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D E C I S I O N
of 18 July 1995

Case Number: T 0201/92 - 3.3.3

Application Number: 84107669.8

Publication Number: 0134465

IPC: C08B 11/193

Language of the proceedings: EN

Title of invention:

Continuous addition for preparing hydroxyalkylalkylcellulose ethers

Patentee:

THE DOW CHEMICAL COMPANY

Opponent:

Aqualon GmbH & Co. KG
HOECHST Aktiengesellschaft Zentrale Patentabteilung
Wolff Walsrode AG

Headword:

-

Relevant legal provisions:

EPC Art. 111,
Art. 11(3) Rules of Procedure of the Boards of Appeal

Keyword:

-

Decisions cited:

T 0156/84, T 0326/87, T 0951/91, T 1016/93, T 0212/91,
T 0892/92, T 0084/82, G 0005/88, G 0007/88, G 0008/88,
T 0669/90, T 0339/92, T 0375/91, T 0356/94, T 0122/84,
T 0092/92

Catchword:

New material (considered)
Remittal (yes)



Case Number: T 0201/92 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal 3.3.3
of 18 July 1995

Appellant:
(Opponent 02)

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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office dated 2 January 1992
concerning maintenance of European patent
No. 0 134 465 in amended form.

Composition of the Board:

Chairman: C. Gérardin
Members: B. ter Laan
W. M. Schar

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 0 134 465 in respect of European patent application No. 84 107 669.8, filed on 3 July 1984, claiming priority from application No. 512 086 of 8 July 1983 in the United States, was announced on 15 June 1988, on the basis of twelve claims, claim 1 reading as follows:

"A process for preparing mixed hydroxyalkylcellulose ethers containing C₃ or higher hydroxyalkoxyl substituents by reacting cellulose with alkali metal hydroxide and etherifying agents comprising a C₃ or higher alkylene oxide, characterized in that said process comprises the steps of (a) forming a reaction mass comprising cellulose and an amount of an alkali metal hydroxide at least sufficient to break up the crystallinity of the cellulose and (b) continuously adding a C₃ or higher alkylene oxide and after the completion of the addition of the alkylene oxide continuously adding an etherifying agent other than an alkylene oxide to the reaction mass under conditions including an elevated temperature such that the alkylene oxide and the etherifying agent react with the cellulose to attach ether groups thereto."

- II. On 23 January 1989, 30 January 1989 and 11 March 1989 respectively, three Notices of Opposition were filed and revocation of the granted patent in its entirety was requested under Article 100(a) EPC as well as under Article 100(b) EPC. The latter point was raised by Opponent 3 only and was subsequently abandoned. These objections were essentially based upon the following documents:

D2: US-A-4 096 325 and
D6: US-A-4 015 067.

III. By an interlocutory decision delivered orally on 12 November 1991 and issued in writing on 2 January 1992, the Opposition Division held that there were no grounds of opposition prejudicing the maintenance of the patent in amended form, i.e. on the basis of claims 1 to 12 filed on 12 November 1991, claim 1 reading as follows:

"A process for preparing mixed hydroxyalkylcellulose ethers containing C₃ or higher hydroxyalkoxyl substituents in a charged reaction vessel by (a) forming a reaction mass comprising cellulose and an amount of a concentrated aqueous alkali metal hydroxide solution sufficient to break up the crystallinity of the cellulose and (b) reacting said reaction mass with etherifying agents by adding a C₃ or higher alkylene oxide in an amount of 0.4 to 5 moles alkylene oxide per mole of cellulose pulp under conditions such that hydroxyalkoxy groups become attached to the cellulose and after the completion of the addition of the alkylene oxide adding, without intermediate cooling, of the reaction mass at elevated temperatures an etherifying agent other than an alkylene oxide to the reaction mass, characterized by continuously adding or adding in series of small portions the C₃ or higher alkylene oxide at a temperature of 40°C to 140°C and continuously adding or adding in a series of small portions the etherifying agent other than an alkylene oxide to the reaction mass wherein the rate of addition of etherifying agent other than an alkylene oxide to the reaction mass is

approximately equal to the rate of reaction thereof such that at no time are there large amounts of unreacted etherifying agent present and having an alkylene oxide conversion efficiency of at least 25 percent."

