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

Case Number: T 1651/10 - 3.3.09
Application Number: 04764859.7
Publication Number: 1664162
IPC: C08J 5/18, B29D 7/01
Language of the proceedings: EN

Title of invention:
Polypropylene blown film

Patent Proprietor:
Borealis Technology Oy

Opponent:
TOTAL PETROCHEMICALS RESEARCH FELUY S.A.
Industrial Property

Headword:
-

Relevant legal provisions:
EPC Art. 113(2)
EPC R. 103(1)(a)

Keyword:
"Revocation of European patent in consequence of patentee's withdrawal of his approval to the text of the patent"
"Reimbursement of the appeal fee due to substantial procedural violation - no"

Decisions cited:
T 0073/84, T 0094/84, T 0186/84, T 0157/85, T 0243/96,
T 0248/00, T 1655/07

Catchword:
-



Case Number: T 1651/10 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 17 June 2013

Appellant: TOTAL PETROCHEMICALS RESEARCH FELUY S.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted
4 June 2010 concerning maintenance of the
European patent No. 1664162 in amended form.**

Composition of the Board:

Chairman: W. Sieber
Members: M. O. Müller
K. Garnett

Summary of Facts and Submissions

I. This decision concerns the appeal by the opponent against the interlocutory decision of the opposition division that European patent No. 1 664 162 as amended met the requirements of the EPC.

II. On 26 July 2010, the opponent (hereinafter: "the appellant") filed a notice of appeal against the above decision and paid the prescribed fee on 28 July 2010. A statement setting out the grounds of appeal was filed on 14 October 2010.

The appellant requested that the decision under appeal be set aside and the patent be revoked. Moreover, the reimbursement of the appeal fee was requested. Oral proceedings were requested unless the opposed patent was revoked entirely.

III. With its letter of 14 April 2011, the proprietor (hereinafter: "the respondent") filed a response to the appeal.

The respondent requested that the appeal be dismissed. Should the board not be minded to grant this request, oral proceedings were requested. First, second, third and fourth auxiliary requests were also filed with the response.

IV. With its letter of 13 July 2012, the appellant filed further observations.

V. With its communication of 5 October 2012, the board summoned the parties to oral proceedings to be held on

14 May 2013, later rescheduled to 27 June 2013 upon request of the respondent.

VI. With its letter of 13 March 2013, the respondent informed the board as follows:

"The EPO and the Technical Board of Appeal are herewith informed that the patentee no longer approves the text in which the patent was granted. All auxiliary requests filed are herewith withdrawn. No other auxiliary request will be filed."

VII. In its communication of 4 April 2013, the board explained that in view of the respondent's letter, the patent would have to be revoked. The only outstanding issue therefore appeared to be the appellant's request for reimbursement of the appeal fee, which, in the board's preliminary view, was likely to be refused. The appellant was asked to inform the board whether it maintained its request for oral proceedings, which in the circumstances would be confined to the question of whether the appeal fee should be reimbursed.

VIII. With its letter dated 21 May 2013, the appellant withdrew its request for oral proceedings.

IX. By communication of 24 May 2013, the summons to oral proceedings were cancelled.

X. As regards the reimbursement of the appeal fee, the appellant's arguments can be summarised as follows:

The appeal fee should be reimbursed since the decision of the opposition division not to admit document F5b

into the proceedings constituted a substantial procedural violation as the opponent's right to be heard pursuant to Article 113(1) EPC was violated. F5b had not been filed late in line with decision T 94/84, wherein a German translation filed during the oral proceedings was admitted into the proceedings. Furthermore the opposition division should have considered this document in order to evaluate its *prima facie* relevance. Finally it was unreasonable not to admit a human translation when a machine translation was challenged.

Reasons for the Decision

1. The appeal is admissible.
2. Article 113(2) EPC requires that the EPO may decide upon the European patent only in the text submitted to it, or agreed by the proprietor of the patent.

Agreement cannot be deemed to be given if the proprietor, without submitting an amended text, expressly states that he no longer approves the text of the patent as granted or previously amended.

In such a situation a substantive requirement for maintaining the patent is lacking and the proceedings are to be terminated by a decision ordering revocation, without going into the substantive issues (see eg decisions T 73/84, OJ EPO 1985, 241; T 186/84, OJ EPO 1986, 79; T 157/85 of 12 May 1986 and T 1655/07 of 10 June 2009, both not published in OJ EPO).

