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**Datasheet for the decision
of 17 December 2024**

Case Number: T 0387/23 - 3.3.03

Application Number: 15178483.2

Publication Number: 2987827

IPC: C08L3/02, C09J103/02,
C09D103/02, C09J103/00,
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C09D133/08, C08L33/08

Language of the proceedings: EN

Title of invention:

BINDER-CONSOLIDATED TEXTILE FABRIC, METHOD FOR PRODUCING IT,
AND USE THEREOF

Patent Proprietor:

Johns Manville Europe GmbH

Opponent:

Politex Sas di Freudenberg Politex Srl.

Relevant legal provisions:

EPC Art. 100(b), 100(c), 111(1)
EPC R. 99(1)
RPBA 2020 Art. 11, 12(6)

Keyword:

Admissibility of appeal - notice of appeal - indication of the impugned decision

Late-filed facts - should have been submitted in first-instance proceedings (yes)

Grounds for opposition - subject-matter extends beyond content of earlier application (no) - insufficiency of disclosure (no)

Remittal



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0387/23 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 17 December 2024

Appellant: Johns Manville Europe GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 December
2022 revoking European patent No. 2987827
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman D. Semino
Members: D. Marquis
A. Bacchin

Summary of Facts and Submissions

I. The appeal lies against the decision of the opposition division revoking European patent No. 2 987 827.

II. The decision under appeal was based on the claims as granted (main request) and on the claims of the auxiliary request submitted with letter of 6 October 2022.

III. Granted claim 1 read as follows:

"1. A binder system, comprising:

- a) 5 to 70% by weight of polymerisates based on carboxylic acid, which have no low-molecular cross-linking agent having a molecular weight of <1000g/mol, and
- b) 95 to 30% by weight of a starch or a mixture of a plurality of starches and
- c) 0 to 10% by weight of a catalyst,
- d) 0 to 1% by weight of an adhesion promoter,
- e) 0 to 10% by weight of additives,

wherein the specified percentages by weight refer to the dry mass of the binder system, i.e., without water and the sum of the constituents a) to e) is equal to 100% by weight, characterized in that the polymerisates based on carboxylic acid have free carboxylic acid groups, the acid groups are bound covalently to the polymer backbone and the concentration of free carboxylic acid groups is 500 to 1000 mg KOH/g of solid".

IV. The following documents were *inter alia* submitted during the opposition proceedings:

D11: WO 00/50354 A1

D12: Amjad, Z., Zuhl, R. and Zibrida, J., "Deposit Control Polymer Selection Criteria for High-Temperature Applications: Part 1-Polymer Characterizations", 2015 the Analyst, 22(3), pages 40-46.

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

- The granted claims met the requirements of Article 123(2) EPC.
- Granted claim 1 was however not sufficiently disclosed.
- The same conclusion applied to claim 1 of the auxiliary request.

VI. The patent proprietor lodged an appeal against the decision of the opposition division and submitted three sets of claims as auxiliary requests 1 to 3 as well as Exhibit A and three Datasheets for components a), b) and c) with the statement of grounds of appeal.

VII. Oral proceedings before the Board were held on 17 December 2024.

VIII. The final requests of the parties were as follows:

- The appellant (patent proprietor) requested that the decision under appeal be set aside and that the case be remitted to the opposition division for

further prosecution on the basis of the patent as granted or, in the alternative, on the basis of the claims of any of auxiliary requests 1 to 3, filed with the statement of grounds of appeal.

- The respondent (opponent) requested that the appeal be rejected as inadmissible or that it be dismissed. The opponent further requested remittal of the case to the department of first instance for further prosecution, should the decision under appeal be set aside.

IX. The parties' submissions, in so far as they are pertinent, may be derived from the reasons for the decision below. The disputed points concerned the admissibility of the appeal, the admittance into the proceedings of the documents filed with the statement of grounds of appeal and the grounds of opposition under Article 100(b) and (c) EPC.

Reasons for the Decision

1. Admissibility of the appeal

1.1 The respondent contended that the appeal was not admissible on the grounds that the notice of appeal of 14 February 2023 did not contain a request defining the subject of the appeal (rejoinder, page 2, section I).