In substance, after acknowledging novelty, which was no longer a matter of dispute between the parties, the decision stated that (1) the relative amount of alkylene oxide, (2) the continuous addition of the alkylene oxide and the etherifying agent other than an alkylene oxide, and (3) the controlled addition of that etherifying agent, avoiding large excesses thereof, represented novel features which could not be derived in an obvious manner from the documents relied upon by the Opponents, so that an inventive step could not be denied.

IV. On 7 March 1992 an appeal against that decision was lodged solely by Opponent (2) (the Appellant) and the appeal fee was paid simultaneously. In the Statement of Grounds of Appeal filed on 12 May 1992 the Appellant maintained its objection of lack of inventive step on the basis of the approach followed before the first instance; in particular, the above indicated features (1) to (3) were said to be obvious in view of the teaching of D2 and D6.

V. In the Counterstatement of Appeal the Respondent (Proprietor) took the opposite view regarding features (1) to (3) and emphasised the importance in D2 of the intermediate cooling step between the hydroxypropylation and methylation reactions; the absence of such a step in the process as defined in Claim 1 of the patent in suit was further evidence for the presence of an inventive step.

- VI. Following a communication sent together with the summons to oral proceedings which both parties had requested and which was to be held on 18 July 1995, the Appellant filed a statement received on 9 June 1995 in which reference was made to a new document (D11a: SU-B-397 519) together with its translation in German (D11) and the corresponding Derwent Abstract. According to that submission, D11 destroyed the novelty of the claimed subject-matter or, in any case, its teaching resulted in a lack of inventive step. In a further submission of 28 June 1995, the Appellant provided comparative data about the conversion rates achieved in D11 and the patent in suit.
- VII. In its reply of 19 June 1995 the Respondent objected to the filing of a new citation at such a late stage, which amounted to an abuse of procedure. In fact, D11 did not have the relevance alleged by the Appellant, neither for the issue of novelty nor for that of inventiveness, and it should consequently be disregarded pursuant to Article 114(2) EPC. Two alternative sets of claims to be considered as first and auxiliary requests were filed simultaneously.
- VIII. The same day the Appellant informed the EPO that its request for oral proceedings was withdrawn and that it would not attend the hearing.
- IX. On 22 June 1995 Opponent 3, which, as a party as of right to the proceedings, had been duly summoned to the oral proceedings, informed the EPO that it would not attend the hearing.
- X. Opponent 1 did not submit any statement and did not reply to the summons to oral proceedings.

XI. During oral proceedings, which were attended by the Respondent only, the Board informed the Respondent that it considered D11 prima facie relevant as regards the main request, and it raised a number of objections against both auxiliary requests. In response the Respondent abandoned its previous requests and filed as its sole request a new set of ten claims and an adapted description, these claims reading:

"1. A process for preparing mixed hydroxyalkylcellulose ethers containing C₃ or higher hydroxyalkoxyl substituents in a charged reaction vessel by (a) forming a reaction mass comprising cellulose and an amount of a concentrated aqueous alkali metal hydroxide solution at least sufficient to break up the crystallinity of the cellulose, (b) reacting said reaction mass with a C₃ or higher alkylene oxide continuously added or added as a series of small portions at a temperature of 40°C to 140°C in an amount of 0.4 to 5 moles alkylene oxide per mole of cellulose pulp under conditions such that hydroxyalkoxy groups become attached to the cellulose, the alkylene oxide conversion efficiency being at least 25 percent, and, after completion of that reaction and while maintaining the temperature in the reaction vessel, and (c) continuously adding or adding in a series of small portions an etherifying agent other than an alkylene oxide to the reaction mass, the rate of addition of the alkylene oxide and the etherifying agent other than an alkylene oxide to the reaction mass being approximately equal to the rate of reaction thereof such that at no time are there large amounts of unreacted alkylene oxide and the etherifying agent present.

