 2's reply at the appeal stage, page 4, 3rd paragraph), while the slump spread was significantly different.

The tests varied only the length of the glass fibres in the slurries. Other product parameters, i.e. the type and content of cellulose fibres, were kept constant within each group of tests.

However, the length of the glass fibres exceeded the length of the cellulose fibres by significantly more than three times in all cases. There is no comparative data for a length ratio below three.

The effect of the distinguishing feature, i.e. the addition of short fibres in the claimed length ratio, can thus not be confirmed by comparing these examples.

Moreover, since the variation of the pull-out strength

of the plasterboards was insignificant, no improvement of the strength of the plasterboard was demonstrated.

In the absence of a comparison in the patent in suit between an example with a length ratio inside and another example with a length ratio outside the claimed range with the examples being otherwise identical, the examples in the patent in suit can also not support the purported effect that the pull-out strength is improved by combining two groups of fibres distinguished in that the average length of the fibres of one group is three times the average length of the fibres of the other group.

The examples use different combinations of fibre types (glass, cellulose and/or polypropylene). A conclusion which can necessarily be attributed to different length ratios between the groups of fibres is not possible for this reason.

Moreover, Example 1 contains 7 wt% fibres (namely, 5 wt% glass fibres and 2 wt% cellulose fibres), while Comparative Example 1 contains 5 wt%. Furthermore, in contrast to Example 1, Comparative Example 1 contains no second group of fibres (cellulose fibres). This comparison cannot show that the different results are due to the length difference between the fibre groups. Nothing else can be derived from the comparison of Example 2 and Comparative Example 2.

Comparative Examples 2 and 3 use different types and amounts of starch as the polymer additive and differ in the amount of glass fibres. Therefore, a comparison of these examples cannot show the purported effect, either.

By comparing Example 1 with Comparative Example 3, it

appears that the pull-out strength depends significantly on the type of starch used for the plasterboard. Example 1 contains much more fibre, even in the required length ratio, and almost the same amount of starch, but the pull-out strength is significantly lower than Comparative Example 3 (Table 1).

Finally, the difference between Comparative Examples 3 and 4 may be attributed to the material of the second fibre. Indeed, polypropylene has significantly different mechanical and surface properties than glass or cellulose fibres.

Consequently, neither the patent nor the tests provided by appellant 2 show that the technical problem stated by appellant 2 was solved by the distinguishing feature.

On the other hand, Examples E7 and E8 in D20, provided by appellant 1, use cellulose fibres of different lengths for the first and second groups of fibres. E7 is in accordance with claim 1, whereas in E8 the ratio of the average fibre length is outside the claimed range.

A statistically significant difference is apparent neither for the slump spread nor the pull-out strength. These tests thus support the absence of the purported effect.

It must thus be assumed that the features in the subject-matter of claim 1 do not solve the technical problem stated by appellant 2.

2.1.6 Therefore, the technical problem must be reformulated to a less ambitious problem, which is to provide an

alternative gypsum plasterboard.

D2, Example 6 does not state the fibre length of the wet recycled paper pulp. As apparent from D19, Figure 4, the average length of cellulose fibres of recycled paper pulp does not normally exceed a length of 0.7 mm and is typically much shorter.

Therefore, when being tasked to provide an alternative gypsum plasterboard, the skilled person would, starting from D2, Example 6, immediately consider recycled paper pulp with a fibre length such that the ratio of the average fibre length of the glass fibres and the cellulose fibres falls within the claimed range.

No inventive step is present (Article 56 EPC).

3. Auxiliary request I, inventive step, Article 56 EPC

3.1 Appellant 2 referred to the arguments submitted for the main request.

Since claim 1 of the main request does not contain paper facings or a mat, it is assumed that appellant 2 does not argue that the paper facings or the mat provided an effect in combination with the ratio of the average fibre lengths, nor is such effect apparent.

It must hence be assumed that the added feature is an aggregation to the features of the main request. The technical problem the features of claim 1 aim to solve must hence be considered to provide an alternative gypsum plasterboard.

3.2 Paper facings or embedded mats are common features of gypsum plasterboards. This has not been disputed.

In addition to the considerations on the main request, the skilled person would thus also immediately consider adding these elements to provide an alternative.