1.2 Rule 99(1) EPC defines the content of the notice of appeal to be filed within the period specified in Article 108 EPC. Under Rule 99(1) EPC the notice of appeal shall contain the name and address of the appellant (Rule 99(1)(a) EPC), an indication of the decision impugned (Rule 99(1)(b) EPC) and a request defining the subject of the appeal (Rule 99(1)(c) EPC).

Pursuant to Rule 101(1) EPC, if the appeal does not comply with, *inter alia*, Rule 99(1)(c) EPC, the Board of Appeal rejects it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 has expired.

1.3 In accordance with Rule 99(1)(b) EPC the notice of appeal of the patent proprietor contains an indication of the impugned decision "Against the decision of the Opposition Division dated December 15, 2022 to revoke the patent no. 2 987 827". It is also apparent that the notice unmistakably states that the appeal is filed against the decision of the opposition division. This statement in the notice of appeal is, according to the consistent case law of the Boards, considered to meet the requirements of Rule 99(1)(c) EPC as it is considered to define the subject of the appeal as a request for the legal effects of the contested decision revoking the patent to be reversed (Case Law of the Boards of Appeal, 10th Edition 2022, V.A.2.5.2 c)).

1.4 The appeal of the patent proprietor is therefore admissible.

2. Admittance of documents

2.1 The appellant sought admission of Exhibit A and three data sheets for components a), b) and c) used in the tests described therein (grounds of appeal, page 8, fourth paragraph). Exhibit A would show the preparation of binder systems according to granted claim 1. The appellant argued that the new evidence had been submitted "in direct reaction of the opposition division changing its position and written argumentation contained in the interlocutory decision under appeal" (letter dated 1 November 2023, page 4,

last sentence).

2.2 The appellant considered that since in the communication attached to the summons to oral proceedings in opposition, the opposition division in section 3.2.6 expressed the preliminary view that the ground of opposition under Article 100(b) EPC did not appear to hold against the claims as granted, there was no indication that sufficiency would become a matter to be discussed at the oral proceedings before the opposition division. Accordingly the appellant had no reason to file further evidence in support of enablement before the opposition division took its decision.

2.3 However, the ground under Article 100(b) EPC had already been raised in the notice of opposition, including all the arguments relating to the lack of guidance as to the choice of the components in the binder system. The proprietor was therefore aware of the objection of lack of sufficiency from the start of the opposition proceedings and, if they wished to rely on further evidence, should have reacted accordingly by submitting the appropriate evidence during opposition proceedings.

2.4 The opinion of the opposition division before the oral proceedings is only a preliminary, non-binding view on the case and does not preclude the opponent from pursuing their objection at the oral proceedings. A change of opinion from the opposition division is therefore always to be reckoned with up to the announcement of the decision. The Board therefore does not consider that a change of view by the opposition division on the question of the sufficiency of the disclosure of the granted claims justifies the

admission of new evidence on this question on appeal.

2.5 The appellant did not show that the filing of the new documents with the statement of grounds of appeal was justified by the presence of any new point in the decision under appeal. The Board does also not find in the statement of grounds of appeal any circumstances that would justify the admittance of new evidence on the question of sufficiency of disclosure for the first time at the appeal stage, i.e. why these amendments could not have been submitted during the first instance proceedings before the opposition division.

2.6 For these reasons, Exhibit A and the data sheets of the components a), b) and c) are not admitted into the proceedings (Article 12(4) and (6) RPBA).

Main request (granted claims)

3. Amendments

3.1 The objections under Article 100(c) EPC (decision under appeal, section 2.1) were pursued in appeal (rejoinder, page 14). In particular, the respondent argued that the definition of "low-molecular" characterizing the cross-linking agents in granted claim 1 would only be disclosed in the application as originally filed with reference to specific agents forming covalent bonds, a limitation that was not present in granted claim 1.

3.2 Granted claim 1 finds a basis in claim 1 of the application as originally filed concerning a binder system comprising as component a) "5 to 70% by weight of polymerisates based on carboxylic acid, which have no low-molecular cross-linking agent" with the further specification "having a molecular weight of <1000g/mol"

with reference to the low-molecular weight cross-linking agent.