2. The process of claim 1 wherein (i) in step (a) the amount of alkali metal hydroxide is not substantially in excess of that amount required to break up the crystallinity of the cellulose; and (ii) said step (b)

comprises (α) continuously adding or adding in a series of small portions at elevated temperature to the reaction mass a C₃ or higher alkylene oxide under conditions such that the desired amount of hydroxyalkoxyl groups become attached to the cellulose; then (β) adding an incremental amount of alkali metal hydroxide to the reaction mass, and having an alkylene oxide conversion in excess of 40%.

3. The process of claim 1 or 2 wherein the temperature is in the range of from 40°C to 120°C.

4. The process of claims 1 to 3 wherein the alkylene oxide is propylene oxide and from 0.4 to 5 moles of propylene oxide are employed per mole of cellulose.

5. The process of claim 1 or 2 wherein the etherifying agent is a haloaliphatic carboxylic acid, an alkyl halide, or a dialkyl sulphate.

6. The process of claim 5 wherein the etherifying agent is chloroacetic acid or chloromethane.

7. The process of claim 6 wherein the etherifying agent is chloromethane and from 1.3 to 6 moles of chloromethane are employed per mole of cellulose.

8. The process of claim 2 wherein following the addition of alkylene oxide in step (α) the reaction mixture containing the cellulose pulp, the alkali metal hydroxide and alkylene oxide is maintained at a temperature of 40°C to 120°C from about 15 minutes to 2 hours prior to the addition of the incremental amount of alkali metal hydroxide.

9. The process of claim 2 wherein following the addition of etherifying agent in step (c), the reaction mixture is maintained at a temperature of 40°C to 120°C for a period of 15 minutes to 2 hours.

10. The process of claim 2 or 9 wherein from 0.15 to 0.5 part of sodium hydroxide per part by weight of cellulose is employed in step (a) and from 0.35 to 1.0 part of sodium hydroxide is employed per part by weight of cellulose in step (b)."

XII. Following the submission of the above set of claims the Respondent was invited by the Board to present arguments showing that the disclosure of D11 was in fact not relevant as regards the process as defined in Claim 1. In substance, the Respondent stated that, although D11 disclosed the gradual addition of propylene oxide to the alkali cellulose, there were substantial differences, in particular the continuous or portionwise addition of the second etherifying agent, so that no excess of this agent was present, by which higher yields could be achieved. Therefore, D11 could not be considered as sufficiently relevant to be taken into account by the Board.

XIII. The Appellant requested that the decision under appeal be set aside and that the patent be revoked entirely.

The Respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 10 and the adapted description, both as filed during oral proceedings, or, as an auxiliary request, that the case be remitted to the first instance for further prosecution on the basis of the above claims and description.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments.*
 - 2.1 Considering that in Claim 1, line 14, the word "reaction" is to be replaced by "addition" (see original Claim 1), the requirements of Article 123(2) EPC are fulfilled. In particular,
 - the use of a concentrated alkali hydroxide solution (page 2, line 56 of the description as granted),
 - the molar ratio of alkylene oxide to cellulose pulp (claim 11 as granted),
 - the conditions such that hydroxyalkoxy groups are attached to the cellulose (page 3, lines 20 to 22, 32 to 33 and 62 to 63),
 - the temperature in the reactor vessel (page 3, lines 14 to 17),
 - the possible addition of etherifying agents in a series of small portions (page 3, lines 30 to 32),
 - the rate of addition of the etherifying agents (page 3, lines 24 to 27 and 44 to 46), and
 - the alkylene oxide conversion efficiency (page 4, lines 29 to 30)

have been disclosed in the original application.

In substance, the scope of the claims has not been affected by the reformulation using the one-part form, so that the requirements of Article 123(3) EPC are met as well.

