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**Datasheet for the decision  
of 17 January 2013**

**Case Number:** T 1462/08 - 3.3.03

**Application Number:** 99964831.4

**Publication Number:** 1159350

**IPC:** C08L 23/04, C08F 10/02

**Language of the proceedings:** EN

**Title of invention:**  
A multimodal polymer composition

**Patent Proprietor:**  
Borealis Technology Oy

**Opponent:**  
Basell Polyolefine GmbH

**Headword:**  
-

**Relevant legal provisions:**  
EPC R. 101(1)

**Relevant legal provisions (EPC 1973):**  
-

**Keyword:**  
"Admissibility of the appeal: no"

**Decisions cited:**  
T 0382/96, T 0774/97, T 0165/00, T 0349/00, T 0509/07,  
T 0613/07

**Catchword:**  
-



Case Number: T 1462/08 - 3.3.03

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.03  
of 17 January 2013

**Appellant:** Basell Polyolefine GmbH  
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**Respondent:** Borealis Technology Oy  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 30 May 2008  
rejecting the opposition filed against European  
patent No. 1159350 pursuant to Article 101(2)  
EPC.

**Composition of the Board:**

**Chairman:** B. ter Laan  
**Members:** O. Dury  
C.-P. Brandt

## Summary of Facts and Submissions

I. The appeal by the opponent lies against the decision of the opposition division posted on 30 May 2008 to reject the opposition filed against European patent No. EP 1 159 350, based on application No. 99 964 831.4.

II. The application as filed contained 15 claims of which claims 1 and 14 read as follows:

"1. A multimodal polymer composition for fibre optic cables, characterised in that it comprises a multimodal polyethylene with a density of 0.920-0.965 g/cm<sup>3</sup> and a viscosity at a shear stress of 2.7 kPa ( $\eta_{2.7\text{kPa}}$ ) of at least 150 kPa.s, said multimodal polyethylene comprising a low molecular weight (LMW) ethylene homo- or copolymer fraction and a high molecular weight (HMW) ethylene copolymer fraction, said multimodal polyethylene composition having a weight ratio of the LMW fraction to the HMW fraction of (35-55):(65-45)."

"14. A fibre optic cable, characterised in that the cable has a fibre supporting element selected from slotted cores and buffer tubes, and that the fibre supporting element consists of a multimodal polymer composition according to any one of claims 1-13."

Claims 2-13 and 15 were dependent claims directed to embodiments of claims 1 and 14, respectively.

III. The granted patent was based on 15 claims corresponding to claims 1-15 as originally filed, claim 1 being amended by indicating that the viscosity at a shear

stress of 2.7 kPa ( $\eta_{2.7\text{kPa}}$ ) was determined "at a temperature of 190°C".

- IV. A notice of opposition against the patent was filed on 16 November 2004, in which the revocation of the patent in its entirety was requested on the grounds of Art. 100(a) EPC (lack of novelty as well as lack of an inventive step) and Art. 100(b) EPC.
- V. The decision under appeal was based, *inter alia*, on the following documents:

D1: WO 97/03124

D2: EP-B1-0 517 868

D3: EP-B1-0 302 242

In its decision the opposition division held that the patent in suit disclosed the invention in a manner sufficiently clear and complete for it to be carried out. Regarding novelty, it was considered that none of the documents cited disclosed a multimodal polymer composition exhibiting a viscosity at a shear stress of 2.7 kPa.s at a temperature of 190°C according to granted claim 1. An inventive step was further acknowledged starting from D1 as the closest prior art, in particular considering that none of the documents cited either covered the technical field of the patent in suit, namely supporting elements for fibre optical cables, or pointed to the influence of the shear stress viscosity on the properties of multimodal polyethylene compositions.

- VI. On 25 July 2008, the opponent (appellant) lodged an appeal against the above decision. The prescribed fee

was paid on the same day. With the statement setting out the grounds for the appeal, received on 6 October 2008, the appellant requested that the patent be revoked and submitted an experimental report:

D9: "Versuchsbericht von Dr. H-F. Enderle"

The US counterpart of D3 was further filed together with a letter dated 29 November 2012.

