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D E C I S I O N
of 4 May 2004

Case Number: T 0248/02 - 3.3.3

Application Number: 94926351.1

Publication Number: 0730622

IPC: C08L 23/08

Language of the proceedings: EN

Title of invention:
Floor coverings

Applicant:
THE AMTICO COMPANY LIMITED

Opponent:
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Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Amendments - substantive"

Decisions cited:
-

Catchword:
-



Case Number: T 0248/02 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal 3.3.3
of 4 May 2004

Appellant: THE AMTICO COMPANY LIMITED
Applicant: Kingfield Road
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Representative: Lawrence, John
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Decision under appeal: Decision of the Examining Division of the
European Patent Office dated 27 June 2001 and
issued in writing on 24 July 2001 refusing
European application No. 94926351.1 pursuant to
Article 97(1) EPC.

Composition of the Board:

Chairman: R. Young
Members: A. Däweritz
H. Preglau

Summary of Facts and Submissions

- I. European patent application No. 94 926 351.1, based on International application No. PCT/GB94/02035, filed on 19 September 1994, claiming the priorities of 20 September 1993 and 7 October 1993 of two earlier applications in the United Kingdom (9319396.9 and 9320651.4), respectively, and published under No. WO-A-95/08593 on 30 March 1995, was refused by a decision of the Examining Division, announced at the end of oral proceedings on 27 June 2001 and issued in writing on 24 July 2001.
- II. The decision was based on a set of 20 claims, Claims 1 to 12 as submitted with a letter dated 25 May 2001 and Claims 13 to 20 as filed during the oral proceedings.

The independent claims of this set read as follows:

- "1. A method of manufacturing a wear layer suitable for use in a resilient floor covering comprising thermally processing a polymer composition comprising an ionomer resin and a polyfunctional polymerisable olefinic compound in the absence of actinic radiation and polymerisation initiators to form a cross-linked polymerisation product of the ionomer resin and the polyfunctional polymerisable olefinic compound.
6. A resilient floor covering including a polymer composition wear layer made by the method of any one of claims 1 to 5.
18. A method of manufacturing a laminated resilient floor covering according to any one of claims 6 to

17, including the step of laminating a wear layer to one or more underlying layers, characterised in that the wear layer is a polymer composition film made by the method of any one of claim [sic] 1 to 5."

The remaining Claims 2 to 5, 7 to 17, 19 and 20 were dependent claims concerning elaborations of the subject-matter defined in the respective preceding claims.

According to the decision, the requirements of Article 123(2) EPC were met by these claims. Novelty of the claimed subject-matter was also acknowledged. However, the decision held that the subject-matter of the application did not involve an inventive step.

III. On 18 September 2001, a Notice of Appeal against the above decision was lodged by the Appellant (Applicant). The prescribed fee was paid on the same day.

In the Statement of Grounds of Appeal, received on 27 November 2001, the Appellant contested the findings of the Examining Division as regards inventive step, maintained the above claims as main request and filed two auxiliary requests, the first of which was limited to the subject-matter according to the above Claims 1 to 17, the second of which related only to the subject-matter according to the above Claims 1 to 5.

IV. In an annex to the summons dated 29 January 2004, the Appellant was informed about the preliminary, provisional view of the Board as to the findings in the decision under appeal and the situation of the case as

regards the requests on file. In particular, the relevant part of the annex read as follows:

"3. However, the Board does not agree with this finding in the contested decision.

3.1 Thus, for the time being, each Claim 1, according to the main and the two auxiliary requests, respectively, refers to a polymer composition comprising an ionomer resin and a polyfunctional polymerisable olefinic compound. The claim then excludes the presence of actinic radiation and of polymerisation initiators.

3.2 Whilst the exclusion of the irradiation is disclosed to be preferred in the application documents as originally filed (page 8, lines 32 and 33), this is clearly not the case for the exclusion of the use of a polymerisation initiator (page 5, lines 10 to 14).

