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**Datasheet for the decision
of 12 February 2008**

Case Number: T 1429/06 - 3.2.06

Application Number: 98940444.7

Publication Number: 0941209

IPC: B68G 1/00

Language of the proceedings: EN

Title of invention:
Filling comprising a polyester fibre

Patentee:
Trendsetter Home Furnishings Limited

Opponent:
Lenzing Aktiengesellschaft

Headword:

-

Relevant legal provisions:
EPC Art. 56

Relevant legal provisions (EPC 1973):

-

Keyword:
"Late-filed documents - not admitted"
"Inventive step - no"

Decisions cited:

-

Catchword:

-



Case Number: T 1429/06 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 12 February 2008

Appellant: Trendsetter Home Furnishings Limited
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 27 July 2006
revoking European patent No. 0941209 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. L. de Crignis
K. Garnett

Summary of Facts and Submissions

I. European patent No. 0 941 209, granted on application No. 98940444.7, was revoked by the opposition division by decision announced during the oral proceedings on 4 July 2006 and posted on 27 July 2006.

II. The decision of the opposition division was based on the finding that in the main request (patent as granted) the subject-matter of claim 13 extended beyond the content as originally filed (Art. 100(c) EPC) and that the subject-matter of claim 1 did not involve an inventive step when starting from either

D9 DE-A-44 45 085 or

D3 WO-A-89/06714

and combining it with the teaching of either

D4 "Einsatz von Lyocellfasern in Vliesstoffen",
Macfarlane K., Technische Textilien, pages 173 -
175, August 1997;

D5 "Spunlace-Nonwovens aus Lenzing Lyocell", Lotz C.,
Technische Textilien, page 143, August 1997; or

D6 "Lyocell Staple Fibre for Industrial Applications"
(Speech), Woodings C., 23 May 1996.

In auxiliary request 1, claim 13 was deleted. The deletion of this claim, however, did not overcome the objections as regards lack of inventive step with regard to the subject-matter of claim 1, which was unaltered.

III. On 13 September 2006 the Appellant (patent proprietor) both filed a notice of appeal against this decision and paid the appeal fee. The statement of grounds of appeal was filed on 30 November 2006.

IV. In a communication dated 10 October 2007 sent in preparation for oral proceedings according to Article 11(1) of the Rules of Procedure of the Boards of Appeal, the Board gave its preliminary opinion on the case, which coincided with respect to inventive step with the decision of the opposition division.

V. Oral proceedings were held on 12 February 2008. The Appellant requested that the decision under appeal be set aside and that the European patent be maintained on the basis of the main request alternatively the first auxiliary request filed with letter dated 10 January 2008, alternatively on the basis of the second auxiliary request filed during the oral proceedings. Furthermore, at the beginning of the oral proceedings the appellant submitted documents EP-A-1 067 227 and EP-B-1 067 227.

It was argued that these documents should be admitted because of their relevance.

The Respondent requested that the appeal be dismissed.

Claim 1 as granted reads:

"A padding, stuffing or filling material comprising a non-woven blend including polyester filling fibre characterised in that the blend includes a cellulosic fibre obtained by an organic spinning process".

Claim 1 of the first auxiliary request reads:

"A padding, stuffing or filling material comprising a non-woven blend including polyester filling fibre characterised in that the blend includes Lyocell".

Claim 1 of the second auxiliary request reads:

"A padding, stuffing or filling material consisting of a non-woven blend consisting of polyester filling fibre and a cellulosic fibre, characterized in that the cellulosic fibre is Lyocell."

At the beginning of the oral proceedings, the chairman pointed out to the appellant that the documents filed with letter of 10 January 2008 were late-filed, and that there had been no explanation as to why they had been late-filed or were relevant. Therefore, the Board intended not to admit them into the proceedings.

VI. In support of its requests the appellant essentially relied upon the following submissions:

EP-A-1 067 227 and EP-B-1 067 227, although only filed at the start of the oral proceedings, should be admitted into the proceedings. While they did not constitute prior art they showed that a skilled person had selected another solution when starting from the same prior art, namely D9, and demonstrated that the skilled person would have selected viscose fibres rather than the fibre according to claim 1 by way of replacement of the ramie fibres for improving the blend for a filling material based upon polyester fibres. Since the vital question in the context of inventive step was whether the skilled person would have arrived at the claimed invention starting from the closest

prior art, and not whether he could have done so, these documents, being evidence of what a skilled person had actually done, were compelling evidence of what the skilled person would have done, starting from the same prior art and faced with the same problem. In this way, the documents provided a highly unusual but wholly objective piece of evidence, on the basis of which the Board was virtually compelled to reach a conclusion favourable to the appellant. The reason why the documents had been filed at such a late stage of the proceedings was because the appellant's representative had only very recently discovered them. This was understandable, as they had not been thrown up by the usual type of investigation, not constituting prior art.