- 2.2 As far as the dependent Claims 2 to 10 are concerned, the only major amendment concerns Claim 2, in which on the one hand the features of the last step, which, in view of the dependency to Claim 1, were redundant, have been deleted, and on the other hand the alkylene oxide conversion efficiency has been incorporated. The latter feature is supported by page 4, lines 29 to 30 of the description as granted.
- 2.3 The other amendments, namely (i) the deletion of "a" before "...the addition of said..." at the end of Claim 8, (ii) the amendment of "the following" into "following the" and the reference to step (c) in Claim 9, and (iii) the reference to "step (a)" instead of "step (α)" in Claim 10 are all of editorial nature, hence without influence on the scope of the claims.
3. *Procedural matter; filing of new evidence.*
- 3.1 As mentioned in point VI above, the Appellant filed a new document (D11a) by a submission dated 19 June 1995. That was after a communication had been sent by the Board on 26 May 1995, accompanying the summons to oral proceedings on 18 July 1995. The communication set a time limit for filing further written submissions of one month before the date set for oral proceedings.
- 3.2 In the meantime a new Rule 71a of the Implementing Regulations concerning inter alia a restriction with regard to the consideration of new facts and evidence entered into force on 1 June 1995 (see Article 2 and Annex of the Decision of the Administrative Council of

13 December 1994; OJ 1995, 9). However, this rule does not yet apply in the present case, because the time limit for filing further submissions was fixed before the Rule entered into force.

3.3 The Respondent had argued that the Appellant had not introduced D11a "on the date of its knowledge of its contents", so that withholding it constituted an abuse of proceedings, and referred to paragraph 2 of the Appellant's letter of 9 June 1995 without further substantiation. Furthermore, it argued that the new document was not more relevant than the ones already on file. However, as the Board does not agree with the latter view (see point 5 below), the question of the allowability of new evidence in the light of an abuse of procedure will have to be decided.

3.4 The question of consideration of **newly filed facts and evidence**, and whether they have to be qualified as "late" is a common problem in procedural law. Facts and evidence are then called "new"; "new" to be understood in the procedural sense, not in the sense of "novelty" as under Article 54 EPC (in some contracting states they are also called "nova", see "inter alia" Fasching H.W., Lehrbuch des österreichischen Zivilprozessrechts, 2.A. Wien 1990, page 872, Guldener M., Schweizerisches Zivilprozessrecht, 3.A. Zürich 1979, page 489), when they are **not** submitted in the first submission of each party or when they are not the direct response either to a submission of one of the other parties or to a question, an order or a decision of the competent instance. They are usually dealt with according to the objects and purposes of the procedures concerned.

To deal with this problem the EPC states in its Article 114(1) EPC that the EPO (including the Boards of Appeal) "shall examine the facts of its own motion; it

shall not be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought", and adds in Article 114(2) in regard to new submissions that it may "disregard facts or evidence, which are not submitted in due time by the parties concerned".

While it is made clear by these provisions that new submissions are allowable, it leaves open what has to be understood by "in due time".

The practice of the Boards is consistent that new submissions are to be considered once they are found "relevant" (see: e.g. T 156/84, OJ EPO 1988, 372; T 326/87, OJ EPO 92, 522; T 951/91, OJ EPO 95, 202; T 1016/93 of 23 March 1995; T 212/91 of 16 May 1995). Relevant is not only understood as relevant for the outcome of the decision, but also in the sense of being useful for the explanation of the reasons of the decision. The practice of the Boards has not defined the latest point in time at which newly introduced matter may be taken into account, but penalties as to costs have been considered where the filing party's reasons pointed to an abuse of procedure (see T 1016/93 as cited above and the further practice cited therein).

