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# D E C I S I O N
## of 10 June 2003

**Case Number:** T 0117/03 - 3.3.3

**Application Number:** 89118593.6

**Publication Number:** 0362872

**IPC:** C08L 67/02

**Language of the proceedings:** EN

**Title of invention:**
Polybutylene terephthalate moulding compositions with an improved flowability

**Patentee:**
SUMITOMO WIRING SYSTEMS, LTD.

**Opponent:**
GENERAL ELECTRIC COMPANY
BASF Aktiengesellschaft, Ludwigshafen

**Headword:**
-

**Relevant legal provisions:**
EPC R. 67, 89

**Keyword:**
"Wrong claim 1 in Druckexemplar of interlocutory decision"
"Correction not within the competence of formalities officers"
"Substantial procedural violation (yes)"
"Reimbursement of appeal fee (yes)"

**Decisions cited:**
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**Catchword:**
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Beschwerdekammern | Boards of Appeal | Chambres de recours

**Case Number:** T 0117/03 - 3.3.3

# D E C I S I O N
## of the Technical Board of Appeal 3.3.3
## of 10 June 2003

**Appellant:** (Opponent)
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**Appellant:** (Opponent)
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**Representative:**
-

**Respondent:** (Proprietor of the patent)
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**Representative:**
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**Decision under appeal:** **Interlocutory decision of the Opposition Division of the European Patent Office posted 2 July 2002 concerning maintenance of European patent No. 0 362 872 in amended form.**

**Composition of the Board:**

**Chairman:** R. J. Young
**Members:** P. Kitzmantel
J. H. Van Moer

## Summary of Facts and Submissions

I. Mention of the grant of European patent No. 0 362 872 in respect of European patent application No. 89 118 593.6 in the name of Sumitomo Wiring Systems, Ltd., which had been filed on 6 October 1989 claiming a JP priority of 7 October 1988, was announced on 22 December 1993.

II. Notice of Opposition requesting revocation of the patent in its entirety on the grounds of Article 100(a) and (b) EPC were filed by

- General Electric Company (Opponent I) on 17 September 1994 and

- BASF Aktiengesellschaft (Opponent II) on 21 September 1994.

III. By its interlocutory decision orally announced on 5 July 2001 and issued in writing on 2 July 2002, the Opposition Division held that, account being taken of the amendments made by the patent proprietor during the opposition proceedings, the patent and the invention to which it relates were found to meet the requirements of the EPC. The documents comprising the amended version on which this decision was based were identified as follows:

Claims 1 to 6 submitted at the oral proceedings on 5 July 2001,

Description, pages 5 to 14 of the patent specification,

Description, pages 2, 3, 3a and 4 as received on 22 October 2001 with letter of 21 October 2001, and

Drawings, No. 1 to 4 as received on 22 October 2001 with letter of 21 October 2001.

IV. Attached to the decision were documents which allegedly constituted this amended version (hereinafter "Druckexemplar").

V. Claim 1 of the "Druckexemplar" reads as follows:

"Polybutylene terephthate (PBT) moulding composition suitable for the manufacture of electrical connector housings by injection moulding and consisting of a releasing agent, a heat stabilizer and at least two PBT resins selected from two polymer groups [A] and [B] having intrinsic viscosity values $[\eta_A]$ and $[\eta_B]$ (in dl/g) of $0.70 < [\eta_A] < 0.92$ and $0.93 < [\eta_B] < 1.40$, respectively when measured at 30°C in a mixture of tetrachloroethane and phenol (weight ratio 60/40); said PBT resin(s) of group [A] being present in an amount of 95 to 50 parts by weight, based on 100 parts by weight of the total of PBT resins of groups [A] and [B]; and said PBT resin(s) of groups [A] and [B] showing a ratio of weight average molecular weight Mw to number average molecular weight Mn of about 2 after having been brought into a molten state and homogeneously blended together."

VI. This wording of Claim 1 of the "Druckexemplar" essentially differs

(i) from the wording of Claim 1 of the "Main request" attached as Annex IV to the "Minutes of the oral proceedings before the OPPOSITION DIVISION" communicated to the parties with the EPO's letter dated 10 August 2001 as well as

(ii) from the quotation of Claim 1 in the "Summary of Facts and Submissions", Section 7, of the decision under appeal

by the absence of the following underlined passages:

"Polybutylene terephthate (PBT) moulding composition ... and at least two PBT resins in pelletized form selected from two polymer groups [A] and [B] each having a ratio Mw/Mn of about 2, ...."

VII. On 29 August 2002 Opponent I (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day. The Statement of Grounds of Appeal was submitted on 7 October 2002.

Therein the Appellant draws attention to the afore-mentioned inconsistencies between the wording of Claim 1 according to the "Druckexemplar" and according to the decision under appeal and specifically complains that two amendments of Claim 1 which had been discussed in the interlocutory decision (reasons 2.1, sections B and C) were missing in Claim 1 of the "Druckexemplar".