- 3.3 The application as originally filed contains several instances defining a low-molecular weight cross-linking agent, namely i) on page 2, line 36 to page 4, line 3, ii) on page 3, lines 17-23 and iii) on page 6, lines 4-12. The Board finds that the passage on page 3, lines 17-23 is the most relevant one for the amendment made in granted claim 1 because it explicitly concerns a binder system according to granted claim 1 (page 3, lines 5-15). The opposition division concluded in the decision under appeal (section 2.1.1) that this passage of the application as originally filed which reads:

"Low-molecular cross-linking agents are meant to be di-, tri- or poly-functional group, which react with the carboxylic acid groups of the polymerisate and generate a covalent chemical bond, such as compounds with OH groups, in particular polyols, as well as compounds with amine groups, in particular polyamines, as well as compounds with OH-and amine groups, in particular polyalkanolamines, wherein the term "low-molecular" comprises compounds, the molecular weight of which is < 1000 g/mol, preferably < 500 g/mol".

provided a basis for granted claim 1.

- 3.4 The Board agrees with this conclusion and finds that this passage of the description contains two parts which are independent from one another, namely a first part relating to the type and chemical groups present on the cross-linking agent and a second part pertaining to the definition of "low-molecular" (decision under appeal, page 2, last paragraph). If one considers the generally accepted meaning of "meant to be" as

"intended to be" or "expected to be", is immediately apparent to the skilled reader that the passage on page 3, lines 17-23 of the application as originally filed does not limit the low-molecular cross-linking agents to those generating a covalent chemical bond with the carboxylic acid groups of the polymerisate only.

- 3.5 Independently of that, the final passage explicitly limits the low-molecular cross-linking agents by their molecular weight by specifying that "the term "low-molecular" comprises compounds, the molecular weight of which is < 1000 g/mol, preferably < 500 g/mol". The Board therefore concludes that there is a basis in the application as originally filed for the limitation of the cross-linking agents by their molecular weight as defined in granted claim 1, independently of the chemical nature of the cross-linking agent.
- 3.6 The Board finds that the ground of opposition under Article 100(c) EPC does not prejudice the maintenance of the claims as granted.
4. Sufficiency of disclosure
- 4.1 Granted claim 1 pertains to a binder system, comprising:
- (a) 5 to 70% by weight of polymerisates based on carboxylic acid, which have no low-molecular cross-linking agent having a molecular weight of <1000g/mol, and
 - (b) 95 to 30% by weight of a starch or a mixture of a plurality of starches and
 - (c) 0 to 10% by weight of a catalyst,
 - (d) 0 to 1% by weight of an adhesion promoter,

(e) 0 to 10% by weight of additives, wherein the specified percentages by weight refer to the dry mass of the binder system, i.e., without water and the sum of the constituents a) to e) is equal to 100% by weight, characterized in that the polymerisates based on carboxylic acid have free carboxylic acid groups, the acid groups are bound covalently to the polymer backbone and the concentration of free carboxylic acid groups is 500 to 1000 mg KOH/g of solid.

4.2 The decision under appeal concluded that granted claim 1 was not sufficiently disclosed on the grounds that the patent in suit did not provide sufficient guidance with respect to the selection of components a) and b) (also in relation to the textile fabric with which the binder system is used) in order to obtain either a binder system, a binder system according to the invention or "a combination with components that works" (page 6, last paragraph; page 7, first, third and fifth paragraphs; paragraph bridging pages 7 and 8; page 8, first and second full paragraphs). The opposition division considered that a person skilled in the art would not be in the position to prepare binder systems according to granted claim 1. That conclusion was contested by the appellant (statement of grounds of appeal, section A.I).

4.3 The question of sufficiency of disclosure in the present case is whether a skilled person would have been in a position, at the filing date of the application, to prepare the binder systems according to granted claim 1 based on the application as a whole and taking into account his or her common general knowledge (Case Law of the Boards of Appeal, 10th Edition 2022,

II.C.1).