No inventive step can be acknowledged (Article 56 EPC).

4. Auxiliary request II, inventive step, Article 56 EPC

4.1 As for the main request, D2, Example 6 is considered the closest prior art for the subject-matter of claim 1.

4.2 The problem the patent aims to solve is, according to appellant 2, to provide a gypsum plasterboard with improved performance and easier manufacture.

4.3 In appellant 2's reply to appellant 1's appeal, tests are included showing the properties of slurries composed of specific components for preparing the plasterboard. The tests show that a slurry containing glass fibres with an average length of 12 mm show a smaller slump spread than when containing glass fibres with an average length of 6 mm.

The admissibility of these tests has not been disputed.

The subject-matter of claim 1 is, however, open ended on the number of groups of fibres. In line with the arguments of appellant 2 itself in its reply to appellant 1's appeal, page 2, 2nd paragraph, a slurry containing glass fibres with an average length of 6 mm does not exclude the additional presence of glass

fibres with an average length of 12 mm.

It seems, moreover, from D20 (Table 2), Examples E4 and E5 that the difference in the mean value slump spread is not statistically significant for the components used in E4 and E5. This seems to indicate that the alleged effect can, if at all, be observed only in specific cases.

Since the purported effect of the first group of fibres alone or an effect in combination with the second group of fibres was not demonstrated, the technical problem is less ambitious and must be considered to provide an alternative plasterboard.

In D2, Example 6, the average fibre length of the glass fibre is 12.7 mm ($\frac{1}{2}$ inch). However, D2 does not restrict the length of the glass fibres (paragraph [0044]).

Moreover, it does not state the fibre length of the wet recycled paper pulp.

4.4 As apparent from D19, Figure 4, the average length of cellulose fibres of recycled paper pulp does not normally exceed 0.7 mm and is typically much shorter. Starting from D2, Example 6, the skilled person would immediately consider replacing the glass fibres of an average length of 12.7 mm with glass fibres which are slightly shorter than 8 mm to provide an alternative plasterboard.

Alternatively, the skilled person would immediately consider to additionally add glass fibres which are slightly shorter than 8 mm to provide an alternative plasterboard.

The skilled person would thus obtain an alternative

plasterboard falling in the ambit of claim 1 of auxiliary request II.

No inventive step can be acknowledged (Article 56 EPC).

5. Auxiliary request IIa, inventive step, Article 56 EPC

5.1 As for auxiliary request II, D2, Example 6 is considered the closest prior art for the subject-matter of claim 1.

5.2 Appellant 2 refers to the arguments submitted in support of auxiliary request II.

The subject-matter of claim 1 of auxiliary request II does not involve an inventive step. Starting from auxiliary request II, the features added in auxiliary request IIa are that the *plasterboard has paper facings or a mat partially or fully embedded at its surface.*

5.3 Appellant 2 did not assert an effect attributable to the combination of the added features and the other features of claim 1, nor is any apparent.

5.4 The added features must hence be considered an aggregation, and the technical problem the features of claim 1 aim to solve must be considered to provide an alternative gypsum plasterboard.

5.5 Paper facings or embedded mats are common features of gypsum plasterboards. This has not been disputed.

In addition to the considerations on auxiliary request II, the skilled person would thus also immediately consider adding these elements to provide an

alternative.

No inventive step can be acknowledged (Article 56 EPC).

6. Auxiliary request III, inventive step, Article 56 EPC
- 6.1.1 As for the main request, D2, Example 6 is considered the closest prior art for the subject-matter of claim 1.
- 6.1.2 The amendment originates from the description. The patent does not specify, let alone provide examples which demonstrate, an effect from the fibre thickness of the second group of fibres.
Neither does appellant 2 assert an effect owing to this feature. It merely pointed out that the examples provided by appellant 1 could not show that this feature did not provide an effect.
- 6.1.3 The technical problem must thus be considered to provide an alternative gypsum plasterboard.
- 6.1.4 D2, Example 6 discloses a gypsum plasterboard containing glass fibres with a length of 12.7 mm ($\frac{1}{2}$ inch) and wet recycled paper pulp. D2, Example 6 does not disclose the fibre length and width of the wet recycled paper pulp.
As apparent from D19, Figure 2, recycled paper pulp has a substantial amount of fibres of a width within the range of 10-75 μm , including fibres within the range of 20-60 μm . D19, Figure 4 shows also that the average length of cellulose fibres of recycled paper pulp does not normally exceed 0.7 mm and is typically much shorter.