3. The only outstanding issue thus is the alleged substantial procedural violation as regards the non-admittance of F5b and the related request of the appellant for reimbursement of the appeal fee.
 - 3.1 As the appellant withdrew its request for oral proceedings, this issue can be decided without holding oral proceedings.
 - 3.2 The appeal fee shall be reimbursed where the board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation (Rule 103(1)(a) EPC). The appellant's case is that a substantial procedural violation occurred because its right to be heard under Article 113(1) EPC was infringed: relevant evidence (F5b) was wrongly excluded by the opposition division. It has therefore to be examined whether the decision of the opposition division not to admit F5b constitutes a substantial procedural violation.
 - 3.3 The appellant filed F5 and a partial English language translation F5a with the notice of opposition and argued that the subject-matter of claim 1 lacked novelty in view of F5. With letter of 30 April 2010, ie four days prior to the oral proceedings before the opposition division, a complete English language translation F5b was filed by the appellant. During the oral proceedings on 4 May 2010, the opposition division did not admit this translation into the proceedings.
 - 3.4 As F5b was only submitted four days before the oral proceedings, it was clearly filed late. It was therefore within the discretionary power of the

opposition division whether or not to admit this document into the proceedings (Article 114(2) EPC).

3.5 As set out in T 248/00 of 17 February 2004 (not published in OJ EPO; point 5.2.2), a discretionary decision of not admitting a late submission constitutes a procedural violation only if the discretion is exercised in the wrong way, ie if the discretion is based on inappropriate ("*sachwidrigen*") or arbitrary considerations.

3.6 In the present case, the opposition division did not admit F5b into the proceedings on the basis of the following considerations (second paragraph of point 14 of the Reasons of the decision):

"Regarding the translation F5b, filed by the opponent with his Telefax of 30.04.2010, it was detected during the oral proceedings that Table 2 of F5b comprises a contradiction to the previous filed translation F5a (compare numbering of the comparative examples in Table 2). Because of the doubts regarding the technical correctness of F5b, it was decided not to introduce this document into the procedure according to Article 114 (2) EPC."

3.7 It is not disputed by the appellant that there is a discrepancy between the numbering of the comparative examples in table 2 of F5a and F5b. This implies that either F5a or F5b contains an error. The appellant argues that the error was in F5b and it could have easily been corrected by the reader. Whether or not this is the case is irrelevant since it cannot be said that it was unreasonable for the opposition division to

have had doubts as to the correctness of the translation F5b.

The presence of doubts as to the correctness of the content of a document put into question its *prima facie* relevance: it could not be determined whether its contents were accurate or not. As acknowledged by the appellant itself, *prima facie* relevance is one of the criteria to be applied when deciding on the admittance of a late-filed document. The opposition division's considerations that led to the non-admittance of F5b were thus based on the correct criterion and were therefore neither inappropriate nor arbitrary. The opposition division's discretionary decision hence does not constitute a substantial procedural violation.

- 3.8 The appellant has referred to decision T 94/84 (OJ EPO 1986, 337; point 10). There, a document in Japanese had been filed with the notice of opposition but the opposition division refused to admit a German translation of it filed for the first time during the oral proceedings. Such refusal was held to be a substantial procedural violation. The facts underlying T 94/84 were however different from the present case in that there the late-filed translation was the only translation and no discrepancy was alleged between this late-filed translation and any earlier filed translation. Accordingly, no doubt as to the correctness of the late-filed document arose.

The appellant also cited the decision T 243/96 of 25 May 1998 (not published in OJ EPO) and argued that this decision showed that the introduction of the full translation of a document in the proceedings can be

allowed when it is necessary for interpreting a document properly. However, this decision does not address the issue of the admittance of a late-filed translation, the correctness of which is in doubt in view of an earlier filed translation. Hence this decision is not relevant to the present case either.

Finally, the appellant's argument that a machine translation of F5 was freely available is irrelevant. The appellant's request was that F5b be admitted into the proceedings; this was the subject of the opposition division's decision.

The same applies to the argument that it was unreasonable not to admit a human translation when a machine translation was challenged. Both the translations F5a and F5b seem to be human translations (F5a being a partial and F5b being a full human translation) and in fact, there is nothing on the documents which would support the appellant's argument.

- 3.9 Therefore, the opposition division's decision does not constitute a substantial procedural violation and there is thus no reason to reimburse the appeal fee.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

M. Cañueto Carbajo

W. Sieber