- 4.4 The decision under appeal considers that the information contained in the patent in suit with respect to the choice of the components a) and b) was only very generic and that the patent in suit did not contain an embodiment showing a specific combination of components that could have provided the necessary guidance as to the selection of a combination of components a) and b) (decision under appeal, section 2.2.1.2). The decision also considers that the opponent plausibly argued that the common general knowledge would not enable the skilled person to reduce granted claim 1 into practice, which discharged the opponent of its burden of proof with respect to the ground of opposition under Article 100(b) EPC.
- 4.5 The decision under appeal, however, does not identify the knowledge missing from the patent in suit without which granted claim 1 could not be reduced into practice. Binder systems are types of compositions that are generally known in the prior art (patent in suit, paragraph 8). The patent in suit further discloses in paragraph 23 that the binder system "can be available as real dispersions, colloiddally dispersed or molecularly dispersed dispersions, generally through as so-called partial dispersions, i.e. aqueous systems, which are in part molecularly dispersed and in part colloiddally dispersed". There is therefore no reason from the patent in suit to conclude that the binder systems according to granted claim 1 would refer to anything else than the binders generally known in the prior art.
- 4.6 Granted claim 1 furthermore sets out that the binder systems comprise 5-70 wt.-% of component a) and 95-30

wt.-% of component b). Component a) is defined as a polymerisate based on carboxylic acid, which have no low-molecular cross-linking agent having a molecular weight of <1000g/mol, and component b) is defined as a starch or a mixture of a plurality of starches. The patent in suit contains further information on components a) and b). Thus, paragraphs 30-41 disclose polyacrylates as the preferred polycarboxylates a), their content in low molecular cross-linking agent (paragraph 34), how component a) can be used in the binder system (paragraphs 36-37) as well as their solids content, viscosity and pH-value if used in an aqueous dispersion (paragraphs 38-40). Paragraphs 42-58 concern the different types of starches that can be used as component b), including specific examples of these starches (paragraphs 44, 51, 52, 53 and 55). The information made available for each of the components a) and b) in the patent in suit was found by the opposition division to be broad but it was not found to be deficient to the point that the individual selections of a) and b) would pose problems to a skilled person. The Board therefore concludes that the skilled person could have chosen the components a) and b) individually from the teaching contained in the patent in suit.

- 4.7 The respondent argued in appeal that the patent in suit lacked guidance as to the selection of the components a) and b) in combination with one another in order to obtain binder systems that would provide consolidation of textile fabrics (rejoinder, part II, sections 2.2-2.6). The respondent additionally contended that the components a) to e) had to be selected so that the resulting binder systems had specific intrinsic properties, such as stability to prevent curing before the binder was applied to a substrate, adherence to a

substrate and an ability to cure and solidify after application to the substrate (rejoinder, page 3, third paragraph of section 2.2). Sections 2.3-2.6 of the rejoinder further allege that guidance is lacking in view of:

- (i) the selection of component a) in view of the specific starch b) and the other components of the composition so that a reaction with the starch occurs after application to a textile fabric (page 4, first full paragraph),
- (ii) how such systems can be crosslinked without a low molecular weight cross-linker (page 4, first full paragraph),
- (iii) the selection of the polycarboxylic acids having an acid number between 500 to 1,000 mg KOH/g of solids (page 4, first full paragraph),
- (iv) the selection of the starch derivatives with any physical or chemical properties, and any conceivable functional groups, so that they provide functional binder systems with the undefined polymerisates a) (page 5, first and second full paragraphs),
- (v) how the catalyst c), adhesion promoter d), additives e), and potential crosslinking agents of the composition shall be selected and adjusted, in view of the polymerisate a) and starch b) to obtain a functional binders (page 5, last full paragraph).