VII. By letters of 16 April 2009 and 17 June 2009, the respondent (patent proprietor) filed comments on the statement of grounds of appeal and requested that the appeal be held inadmissible. Alternatively it was requested to maintain the patent in amended form according to either the main request or any of auxiliary requests 1 and 2 filed therewith.

By letter of 29 November 2012, the respondent filed a new auxiliary request 1, renumbering auxiliary requests 1 and 2 then on file to auxiliary requests 2 and 3, respectively. Additional arguments were brought forward with letter of 24 December 2012.

The claims of those requests were directed to embodiments of claims 1 and 14 as granted and concerned in particular a multimodal polymer composition characterised by a weight ratio of the LMW fraction to the HMW fraction within the range (35-55):(65-45).

VIII. In a communication issued by the Board on 8 October 2012 accompanying the summons to oral proceedings, it was *inter alia* pointed out that the appeal appeared to be admissible since the statement of grounds of appeal

contained a reasoned objection relating to the novelty of claims 1 and 2 of the patent in suit over example 9 of D3, in view of D9. It was further indicated that since the statement of grounds of appeal did not indicate why the other parts of the decision would be wrong (Art. 100(b) EPC, Art. 100(a) EPC in respect of novelty over prior art other than example 9 of D3 and Art. 100(a) EPC in respect of Art. 56 EPC), any arguments relating to those issues would underlie the stipulations of Art. 13 of the Rules of Procedure of the Boards of Appeal (RPBA).

IX. Oral proceedings were held on 17 January 2012 in the presence of both parties.

After having given arguments regarding novelty with regard to example 9 of D3, the appellant admitted that, as argued by the respondent, the multimodal polyethylene prepared in D9 had a LMW:HMW of 61:39, which was outside the range defined in claim 1 of the patent in suit and of each of the requests of the respondent. Therefore the appellant withdrew its argument regarding a lack of novelty over D3.

The chairman of the Board informed the parties of the Board's conclusion that the objections of the appellant on the opposition grounds according to Art. 100(b) EPC and Art. 100(a) EPC relating to Art. 56 EPC were considered to be not substantiated and that after withdrawal of the argument regarding lack of novelty over D3 no argument on the ground of Art. 100(a) EPC relating to Art. 54 EPC was on file any more, so that that opposition ground had to be regarded as unsubstantiated as well. The chairman also pointed out

the consequences of inadmissibility of the appeal. The parties were then asked to take position regarding the admissibility of the appeal under the given circumstances.

- X. The appellant's arguments relevant for the present decision may be summarised as follows:

*Admissibility of the appeal*

- (a) It was confirmed during the oral proceedings that no objection regarding a lack of sufficient disclosure was raised.
- (b) The sole argument regarding lack of novelty that had been raised in the statement setting out the grounds of appeal concerned example 9 of D3 in the light of the data contained in D9. However, since the appellant had to admit during the oral proceedings that D9 showed Example 9 of D3 to be not novelty destroying, that argument was withdrawn during the oral proceedings.
- (c) Although no reasoning on inventive step had been provided in the statement of grounds of appeal, arguments were given in the submission dated 29 November 2012 (bottom of page 2; page 3). Reference was further made to the objection of lack of inventive step raised during the opposition proceedings (e.g. letter of 12 December 2007, section II; minutes of the oral proceedings before the opposition division). Therefore, the objection regarding inventive step was substantiated.

- (d) Considering that the objection of lack of inventive step was substantiated, the appeal was admissible.

XI. The respondent's arguments relevant for the present decision may be summarised as follows:

*Admissibility of the appeal*

- (a) The objections of the appellant regarding Art. 100(b) EPC and Art. 100(a) EPC / Art. 56 EPC did not fulfil the requirements of Art. 12(2) and 13 of the Rules of Procedure of the Boards of Appeal. In particular, the appellant had not explained in the statement of grounds of appeal why the contested decision would be wrong. Also in reply to the communication of the Board, which already pointed out those deficiencies, did the appellant fail to give such reasons. Arguments submitted for the first time at the oral proceedings would take the respondent by surprise and should not be admitted. Under such circumstances, the appeal contained no valid substantiation regarding either Art. 100(b) EPC or Art. 100(a) EPC together with Art. 56 EPC.
- (b) The sole objection that had been substantiated by the appellant related to novelty over example 9 of D3, as allegedly shown by D9. Considering that that objection was part of the statement of grounds of appeal, it could be admitted that the appeal was admissible when it was filed. The substantiation of the objection of lack of novelty



was, however, withdrawn during the oral proceedings, so that the sole substantiated objection on file was removed. In the absence of any substantiated objection, the appeal was inadmissible.