D9 disclosed a blended fibre non-woven which was suitable for use as a filling material. It represented a suitable starting point for the assessment of inventive step. The fibres blended for the non-woven were polyester and ramie fibers. Ramie fibers as naturally occurring cellulosic fibres were very different from Lyocell cellulosic fibres and the skilled person would not look for artificially produced fibres to replace the natural ramie fibres.

D4 referred to the use of Lyocell fibres in non-woven webs. However, D4 did not disclose the use of Lyocell as a filling material but referred to the use of Lyocell in various other articles. Hence, D9 and D4 related to different types of articles. Moreover, D4 did not refer to breathability or water vapour absorption but only to water absorption. Nor was there any suggestion that the teachings of D9 and D4 should be combined.

Lyocell fibres had been available from the early 1980s and the time gap between their availability and their claimed use in the patent also pointed to an inventive step. The skilled person could have considered such a combination but there was no suggestion that he would have selected such a combination.

The above arguments concerned the subject-matter of claim 1 of the main request but were equally applicable to the subject-matter of claim 1 of auxiliary request 1.

With regard to auxiliary request 2, the subject-matter of its claim 1 was limited to an article solely consisting of cellulose and polyester. Such an article was not disclosed anywhere.

VII. The Respondent essentially argued:

The two documents submitted at the beginning of the oral proceedings were late-filed and should not be allowed into the proceedings. They did not constitute prior art and were not of greater relevance than any of the cited documents.

With regard to the subject-matter of claim 1 of the main request and of the first auxiliary request, identical arguments and objections applied. When assessing inventive step, D9 was an appropriate starting point. It referred to a padding, stuffing or filling material being a nonwoven comprising polyester and natural cellulosic fibres. Additionally, D9 emphasized the better characteristics of polyester fibres in relation to transport of humidity and the

better characteristics of cellulosic fibres in relation to storage of humidity, and highlighted that due to these properties the combination of these fibres resulted in an improved article.

The skilled person would not limit his consideration to "natural" cellulosic fibres. D4 suggested the use of Lyocell fibres in nonwovens. Lyocell was a cellulosic fibre with improved strength, absorbency and fluid transport characteristics. Therefore, it was obvious for the skilled person to replace the "natural" cellulosic ramie fibre by a more sophisticated cellulosic fibre if such an improvement in the fibre's properties was relevant.

The general characteristics of cellulosic fibres with respect to absorbency of water vapour were well-known and they did not change depending on whether a ramie fibre or a Lyocell fibre was concerned.

Lyocell fibres were commercially available in quantity only in the late 1990s so that only then would the skilled person have had a real possibility of testing fibre combinations on the necessary scale.

D4 referred on page 175, left column, to a blend of Lyocell with polyester alone, as it referred to Lyocell with either polyester **or** with polyamide. Furthermore, D9 referred to a blend consisting of polyester and ramie, as no other compounds were specified and the specific percentages indicated left no room for other fibres. Therefore, the subject-matter of auxiliary request 2 also lacked an inventive step.

Reasons for the Decision

1. The appeal is admissible.
2. *Late-filed documents*

EP-A-1 067 227 and EP-B-1 067 227 have a filing date of 7 July 1999 and a publication date of 10 January 2001. Hence, and as the appellant was himself at pains to emphasise, these documents do not constitute prior art. These documents show that one inventor, starting from D9, and faced with the same problem as in the patent in suit, came up with a blend of fibres different from the blend claimed in the patent in suit. They also show that a European patent was obtained for the blend claimed therein. These documents thus provide some evidence about what one person did when starting from D9 and faced with the same problem as in the patent in suit. However, the documents by themselves throw no light on whether or not the present invention involved an inventive step. The appellant's argument ignores the fact that a particular problem may have more than one solution, each of which may be obvious (or indeed inventive). Evidence contained in documents such as these about one particular solution thus sheds no light on whether or not some other solution was inventive. The examination of inventive step is always specific to the particular case under consideration.

These late-filed documents are therefore irrelevant to the present proceedings and are not admitted into the proceedings (Article 114(2) EPC).

3. *Inventive step - Main request*

3.1 The Board agrees with the view of the opposition division and of the parties according to which document D9 represents the closest prior art. D9 discloses a blend of ramie (cellulosic) fibres and polyester fibres for use in a padding, stuffing or filling material (see title, col. 1, l. 23 - 27).

3.2 The feature distinguishing the subject-matter claimed in claim 1 of the patent in suit from the disclosure of D9 is the use of cellulosic fibres which are "obtained by an organic spinning process" and which in fact, as was stated by the appellant during the oral proceedings, concern Lyocell fibres.

3.3 D9 emphasizes the capability of ramie fibres to absorb humidity and refers to this capability in particular as advantageous when used in nonwoven webs consisting of ramie and polyester fibres (col. 1, l. 33 - 60) because the ramie fibres can store the humidity until it is transported and removed via the polyester fibres.