- 4.8 None of these properties however is disclosed as being critical to binder systems of the type described in the patent in suit. It is also apparent from the arguments contained in the rejoinder to the statement of grounds of appeal (part II, sections 2.2-2.7), as well as in the letters of 20 November 2023 (section I) and 29 November 2024 (sections A-G) that the respondent merely contends that the binder systems must have defined properties. However the Board does not find in these arguments factual evidence establishing why any of these properties and steps for the selection of the components of the binders were indeed necessary to prepare the binder systems defined in granted claim 1, which contains no specific limitation with respect to them.
- 4.9 The respondent argued in this respect that it had already discharged their burden of proof during the opposition proceedings and that it was now for the appellant to show that the claims were sufficiently disclosed (letter of 29 November 2024, page 6, section B, page 7, last paragraph). The Board does not concur with the respondent on that point.
- 4.10 A successful objection of a lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts that the claimed subject matter cannot be reduced to practice. In application of the general principle of the law of evidence that each party bears the burden of proving the facts it alleges, in *inter partes* proceedings, the burden of proof is upon an opponent to establish, on the balance of probabilities, that a skilled person reading the patent, using his common general knowledge, would be unable to carry out the invention (*supra*, II.C.9). The existence of a first instance decision

cannot lead to a reversal of the burden of proof as the reversal depends solely on the existence of serious doubts supported by verifiable facts provided by the opponent.

- 4.11 The Board does not find in the decision under appeal that serious doubts, substantiated by verifiable facts were raised about the preparation of the binder systems according to granted claim 1. The decision under appeal contends that the information in the patent in suit about the components a) and b) was very generic and that the patent in suit contained no single embodiment of a binder system (page 7, first, third and fourth paragraphs). That alone, however, does not show why a skilled person could not have prepared a binder system containing well-known components a) and b). Furthermore, the opposition division considered that the individual components of the binder system had to be selected according to "an intended use of the consolidated textile fabric and/or the required level of mechanical properties" (decision under appeal, page 7, seventh paragraph) or "a combination with components that works" (decision under appeal, page 8, first full paragraph). These generic and unspecified properties, however, are not part of the definition of granted claim 1 so that the Board does not see how they could be relevant to the preparation of the claimed binder systems. Besides, the Board does not find in the decision under appeal evidence or facts that would effectively show that specific properties would have been understood as being inherent to the binder systems of granted claim 1. The Board therefore does not find that serious doubts substantiated by verifiable facts have been raised as to the preparation of the binder systems of granted claim 1. It follows that the respondent has not discharged its burden of proof with

respect to the question of sufficiency of disclosure of the granted claims.

4.12 The respondent additionally argued that the lack of examples in the patent in suit showed a lack of sufficient guidance as to the selection of components (a) and (b) according to granted claim 1. The appellant acknowledged that the patent in suit did not contain an example of the preparation of a binder system, but nevertheless considered that the teaching provided in paragraphs 91-97 of the patent in suit was relevant to the question of sufficiency of disclosure and provided sufficient information (letter of 1 November 2023, page 3, last paragraph and page 4, first paragraph).

4.13 Paragraphs 91 to 97 of the patent in suit indeed provide information on the binder system and its use for the consolidation of textile fabrics. Paragraph 97 teaches the reader that the polycarboxylate and the starch of the binder system are such that they react through an esterification in the consolidation step. The application of the binder to the textile fabric (paragraph 96) and the formation of the textile fabric (paragraph 92) are described and said to be known in the art. In this respect, the Board has no doubts that this kind of esterification reactions are well-known and concludes that even in the absence of an example, the patent in suit provides sufficient guidance as to the preparation of the binder system and its use to consolidate textile fabrics.

4.14 The respondent further argued in section 2.9 of part II of the rejoinder to the statement of grounds of appeal that the wording of granted claim 1 with respect to component a) and in particular the expression "have no low-molecular weight cross-linking agent" would result

in a lack of clarity. The wording considered to be unclear by the respondent is however part of claim 1 as granted and lack of clarity is not a ground for opposition. In this respect the Board fails to see how the alleged lack of clarity could be relevant to the question of sufficiency of the claims of the main request.