VIII. The Appellant requests that the decision under appeal be set aside and that the "Druckexemplar" be amended in accordance with the content of the written decision.

The Appellant also requested that the appeal fee be refunded.

In addition, the Appellant stated in the Grounds of Appeal that it would withdraw its appeal if the communication of the Formalities Officer of 4 September 2002 who in the meanwhile has endeavoured to correct the incriminated mistake would be binding.

IX. In its communication of 27 February 2003 the Board *inter alia* made the following statements:

"1. ...

2. In a communication dated 4 September 2002 the formalities officer informed the parties as follows:

"Due to a clerical error a wrong set of claims has been attached to the Interlocutory decision dated 02.07.2002.
The correct claims 1-6 according to the minutes of the oral proceedings, Annex IV, are attached."

3. ...

4. In the Board's view, the error which occurred by attaching the wrong set of claims to the Opposition Division's Interlocutory decision may be corrected under Rule 89 EPC.

5. However, the power to carry out such a correction is not among the duties normally the responsibility of the Opposition divisions of the EPO which have been entrusted to formalities

officers (cf. Notice of the Vice-President of General Directorate 2 of the EPO dated 28 April 1999 (OJ EPO 1999, 504)).

6. It is therefore the intention of the Board to allow the appeal and to remit, for the purpose of this correction, the case to the Opposition Division.

7. Since this error involved a substantial procedural violation, reimbursement of the appeal fee seems to be justified.

8. The parties are invited to submit their comments within a time limit of 2 months."

X. With letter dated 25 March 2003 the Appellant accepted the procedure proposed in the Board's communication.

XI. With letter dated 14 April 2003 the Patentee (Respondent) also agreed to the Board's proposal.

The Patentee furthermore suggested that, when remitting the case back to the Opposition Division, an amended drawing sheet of Figure 3 comprising an amended sample designation should be used for replacing the corresponding sheet of drawing of the "Druckexemplar", which was defective insofar as therein "the sample has been circled with a question mark added as it was partially cut off".

XII. Opponent II has not commented on the appeal case and, particularly, has not reacted to the Board's communication within the prescribed time period.

## Reasons for the Decision

1. The appeal is admissible.

2. In view of the fact that Claim 1 of the "Druckexemplar" is different from the version of Claim 1 underlying the decision under appeal, correction of that decision under Rule 89 EPC is called for.

3. According to the reasoning set out in the aforementioned communication of the Board, a correction of this mistake by a formalities officer acting on behalf of the Opposition Division which committed the error is not possible and the respective communication of 4 September 2002 of the formalities officer is therefore without effect (cf. Section IX, items 2 and 5).

4. The appeal must therefore be allowed and the case remitted to the Opposition Division to carry out the necessary correction of Claim 1 of the "Druckexemplar".

5. This correction should be made in accordance with the version of Claim 1 of the Main request attached as Annex IV to the Minutes of the oral proceedings, this being a paper copy of the manuscript amended claims sheet which is dated and signed by the Patentee and is therefore authentic.

It would not be appropriate to rely, for the purpose of the requested correction, on the retyped citation of Claim 1 in the decision under appeal (cf. Section V) because it does not correctly repeat the passage "having intrinsic viscosity values $[\eta_A]$ and $[\eta_B]$ (in dl/g) of $0.70 < [\eta_A] < 0.92$ and $0.93 < [\eta_B] < 1.40$" of

the claim version according to Annex IV. Rather the retyped citation is defective with respect to the missing symbol "η" and the faulty presentation of "A" and "B", i.e. not in the form of subscripts to the symbol "η".

6. The inclusion into the "Druckexemplar" of a version of Claim 1 which differs from the one on which the decision under appeal is founded involves a substantial procedural violation which renders a reimbursement of the appeal fee equitable (Rule 67 EPC).

7. As regards the Patentee's request for amendment of the drawing sheet of Figure 3, the admission of this correction is to be dealt with by the Opposition Division in accordance with the requirements of the EPC. It appears to the Board that the replacement in the "Druckexemplar" of the drawing sheet of Figure 3 by a sheet corresponding to the one as originally filed and as eventually comprised by the patent as granted (i.e. without the circle around the (not clearly legible) sample designation and without the nearby question mark) is not objectionable. It remains, however, to be decided whether the amendment of the sample designation itself as requested by the Patentee complies with Rule 88 EPC.

## 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 with the order to correct the "Druckexemplar" attached to the interlocutory decision of 2 July 2002 by amending Claim 1 in accordance with its version as submitted as main request (Annex IV) at the oral proceedings on 5 July 2001.

3. The appeal fee is to be reimbursed.

The Registrar: The Chairman:

E. Görgmaier R. Young