- XII. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent No. 1 159 350 be revoked.

The respondent (patent proprietor) requested the maintenance of the patent on the basis of the main request filed with letter of 17 June 2009, or alternatively on the basis of the first auxiliary request filed with letter dated 29 November 2012, or on the basis of any of auxiliary requests 2 or 3, filed with letter of 17 June 2009 as auxiliary requests 1 and 2.

- XIII. The Board announced its decision at the end of the oral proceedings.

## **Reasons for the Decision**

### *Admissibility of the appeal*

1. According to Rule 101(1) EPC in combination with Art. 108 EPC and Rule 99(2) EPC, in order for the appeal to be admissible, the appellant shall indicate in the statement of grounds of appeal the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.

2. In the present case, the opposition division rejected the opposition because none of the grounds according to Art. 100(a) EPC in relation to both novelty and inventive step and Art. 100(b) prejudiced the maintenance of the patent in suit.

2.1 Art. 100(b) EPC and Art. 100(a) EPC in respect of Art. 56 EPC

2.1.1 Regarding the opposition ground according to Art. 100(b) EPC, the statement of grounds of appeal does not expressly address the issue of sufficiency of disclosure. In that respect, the appellant merely made reference on page 1 to "his written submissions of November 15, 2004, December 12, 2007 which are maintained in its entirety for the appeal proceedings" and to "his objections which he has presented during the oral proceedings of April 24, 2008" (i.e. before the opposition division). However, according to established case law of the Boards of Appeal, the reference to a party's own submissions can not replace an explicit account of the legal and factual reasons for the appeal and does not as a rule clearly indicate which grounds of the decision were regarded as mistaken, and for which reasons (see e.g. decisions T 349/00: Reasons, point 2; T 165/00: Reasons, points 2-3; T 613/07: Reasons, point 2). The Board sees no reason to depart from that view in the present case.

Although it is acknowledged on page 1 of the submission dated 29 November 2012 that "The introduction of the melt strength parameter in the claims presently on file also attracts some considerations related to enabling

disclosure Article 100(b) EPC" and on page 2 that "Otherwise it should be concluded that the opposed patent fails to indicate all the essential features required to achieve the desired melt strength (lack of enabling disclosure)", these remarks do not explain why the conclusions of the opposition division in that respect would be wrong. The appellant further confirmed during the oral proceedings that he had no objection regarding Art. 100(b) EPC. Therefore, there is no substantiation for an objection under Art. 100(b) EPC.

2.1.2 Regarding the opposition ground according to Art. 100(a) EPC in respect of Art. 56 EPC, in the statement of grounds of appeal the appellant merely referred to submissions filed during the first instance proceedings. For the same reasons as given above regarding sufficiency of disclosure (see point 2.1.1), the objection of lack of inventive step mentioned in the statement of grounds of appeal can therefore not be regarded as substantiated.

Also in the appellant's letter dated 29 November 2012, after the Board had pointed out the deficiencies in the statement setting out the grounds of appeal, only a general remark was made that the subject-matter claimed did not result in any effect over the prior art (page 2: "As regards technical effect/..." to page 3, "... is demonstrated") and it was concluded that "the selected ranges do not provide a technical effect and should be considered an arbitrary specimen of the prior art, for instance with respect to D1 or D3".

Since that argument had not been filed together with the statement of grounds of appeal - contrary to the

requirements of Art. 12(2) RPBA that the statement of grounds of appeal shall contain a party's complete case -, the admission to the proceedings of the objection of lack of inventive step underlies the stipulations of Art. 13(1) RPBA.

Also in its letter of 29 November 2012 the appellant did not explain why the reasoning and the conclusions of the opposition division with regard to inventive step would be wrong. No argument was submitted in relation to the findings of the opposition division that none of the documents cited in the proceedings covered the technical field of the patent in suit, namely supporting elements for fibre optic cables, or pointed to the influence of the shear stress viscosity on the properties of multimodal polyethylene compositions.