- 4.15 The respondent additionally argued that claims 16-22 of the main request would also lack sufficiency of disclosure because it was not credible that any type of fiber could be consolidated with binders with any components a) to e) and because it would require an even higher undue burden to provide textile fabrics suitable for the uses of granted claim 22 (rejoinder, part II, section 2.7). The Board, however, does not find in the arguments of the respondent facts that would support this argumentation. In this respect, the question of sufficiency of disclosure was not whether any possible combination of components and parameters falling under the scope of the claims of the main request was taught in the patent in suit, but whether the patent in suit provided sufficient guidance to a skilled person, also relying on the common general knowledge, to operate the technically meaningful subject matter defined in these claims. In this respect, the patent in suit already provides the general teaching in paragraph 97 that drying or consolidation of the binder is carried out by means of methods known to the person skilled in the art, wherein temperatures of at least 140°C to 250°C prove to be advantageous. It is also disclosed therein that the drying or the thermal treatment cause among others a chemical reaction (esterification) between the polycarboxylate and the starch with formation of the corresponding condensates. The Board has no doubts that

this is what is expected by the person skilled in the field of binders in view of the presence of components a) and b). In view of this and in the absence of factual evidence from the respondent that the subject matter of claims 16-22 could not be reduced to practice, the Board does not find that claims 16-22 of the main request lack sufficiency of disclosure.

4.16 In addition to the objection of lack of sufficiency based on the selection of the components of the binder system, the decision under appeal considered a further objection based on the determination of the acid value concerning the concentration of free carboxylic acid groups defined in granted claim 1 (section 2.2.2 of the decision under appeal). The opposition division saw the objection as a lack of clarity and found that paragraph 104 contained information on the determination of the acid content. The respondent pursued that objection of lack of sufficiency in appeal (rejoinder, part II, section 2.8).

4.17 The objection of the respondent concerned the definition of the polymerisates based on carboxylic acid a) and in particular the determination of the content in free carboxylic groups on component a). The argument made in appeal was that several methods of determination of the acid number exist in the prior art, some based on a calculation and some on various titration methods and that these methods yield results varying by up to 29% as shown in D11 and D12. As neither granted claim 1 nor the specification of the patent in suit defined the method of determining the free carboxylic acid content in component a), that component was insufficiently disclosed.

4.18 It is first apparent from the passages cited in D11 and D12 that the comparisons made by the respondent do not concern the same polyacrylic acid compounds so that it is doubtful whether these comparisons can establish that the same compound could have acid number values that largely differ from one another depending on the method of determination used. Independently of that, even if the acid number value of a given polyacrylic acid component was to depend to some extent on the method of determination, showing a lack of accuracy of the values of acid number alone does not establish a lack of sufficient disclosure of the component a). Any alleged ambiguity resulting from a lack of definition of the measurement method of the acid number cannot be seen as an issue of sufficiency if it were not shown that the lack of accuracy would have prevented the skilled person from performing the invention as claimed. That, however, was not shown by the respondent. In view of this, the Board concludes that any lack of accuracy in the determination of the acid number of component a) as defined in granted claim 1 was only a question of clarity which is not open to objection in opposition proceedings for the granted claims.

4.19 The Board therefore concludes that the decision of the opposition division on sufficiency of disclosure is to be reversed and the ground of opposition under Article 100(b) EPC does not prejudice maintenance of the patent as granted.

5. Remittal

5.1 Both parties requested the remittal of the case to the department of first instance for further prosecution should any of the requests on file be found to meet the

requirements of sufficiency of disclosure and those of Article 123(2) EPC.

5.2 The Board came to the conclusion in the present decision that the grounds of opposition under Article 100(b) EPC and Article 100(c) EPC do not prejudice the maintenance of the patent as granted. It is however apparent from the notice of opposition that revocation of the patent was also requested on the grounds of Article 100(a) EPC (lack of novelty and lack of inventive step). That ground of opposition was not addressed in the decision under appeal. Considering that the primary object of the appeal proceedings is to review the decision under appeal (as now explicitly stated in Article 12(2) RPBA), the Board considers that the circumstances of the present case amount to special reasons pursuant to Article 11 RPBA that justify remittal of the case as requested by the parties in appeal. Accordingly, exercising its discretion under Article 111(1), second sentence, EPC, the board decided to remit the case to the department of first instance for further prosecution.

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.

The Registrar:

The Chairman:



D. Hampe

D. Semino

Decision electronically authenticated