The presence of such a compound is one of several process features, referred to as being of equal importance for controlling the degree of reaction in the extruder, a reaction necessary to ensure that the olefinic compound, one of the two mandatory constituents in Claim 1, cannot exude from the extruded wear layer during the preparation or on storage (page 9, lines 5 to 12).

3.3 Therefore and in view of the fact that the description does not appear to contain a general teaching to the effect that actinic radiation and polymerisation initiators may be simultaneously

absent, it is doubtful whether Claim 1 according to any one of the requests presently on file meets the requirements of Article 123(2) EPC.

3.4 Whilst it is true that in the examples, wherein 'Surlyn 9910' was combined with certain amounts of trimethylolpropane trimethacrylate, no mention is made of the presence of a polymerisation initiator component (nor of any other optional components as referred to on pages 5 and 6, which probably would have an influence of the properties such as curl, adhesion, hardness, residual indentation, bleeding, and the resistance against scratching, abrasion and scuffing), this does not appear to amount to a general teaching derivable from the application as a whole.

3.5 This is compounded by the fact that on page 2, penultimate paragraph, the trade mark "Surlyn" is only identified as referring to a commercially available ionomer thermoplastic copolymer resin based on an olefin and an α,β -unsaturated carboxylic acid without providing any particulars of the specific commercial product 'Surlyn 9910' used in the examples, such as the composition of this polymer and the presence or absence of any additives."

Additionally, some observations to the issue of inventive step were given in the annex.

V. On 5 April 2004, the Board was informed by facsimile and, on 7 April 2004, by confirmation letter, both dated 5 April 2004 and reading as follows:

"Reference is made to the summons to oral proceedings pursuant to Rule 71(1) EPC dated 29 January 2004. It is noted that oral proceedings are set for 4 May 2004 and final written submissions should be filed by 4 April 2004. We wish to inform the European Patent Office that the applicant does not intend to file any further written submissions in relation to this matter and furthermore the applicant will not be represented at the oral proceedings set for 4 May 2004 and requests that the case be decided on the basis of the facts at present before the Board of Appeal in relation to this matter.

We look forward to receiving the decision of the Board of Appeal concerning this matter in the near future."

VI. The oral proceedings were held on 4 May 2004.

Reasons for the Decision

1. The appeal is admissible.
2. In view of the information given by the Appellant in its letter of 5 April 2004, the oral proceedings were held as scheduled in accordance with Rule 71(2) EPC, in the absence of the Appellant.
3. *Article 123(2) EPC*
 - 3.1 As set out above, the Board had disagreed with the finding in the decision under appeal as regards Article 123(2) EPC and had expressed doubts as to the

compliance of any one of the requests on file with the requirements of this Article. To that end, reference is made to items 3 to 3.5 of the Annex to the summons, which is quoted in section IV, above.

3.2 Moreover, the Appellant had been informed in the Annex (item 5) that any submissions in reply to this preliminary, provisional opinion were to be made available to the Board at least one month before the oral proceedings at the latest. This time limit was *expressis verbis* acknowledged by the Appellant in the letter dated 5 April 2004 (section V, above). However, the Board was only informed that no amendments were intended and that the Appellant looked forward to receiving the decision of the Board on the basis of the facts on file.

3.3 In view of these facts, and for the reasons already given (section IV, above), the Board cannot regard the requirements of Article 123(2) EPC as having been met. Hence the Board comes to the conclusion that Claim 1 according to the Main request and each of Auxiliary requests 1 and 2 contravenes Article 123(2) EPC.

3.4 Since a decision can be made only on the basis of a request as a whole, but not on individual claims, there is no need to consider the further claims separately.

3.5 Nor is it appropriate to consider the question of inventive step, which had been the gist of the decision under appeal and of the arguments in this connection in the Statement of Grounds of Appeal, because no version of the claims is on file which meets the requirements of Article 123(2) EPC.

4. It follows that all of the above requests (section III, above) must be refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

E. Görgmaier

R. Young