Therefore, when being tasked to provide an alternative gypsum plaster board, the skilled person would, starting from D2, Example 6, immediately consider recycled paper pulp with a fibre length and width such that the ratio of the average fibre length of the glass fibres and the cellulose fibres as well as the cellulose fibre thickness falls within the claimed range.

No inventive step can be acknowledged (Article 56 EPC).

7. Auxiliary request IV, amendments, Article 123(2) EPC

Appellant 2 indicates paragraph [0017] of the patent in suit, which corresponds to the paragraph bridging page 3 to 4 in the description as originally filed, as a basis for the amendment. Claim 7 essentially provides the same information.

However, these passages refer to cellulose-based fibres. While cellulose-based certainly also encompass cellulose fibres, the restriction to cellulose fibres is not originally disclosed.

The subject-matter of claim 1 extends over the application as originally filed (Article 123(2) EPC).

8. Auxiliary request V, inventive step, Article 56 EPC

8.1 D2, Example 6 is considered the closest prior art for the subject-matter of claim 1.

8.2 The problem the patent aims to solve is, according to appellant 2, to provide a gypsum plasterboard with

improved performance and easier manufacture.

- 8.3 In appellant 2's reply to appellant 1's appeal, examples are included showing that a slurry with specific components for preparing the plasterboard comprising glass fibres with an average length of 12 mm, show a smaller slump spread than with glass fibres with an average length of 6 mm. The subject-matter of claim 1 is, however, open ended on the number of groups of fibres. In line with the arguments of appellant 2 itself in the reply to appellant 1's statement of grounds of appeal, page 2, 2nd paragraph, it does not exclude the additional presence of glass fibres of an average length of 12 mm.

Since the purported effect of the first group of fibres alone or an effect in combination with the second group of fibres was not demonstrated, the technical problem is less ambitious and must be considered to provide an alternative plasterboard.

- 8.4 In D2, Example 6, the average fibre length of the glass fibre is 12.7 mm ($\frac{1}{2}$ inch). However, D2 does not restrict the length of the glass fibres (paragraph [0044]). Moreover, it does not state the fibre length of the wet recycled paper pulp.

As apparent from D19, Figure 4, the average length of cellulose fibres of recycled paper pulp does not normally exceed 0.7 mm and is typically much shorter. Starting from D2, Example 6, the skilled person would immediately consider replacing the glass fibres of an average length of 12.7 mm with glass fibres which are slightly shorter than 8 mm to provide an alternative plasterboard.

Alternatively, the skilled person would immediately consider adding glass fibres which are slightly shorter than 8 mm to provide an alternative plasterboard.

The skilled person would thus obtain an alternative plasterboard falling within the ambit of claim 1 of auxiliary request V.

No inventive step can be acknowledged (Article 56 EPC).

9. Auxiliary request VI

9.1 Amendments Article 123(2) EPC

Examples 1 and 2 cannot provide a basis for the amendment.

Example 1 contains ethylated starch in an amount of 5 wt%.

It cannot serve as a basis for claim 1, which requires 10 wt%.

Example 2 requires 5 wt% glass fibres - relative to the amount of stucco - of an average length of 6 mm, and 5 wt% cellulose fibres - relative to the amount of stucco - of an average length of 500 μm and an average diameter of 35 μm .

Therefore, only some parameters disclosed in Example 2 were included in claim 1. The amounts of glass fibres and cellulose fibres and the average diameter of the cellulose fibres were not included. This extracting in isolation of only some features is not justified since it is not directly and unambiguously disclosed to the skilled person to select only the claimed and not other

or more of the parameters disclosed in Example 2.

The subject-matter of claim 1 extends over the application as originally filed (Article 123(2) EPC).

Order

For these reasons it is decided that:

- The decision under appeal is set aside.
- The patent is revoked.

The Registrar:

The Chairman:



C. Vodz

T. Burkhardt

Decision electronically authenticated