- 3.5 It is undisputed that the proceedings before the Boards of Appeal as well as those before the Opposition Division are conducted in writing with one (or several) optional oral proceedings usually following the written stage (see Article 108, 110(2), 99(1), 101(2) and 116(1) EPC). Any party has the right to be heard in these proceedings (Article 113 EPC) and any party is entitled to a fair procedure (see e.g. T 892/92, OJ EPO 1994, 664). A party has therefore to be given a fair chance to respond to objections by the instances of the EPO or by other parties. Both the instances of the EPO and the

parties have to observe the principle of good faith (T 84/82, OJ EPO 1983, 451 and G 5/88, 7/88, 8/88, OJ EPO 1991, 137; J 2/87 OJ EPO 1988, 330, point 9). In inter-partes proceedings every party has to be given equal opportunity to present their submissions during the written and the oral stages (see: T 669/90, OJ EPO 1992, 739). Furthermore, it follows clearly from the provisions of the EPC as well as from the nature and the purpose of appeal proceedings (see inter alia Article 110(2), 111, 114(1), 114(2), 116(1), 117, 122, 125 EPC) that it is the competent Board who has the duty to direct and control the proceedings before it. Due to the fact that every legal and judicial procedure has to come to an end within due time, the principle of procedural economy is inherent in any procedural law, as it appears in the EPC inter alia in Article 114(2) and also clearly follows from the Travaux Préparatoires of the EPC (see: T 951/91, OJ 1995,202).

That means that any party, and not least the attacking ones, has to observe a fair degree of **procedural vigilance**.

- 3.6 That implies further that facts and evidence must be submitted **once they are available and once it has become clear that they are relevant**. As mentioned above, this usually arises as a result of the submissions of other parties or communications, orders or questions by the competent instance and it is possible that a decision under appeal, be it by the manner of an interpretation or otherwise, makes it apparent for the first time that more or other facts and evidence are needed to substantiate a certain point or that other submissions are necessary. It is to be underlined in this context that the Board of Appeal is not entitled to use hindsight while considering the procedural duties of the parties.

This means also that the Board may ask for an explanation so as to make sure that the filing of new matter does not constitute an abuse of procedure. If the explanation is not convincing, new facts and evidence were not duly filed, which means that they were not filed "in due time". That brings forth the application of Article 114(2), which may then be reconsidered when the adverse party has agreed to the consideration of new matter.

- 3.7 All these principles are reflected in the current practice of the Boards. The practice according to T 156/84 (OJ EPO 88, 372) to the effect that the investigative power of the Board takes precedence over the possibility not to consider new material, is to be qualified in the light of the above insofar as the filing of new material may not lead to an abuse of procedure. Another line of practice (see e.g. T 951/91, OJ EPO 1995, 202 and T 212/91 of 16 May 1995) to the effect that new facts and evidence should only exceptionally be admitted into the proceedings, is consistent with the above insofar as this means that new matter is to be considered when it is found relevant and when there was no abuse of procedure. The same applies to the practice according to T 1016/93 (of 23 March 1995). However, in view of the above, it is added that an abuse of procedure may not just lead to an apportionment of costs according to Article 104 EPC, but may result in the exclusion of new material altogether. In T 339/92 (of 17 February 1995) it was found that new material had to be considered because it did not cause a delay in the procedure and because both parties had dealt with it, i.e. no abuse of procedure was seen in this case. In T 375/91 (of 17 November 1994), on the other hand, the filing of test results in response to an objection by the adverse party more than two years after this objection had been raised and after oral

proceedings were appointed and only few weeks before the hearing, was found to jeopardize the other party's right to respond in time and to be contrary to a fair and expedient procedure. A similar approach was followed in T 356/94 of 30 June 1995 in line with T 122/84 (OJ EPO 87, 177, point 14.2), but because the party concerned had been given sufficient opportunity to respond, its right to be heard was not found to be infringed while the aspect of fairness and expediency of procedure was not dealt with as such.

The filing of new material may also lead to the remittal of the case to the department which was responsible for the decision appealed (Article 111(1) EPC), but that depends on the circumstances of each specific case (see below).

3.8 The submission of facts and evidence is different from the mere submission of arguments (see also: T 92/92 of 21 September 1993). They need not be restricted insofar as they do not essentially change the procedural situation. However, in written proceedings the filing or exchange of submissions has also to be brought to an end, in particular when oral proceedings are going to follow.