In addition, there still was no complete reasoning in relation to inventive step, e.g. whether or not the appellant intended to use the problem-solution approach, the method of assessment of inventive step which usually prevails in EPO proceedings.

With regard to the "selected ranges" indicated in the letter dated 29 November 2012, it is neither clear which ranges are meant, nor to which document(s) and which passage(s) thereof reference is made. Also, the presence of a technical effect over the prior art is not mandatory in order to support an inventive step, as concluded in the contested decision and according to established jurisprudence of the EPO. Hence, also that argument of the appellant does not explain why the

conclusions of the opposition division in respect of inventive step would be wrong.

Similarly, no argument was submitted in relation to the amendments of the claims made during the appeal proceedings. Citing, during the oral proceedings before the Board, passages from a submission dating from 12 December 2007 cannot overcome those deficiencies.

Therefore, the arguments regarding a lack of inventive step submitted by letter of 29 November 2012 still do not clearly indicate why the contested decision is alleged to be incorrect, nor do they clearly identify the facts intended to be relied upon. The respondent and the Board cannot be expected to make their own investigations in order to assess the merit of the appeal.

Finally, to accept the presentation of any argumentation, be it complete or not, at such a late stage as the oral proceedings, would not comply with the requirements of Art. 12(2) RPBA and would be both unfair to the respondent as well as go against the need for procedural economy.

In view of the above, no argument relating to Art. 56 EPC submitted for the first time at the oral proceedings before the Board is admitted to the proceedings and hence is considered (Art. 13(1) RPBA).

2.1.3 Under such circumstances, no objection under Art. 100(b) EPC or Art. 100(a) EPC in respect of Art. 56 EPC can be considered as having been substantiated.

- 2.2 Art. 100(a) EPC having regard to Art. 54 EPC
- 2.2.1 Concerning the opposition ground according to Art. 100(a) EPC / Art. 54 EPC, in the statement of grounds of appeal the appellant substantiated an objection of lack of novelty with regard to example 9 of D3 in view of D9.
- 2.2.2 The EPC contains no provision concerning partial admissibility of an appeal (T 382/96: section 1; T 774/97: end of section 1.1; T 509/07: section 1.4). As a consequence, since the statement of grounds of appeal contained at least one reasoned objection regarding lack of novelty, the appeal as a whole was originally admissible.
- 2.2.3 During the oral proceedings the appellant admitted that the polymer composition prepared in D9 exhibited a ratio LMW:HMW of 61:39, which was outside claim 1 of the patent in suit and of each of the requests of the respondent and, therefore, withdrew the sole argument supporting the objection of lack of novelty. The appellant further confirmed that he had no other arguments regarding Art. 100(a) EPC / Art. 54 EPC.
- 2.2.4 Since the sole argument submitted regarding lack of novelty was withdrawn, that opposition ground lost its substantiation.
3. As a result, the appeal contained no substantiation anymore regarding any of the opposition grounds on which the appealed decision was based, contrary to the requirements of Rule 99(2) EPC.

4. The parties were made aware by the Board of the possible consequences in the present case of the result of the withdrawal by the appellant of the sole argument substantiating lack of novelty (see section IX, second paragraph above). Their right to be heard in that matter was, thus, safeguarded (Art. 113(1) EPC).
  
5. According to EPO case law, the admissibility of an appeal may be assessed *ex officio* at every stage of the appeal proceedings (see T 15/01, published in OJ EPO, 2006, 153: Reasons, point 1; Joos/Schmitz in Singer/Stauder, EPÜ, 6. Auflage, Art. 110, Rdn 9: "Die Zulässigkeitsvoraussetzungen müssen während des gesamten Verfahrens gegeben sein."). Hence, the Board is empowered to assess, also during the oral proceedings, whether under the given circumstances the appeal is still admissible.
  
6. The requirements of Rule 99(2) not being met, the appeal has to be rejected as inadmissible (Rule 101(1) EPC).
  
7. The appeal being inadmissible, no request filed during the appeal proceedings by the respondent/patent proprietor (see section VII above) can be considered.

**Order**

**For these reasons it is decided that:**

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

E. Görgmaier

B. ter Laan