3.4 The patent in suit (paragraphs [0004] and [0006]) discloses as the problem to be solved the improvement of the breathability of synthetic fibrefill. The specific function of the claimed non-woven blend is to provide improved moisture transport and absorption properties combined with a higher degree of thermal insulation to the claimed padding, stuffing or filling material.

3.5 D9 already solves this problem via the combination of cellulosic (ramie) fibres with polyester fibres. Thus, when assessing inventive step, the objective technical problem to be solved by the subject-matter of claim 1 has to be redefined as was done by the opposition division, namely to find an alternative or better solution.

3.6 The Board also agrees with the opposition division that D4 especially encourages the skilled person to examine Lyocell.

D4 (page 173, left column, last paragraph) refers to the absorbent characteristics of Lyocell cellulosic fibres. Furthermore, it emphasizes (page 174, right column, second paragraph and page 174, left column, second paragraph) the possibility of blends of Lyocell with "synthetics" and highlights that (D4, page 175, left column, third paragraph) Lyocell fibres can be incorporated in blends with polyester, thus obtaining the required tensile strength, suppleness, porosity and absorbency in hydro-entangled nonwovens. There is no specific reference to the use of Lyocell as a filling material. However, fleece material made of the blend is at least disclosed which is clearly suitable for the use of the fleece material cited in D9 (col. 1, l. 23 to 27) as a filling material. D4 specifically encourages the skilled person to use Lyocell fibres as a replacement for the ramie fibres as they show all the relevant advantageous properties for a filling material. Hence, the suitability of Lyocell fibres as an alternative for the ramie fibres is disclosed via their characteristics.

Thus, the skilled person, noting that the cellulosic fibres referred to in D4 in the form of the Lyocell fibres have the desired properties, would choose them for improving strength, suppleness and absorbency, and no inventive skills for arriving at the subject-matter of claim 1 would be necessary.

- 3.7 The appellant submitted that essentially it was the breathability that was relevant and the good absorbency properties of Lyocell would be irrelevant in this respect.

In this regard it is to be noted that the breathability of the filling material is dependent on the interaction of the polyester and cellulosic fibres, which is well highlighted in D9 where it is explained that the cellulosic fibres generally absorb the H₂O molecule (storage of humidity) and the polyester fibres are responsible for its transportation. Thus, generally, the characteristics of cellulosic fibres with regard to the uptake, storage and transportation of moisture and humidity are well-known in the art and explained in D9. Thus, the skilled person would have the requisite knowledge with respect to the respective properties of cellulosic fibres and polyester fibres.

- 3.8 The appellant's further argument about the delay of time between the Lyocell fibres being patented and the recognition that such a nonwoven blend was advantageous for filling materials is not persuasive since it is not supported by any evidence. In this respect the opponent's explanation according to which Lyocell fibres were commercially available to the necessary extent only in the late 1990s was not disputed by the

appellant and there may be many secondary reasons (such as cost) which would be equally important explaining the delay, if any.

3.9 Hence, the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

4. *Inventive step - first auxiliary request*

The subject-matter of claim 1 of the first auxiliary request refers to Lyocell fibres **which are** cellulosic fibres obtained by an organic spinning process. Only such fibres were considered with regard to claim 1 of the main request as D4 refers to Lyocell fibres. The conclusion drawn for the subject-matter of the main request thus applies simultaneously for the subject-matter of the first auxiliary request.

5. *Second auxiliary request*

5.1 Amendments

The subject-matter of claim 1 was amended such that the padding, stuffing or filling material was limited to a non-woven blend consisting solely of a blend of polyester fibres and Lyocell fibres.

No formal objections were raised to this request and as it is not allowable for the reason of lack of inventive step of its claim 1 (see below), it is not necessary to reach any conclusion on its formal admissibility on this issue.

5.2 Inventive step

D9 refers (col. 1, l. 60 - 64) to a nonwoven blend consisting of 50 to 70% polyester fibres and, complementarily, 30 to 50% ramie fibres. Hence, D9 refers to an article composed of a nonwoven blend consisting of solely these two fibres. D4 refers (page 175, left column) to nonwoven blends of Lyocell with either polyester or polyamide. Hence, again no other fibres are considered for these nonwoven webs.

Accordingly, when starting the assessment of inventive step from D9 and replacing the ramie fibres by Lyocell fibres, no suggestion to use further additional fibres is available. Therefore, the conclusions reached for the subject-matter of claim 1 of the main request and of the first auxiliary request apply as well to this request.

Hence, the subject-matter of claim 1 of the second auxiliary request does not involve an inventive step (Article 56 EPC). Accordingly, the appeal will be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

S. Sánchez Chiquero

P. Alting van Geusau