3.9 Once the parties have been given **fair and equal opportunity to present their written submissions**, it would be a perfectly fair approach, in the light of the above, to conclude the written stage and to open the oral stage by fixing a date for oral proceedings. However, the Board has in the present case chosen to go further and to fix a time limit for further written submissions. **That does not mean that parties were given the opportunity to withhold relevant facts or evidence until that date, or (in the case of the attacking party) to start a thorough search for material only at an**

advanced procedural stage (see also T 951/51, OJ EPO 95, 202). On the contrary, as soon as relevant new facts and evidence are discovered, they have to be communicated expediently so that the Board and the other parties can take the steps deemed necessary. The additional time limit can only mean that open points which need written clarification or the filing of amended claims and descriptions in line with the procedural situation are to be completed so that oral proceedings can be duly prepared. Because the appeal procedure is principally conducted in writing, because Article 11(3) of the Rules of Procedure of the Boards of Appeal (OJ EPO 1989, 361) requires that the case has to be ready for decision at the conclusion of the oral proceedings, and because the Boards of Appeal are the last instance in the proceedings before the EPO, the mentioned time limit means that all the material necessary for the decision should have been filed by then, save special circumstances which did not allow a party to file it in time. It needs hardly be added that claims and description may still be changed afterwards according to the procedural situation and the Board's acquiescence. But, in the light of what was said above, new facts and evidence are only considered when they are relevant and when their filing does not amount to an abuse of procedure.

4. In the present case, the Appellant's submission of 9 June 1995 in reply to the communication of the Board in preparation of the oral proceedings, did not contain any comment on the content of that communication, nor any argument in connection with the reasons given in the decision under appeal; on the contrary, it was merely used to introduce a new citation, thereby modifying the

factual framework of the case. The Appellant explained that the relevance of the corresponding Derwent Abstract was not immediately apparent and that, consequently, there was no reason to consider a full translation of the Russian patent.

However, as it appears from the search report, reference was not made to the Derwent Abstract, but to the article from Chemical Abstracts as well as to the original patent document, i.e. document D11a; moreover, that disclosure was already classified as a relevant document which should have been an incentive for the Opponent/Appellant to consider not just the abstract, but the full document when the opposition or at the latest when the appeal was lodged. The Appellant's course of action is thus not fully in line with the principles enunciated above and the Board considers that a more diligent approach of the Appellant would have resulted in an earlier filing of D11a and D11, thus avoiding the risk that this evidence might not be taken into consideration due to late filing. However, the Board cannot regard the Respondent's unspecified reference to the Appellant's letter of 9 June 1995 as evidence that the Appellant was in fact aware of the full disclosure of D11a at an earlier stage and that the disclosure has been withheld e.g. for tactical purposes, so that in that respect an abuse of procedure cannot be acknowledged in this case. Therefore, the new evidence D11 has to be considered.

5. The Board has duly examined the late filed document D11 and has found it to be sufficiently relevant to be admitted to the proceedings.

This citation discloses the gradual ("allmählich" in the German translation) addition of propylene oxide to alkali cellulose, which disclosure was confirmed by the Respondent. This characteristic, which, in view of the arguments brought forward during the opposition and appeal proceedings, is an essential feature of the process as defined in Claim 1, is not disclosed by any of D2 or D6, which makes D11 more relevant than these citations. Moreover, the opposite assertions made by the parties regarding the conversion rate of the etherifying agents as well as the question of the influence of the temperature on that efficiency, which hitherto has not been considered by the parties and which, in the Board's view, would appear crucial for a fair comparison of that feature, require an examination of the opposition on an entirely new basis. For this reason, the Board comes to the conclusion that D11 cannot be disregarded (T 156/84, OJ EPO 1988, 372) and that the opposition should be examined on that new basis.

6. Accordingly, the Board deems it appropriate in the present circumstances to make use of the power conferred upon it in Article 111(1) EPC to remit the case to the Opposition Division for further prosecution. As far as possible the matter should be dealt with in good time in order not to delay the procedure any further.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of claims 1 to 10 and the description, both as submitted on 18 July 1995.

The Registrar:


E. Görgmaier

The Chairman:


C. Gérardin